



1-1-2014

In Our Own Backyard: Why California Should Care About Habeas Corpus

Theresa Hsu Schriever
Pacific McGeorge School of Law

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Theresa H. Schriever, *In Our Own Backyard: Why California Should Care About Habeas Corpus*, 45 MCGEORGE L. REV. 763 (2014).
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In Our Own Backyard: Why California Should Care About Habeas Corpus

Theresa Hsu Schriever*

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I. INTRODUCTION

The troubling prospect of convicting an innocent person is no longer a mere specter that haunts our criminal justice system—it is a reality. Ronald Cotton.¹ Wilton Dedge.² Nicholas Yarris.³ These names represent only a few of the people who have lost years of their lives serving time for crimes they did not commit.⁴ California inmate Kevin Cooper has spent almost half of his life on California’s death row,⁵ despite overwhelming evidence calling his guilt into question.⁶ Five federal judges openly believe Cooper did not receive a fair hearing and is “probably innocent” of the crimes of which he was convicted in 1985.⁷ Yet, as of March 2014, Cooper remains on death row, awaiting execution.⁸

* J.D. Candidate, University of the Pacific, McGeorge School of Law, 2014; B.A., Legal Studies, University of Wisconsin-Madison, 2003. I am very grateful to Professor Emily Garcia Uhrig for her invaluable guidance and inspiration, and to John S., Beth Jaworski, and John H. for their expertise and helpful comments. I would also like to thank the editors of the *McGeorge Law Review*, as well as my friends and family for their constant support.

1. Ronald Cotton served 10.5 years of a life sentence for a crime he did not commit. Cotton is now an advocate for criminal justice reform and works closely with the victim who misidentified him, Jennifer Thompson, to educate the public about the dangers of eyewitness misidentification. *Ronald Cotton*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ronald_Cotton.php (last visited Nov. 10, 2012) (on file with the *McGeorge Law Review*).

2. Wilton Dedge served twenty-two years of a life sentence for a crime he did not commit. Although DNA evidence proved Dedge’s innocence in 2001, he was not released until 2004 because the State of Florida continued to object to his release on procedural grounds, admitting at one point that they “would oppose Dedge’s release even if they knew that he was absolutely innocent.” *Wilton Dedge*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Wilton_Dedge.php (last visited Nov. 10, 2012) (on file with the *McGeorge Law Review*).

3. Nicholas Yarris served 21.5 years of a death sentence for a crime that he did not commit. *Nicholas Yarris*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Nicholas_Yarris.php (last visited Nov. 10, 2012) (on file with the *McGeorge Law Review*). “Nick Yarris at first faced the electric chair and later lethal injection” before DNA exonerated him in 2004. *Nick Builds New Life After 23 Years on Death Row*, SPALDING GUARDIAN, <http://www.spaldingtoday.co.uk/news/latest-news/nick-builds-new-life-after-23-years-on-death-row-1-4957342> (last visited April 3, 2013) (on file with the *McGeorge Law Review*). During his time in prison, Yarris spent 8,057 days in solitary confinement. *Id.*

4. *Know the Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Nov. 10, 2012) (on file with the *McGeorge Law Review*).

5. *Cooper v. Brown*, 565 F.3d 581, 634 (9th Cir. 2009) (J. Fletcher, dissenting); Kevin Cooper Fact Sheet, http://www.savekevincooper.org/Scripts/DataLibraries/upload/kevincooper_fact_sheet.pdf (last visited Feb. 3, 2013) (on file with the *McGeorge Law Review*).

6. *Cooper v. Brown*, 565 F.3d 581, 581 (9th Cir. 2009) (J. Fletcher, dissenting).

7. *Id.* Judge Fletcher, joined by four other Ninth Circuit judges, wrote over one hundred pages in dissent, calling Kevin Cooper’s guilt into question and stating that Kevin Cooper is “probably innocent.” *Id.* at 634–35.

8. Kevin Cooper Fact Sheet, *supra* note 5.

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At the time of this Comment, over three hundred people have been exonerated nationwide through post-conviction DNA testing and had their wrongful convictions overturned.⁹ However, the number of innocent people in prison is likely much higher.¹⁰ As DNA evidence is not available in the majority of criminal cases,¹¹ we cannot rely on DNA alone to save every innocent prisoner; we must have a workable method for wrongfully convicted prisoners to prove their innocence even in the absence of DNA evidence.

The alarming number of wrongful convictions serves as a resounding alert that “an unconstitutional breakdown in the [criminal justice] process has occurred.”¹² This issue is particularly troubling in California, a state that criminal justice experts believe “has put more innocent people behind bars than any other state.”¹³ Yet, current California law provides little opportunity for wrongfully convicted prisoners to secure their release.¹⁴ Something must be done.

The writ of habeas corpus is a civil proceeding allowing a prisoner to attack collaterally his criminal conviction by “claiming that constitutional violations during his trial now make his confinement unconstitutional.”¹⁵ Habeas corpus was intended to function as a safeguard against the injustice of depriving an innocent person of his life or liberty;¹⁶ “a prisoner’s last chance to have his

9. *Know the Cases*, *supra* note 4.

10. “[O]nly an estimated ten to twenty percent of criminal cases in the United States have any biological evidence for DNA testing. This statistic suggests that documented DNA exonerations likely represent only a mere fraction of the total number of innocent prisoners who are currently incarcerated.” Daniel S. Medwed, *California Dreaming: The Golden State’s Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437, 1440 (2007); *see also* Carol Tavis & Elliot Aronson, MISTAKES WERE MADE (BUT NOT BY ME) 130 (2007).

After a comprehensive study of criminal cases in which the convicted person was indisputably exonerated, law professor Samuel R. Gross and his associates concluded that “if we reviewed prison sentences with the same level of care that we devote to death sentences, there would have been *over 28,500 non-death-row exonerations in the past 15 years* rather than the 255 that have in fact occurred.” *Id.* (emphasis in original).

11. Medwed, *supra* note 10 and accompanying text. “Although post-conviction innocence claims hinging on DNA testing have captured the attention of state legislators and the broader public, the far more pervasive issue of innocence claims in cases that lack biological evidence has largely escaped notice.” 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, 657 (2005) [hereinafter *Up the River*].

12. Randy Hertz & James Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 97 (6th ed. 2011) (“The courts properly ought to take the fact that an innocent person may have been convicted . . . as one, among other, indicators that an unconstitutional breakdown in the process has occurred.”).

13. Medwed, *supra* note 10, at 1442–43. “In the past 15 years, with surprisingly little fanfare, at least 200 Californians have been freed after courts found they were unjustly convicted—nearly twice the number of known exonerations as in Illinois and Texas combined.” *Id.* at 1442 n.20 (citing Nina Martin, *Innocence Lost*, S.F. MAG. Nov. 2004, at 78, 84).

14. *See infra* Part V.

15. Erik Degrate, *I’m Innocent: Can a California Innocence Project Help Exonerate Me? . . . Not if the Antiterrorism and Effective Death Penalty Act (AEDPA) Has Its Way*, 34 W. ST. U. L. REV. 67, 76 (2006).

16. *Harrington v. Richter*, 131 S.Ct. 770, 780 (2011) (“The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law.”).

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sentence overturned, or better still, to prove his innocence.”¹⁷ Habeas corpus provides a crucial remedy for wrongfully convicted prisoners in California.

In evaluating how habeas corpus law should be interpreted, courts must balance a number of competing interests.¹⁸ Concerns over abuse of the writ weigh in favor of limiting its reach.¹⁹ If the requirements for filing a writ are not sufficiently strict, prisoners could clog the criminal justice system by filing unwarranted or frivolous claims, which would overwhelm scarce judicial resources.²⁰ Habeas review also raises concern over state sovereignty because allowing federal courts to review state court judgments can strain the relationship between state and federal courts.²¹ However, these concerns must ultimately be balanced against the grave injustice of holding a prisoner in violation of the Constitution.²²

While habeas corpus represents a wrongfully incarcerated person’s last chance for justice, the ability of the writ to deliver justice has been stifled by complex legal and procedural requirements at both the state²³ and federal level.²⁴ In California, stringent substantive legal tests make habeas relief particularly difficult to obtain.²⁵ Meanwhile, evidence of wrongful convictions and documentation of the difficulties innocent prisoners face in achieving exoneration are constantly increasing; to address the plight of wrongfully convicted prisoners, California should respond by making changes to its state habeas procedures.

This Comment argues that in light of the procedural barriers to federal habeas corpus relief for state prisoners, California should adjust its own habeas law to provide more meaningful opportunities for relief at the state level. Part II provides a brief overview of the relationship between federal and state habeas law. Part III explains the legal standards and procedures for obtaining habeas corpus relief under California law. Part IV analyzes the problems with the current state of federal habeas law, while Part V analyzes the problems specific to California habeas law. Part VI suggests two reforms for habeas law in California: lowering the legal standard for relief and reforming the use of summary denials.

17. Degrate, *supra* note 15, at 76.

18. Matthew Mattingly, *Actually Less Guilty: The Extension of the Actual Innocence Exception to the Sentencing Phase of Non-Capital Cases*, 93 KY. L. J. 531, 533, 543 (2004).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 544 (citing *Brown v. Allan*, 344 U.S. 443, 554 (1954) (Black, J., dissenting) (“[I]t is never too late for courts in habeas corpus proceedings to look through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution.”)).

23. Medwed, *supra* note 10, at 1445 (describing the “high procedural, evidentiary, and legal bars” faced by California state prisoners seeking state habeas corpus relief).

24. *Id.* at 1444 (“Federal habeas corpus has effectively vanished as a viable post-conviction remedy for potentially innocent state prisoners over the past decade.”).

25. *See infra* Part V.

II. PROCEDURAL OVERVIEW OF HABEAS CORPUS

Although the remedy of habeas corpus exists at both the state and federal level,²⁶ prisoners seeking habeas relief must first seek relief in state court.²⁷ The prisoner may proceed to federal court to seek federal habeas relief only if the state habeas petition was denied and all of the prisoner's state court remedies have been exhausted.²⁸ Significantly, under of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, a prisoner must file his federal habeas petition within one year of the date his state court conviction became final.²⁹ This procedure is particularly burdensome because the majority of habeas petitioners are pro se litigants³⁰ and AEDPA's procedural requirements are extremely complex.³¹ These concerns are further exacerbated by the high rates of illiteracy and mental illness within the general prison population.³² As a result, many prisoners seeking federal habeas relief are barred by the federal statute of limitations and relief is denied on procedural grounds, rather than on the merits of the petition.³³

Because federal relief is difficult to obtain, it is particularly important that habeas petitioners have a full and fair opportunity to obtain relief in state court. This is especially important in California, a state that has had more wrongful convictions overturned than any other state except New York³⁴ and where over ten-percent of the entire nation's prison population is incarcerated.³⁵ However,

26. Mattingly, *supra* note 18, at 544.

27. Hertz & Liebman, *supra* note 12, at 1183 ("The doctrine of 'exhaustion of state remedies' requires that federal habeas corpus petitioners adequately present their claims to the state court before seeking relief in from the federal courts."); 28 U.S.C. § 2244(1)(B)(1)(a) (2006).

28. Hertz & Liebman, *supra* note 12, at 1184. Under the "total exhaustion rule" federal courts are required to dismiss all unexhausted claims. In addition, they must also dismiss any petitions that contain both exhausted and unexhausted claims (i.e., "mixed petitions"). *Id.*

29. 28 U.S.C. § 2244(d) (2006). The one-year clock is tolled, however, while the petitioner's state post-conviction application is pending. *Id.* § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.")

30. Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. CONST. L. 1219, 1223 (2012).

31. *Id.* at 1252.

32. *Id.*

33. Hertz & Liebman, *supra* note 11, at 126 ("Recent studies provide some evidence that AEDPA has significantly reduced the availability of federal habeas corpus relief in state-prisoner and federal-prisoner cases."); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL L. REV. 1, 11 (2010) ("[F]ederal judges ultimately deny almost all petitions for relief without considering their substantive merits."); Frank Tankard, *Tough Ain't Enough: Why District Courts Ignore Tough-on-Paper Standards for a Federal Prisoner's Right to a Hearing and How Specialty Courts Would Fix the Problem*, 79 UMKC L. REV. 775, 781-82 (2011) ("Forty-two percent of habeas petitions are dismissed without reaching the merits of any claim.")

34. *UPDATE: 2012*, THE NATIONAL REGISTRY OF EXONERATIONS, 14 (April 3, 2013).

35. Matthew Seligman, *Harrington's Wake: Unanswered Questions on AEDPA's Application to Summary Dispositions*, 64 STAN. L. REV. 469, 501 n.145 (2012). Based on the greater number of prisoners

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under current California law, habeas relief is almost impossible to obtain.³⁶ In short, this means that many potentially innocent criminal defendants will remain in prison and will not be granted relief in any form.

III. CALIFORNIA STATE HABEAS CORPUS

This Part provides an overview of the use and function of the writ of habeas corpus in California. It explains the legal standards, procedural requirements, and relevant procedural exceptions as they relate to claims of actual innocence made in California state court.

A. Generally

Although the United States Constitution does not obligate states to provide for the writ of habeas corpus as a remedy,³⁷ habeas corpus is guaranteed by the California constitution.³⁸ In California, anyone who is “unlawfully imprisoned or deprived of his liberty” may pursue relief through the writ of habeas corpus.³⁹ It is provided for by statute⁴⁰ and is the primary post-conviction remedy used in California.⁴¹ As is the case under federal law, habeas corpus is intended to be an extraordinary remedy.⁴² It is not meant to serve as a second appeal and should generally be used only when all other state remedies have been exhausted.⁴³

incarcerated in California, it is not surprising that California has had more wrongful convictions than other states. This statistic suggests not that California proportionally makes more errors than other states, but simply that there may be more innocent prisoners in California (compared to other states) who are in need of meaningful opportunities for relief.

36. *See infra* Part V.

37. *In re Clark*, 5 Cal. 4th 750, 763 (1993).

38. CAL. CONST. art. I., § 11.

39. CAL. PENAL CODE §1473(a) (West 2006).

40. *Id.* §1473.

41. Medwed, *supra*, note 10, at 1441.

42. *In re Clark*, 5 Cal. 4th at 764 (“Our cases simultaneously recognize, however, the extraordinary nature of habeas corpus relief from a judgment which, for this purpose, is presumed valid.”); *In re Robbins*, 18 Cal. 4th 770, 777 (1998) (“[O]ur cases emphasize that habeas corpus is an extraordinary remedy that ‘was not created for the purpose of defeating or embarrassing justice, but to promote it.’”); *see also In re Clark*, 5 Cal. 4th at 803 (J. Kennard dissenting) (describing the traditional function of habeas corpus as a “flexible procedural remedy of last resort to prevent severe and manifest injustice”).

43. *Marks v. Superior Court*, 27 Cal. 4th 176, 188 (2002) (“[C]ollateral review by habeas corpus is not a reiteration or substitute for an appeal.”); *see also Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (“Section 2254(d) reflects the view that habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.”).

B. Legal Standard for Relief in California

In California, a petitioner may pursue the writ of habeas corpus to collaterally attack the validity of a judgment through challenges based on newly discovered evidence, jurisdictional defects, or constitutional claims.⁴⁴ In order to limit the scope of this Article, this Comment focuses on claims based on newly discovered evidence. Newly discovered evidence is “one of the ‘more common issues’ raised in California state habeas petitions.”⁴⁵ A court may grant habeas relief to a petitioner who proves actual innocence through newly discovered evidence.⁴⁶

Newly discovered evidence, however, may be a basis for habeas corpus relief only if the evidence “undermine[s] the entire structure of the case upon which the prosecution is based.”⁴⁷ The evidence must be conclusive and “point unerringly to innocence or reduced culpability.”⁴⁸ “It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury.”⁴⁹ Rather, the new evidence must “cast[] fundamental doubt on the accuracy and reliability of the proceeding.”⁵⁰ There must be more than evidence that might have raised a reasonable doubt as to guilt.⁵¹ “If ‘a reasonable jury could have rejected’” the newly discovered evidence, then the evidence will not be sufficient to warrant habeas relief.⁵²

In order to qualify as “new” evidence for newly discovered evidence purposes, it must be “evidence that [the petitioner] could not have discovered with reasonable diligence prior to judgment.”⁵³ Notably, California courts have been known to construe the definition of “new” rather liberally in this context.⁵⁴

44. *In re Clark*, 5 Cal. 4th at 766–67. However, not all errors of constitutional dimension warrant habeas relief. Errors that carry no risk of convicting an innocent person do not provide grounds for habeas relief. For example, Fourth Amendment violations cannot provide the basis for a proper habeas claim. *Id.*

45. Medwed, *supra* note 10, at 1454 n.82.

46. *In re Lawley*, 42 Cal. 4th 1231, 1238 (2008); *In re Hardy*, 41 Cal. 4th 977, 1016 (2007); CAL. PENAL CODE §1473.6 (West 2006).

47. *In re Clark*, 5 Cal. 4th at 766; *In re Lawley*, 42 Cal. 4th at 1239; *In re Hardy*, 41 Cal. 4th at 1016.

48. *In re Clark*, 5 Cal. 4th at 766; *In re Hardy*, 41 Cal. 4th at 1016. For example, a *credible* third party confession could meet this standard. *Id.*

49. *In re Clark*, 5 Cal. 4th at 766.

50. *Id.*; *In re Lawley*, 42 Cal. 4th at 1239.

51. *In re Hardy*, 41 Cal. at 1017–18 (“The most that can be said is that this evidence would have presented a more difficult question for the jury and may well have created in the minds of the jurors a reasonable doubt as to petitioner’s guilt. As explained *ante*, this is not the standard.”).

52. *In re Lawley*, 42 Cal. 4th at 1239.

53. CAL. PENAL CODE §1473.6 (West 2006); *In re Hardy*, 41 Cal. 4th at 1016.

54. Medwed, *supra* note 10, at 1455 n.86 (citing Cal.Jur. 3d Habeas Corpus § 50 (2006)) (“[N]ew evidence’ includes any evidence not presented to the trial court that is not merely cumulative in relation to evidence that was presented at trial.”).

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C. Operation of the Writ in California Courts

In California, a petitioner who is in custody may file a petition for habeas relief in the superior court, appellate court, or California Supreme Court;⁵⁵ although, in most instances, a petitioner is required to begin this process in superior court.⁵⁶ If the writ is denied, the petitioner may not appeal the order of denial directly.⁵⁷ Instead, the petitioner must file a new petition in a higher court.⁵⁸ Thus, if a petitioner files a state habeas petition in superior court and that petition is denied, the petitioner may file a new petition in the appellate court.⁵⁹ The appellate court is not bound by the determinations of the lower court,⁶⁰ unless the lower court made factual determinations regarding the credibility of witnesses. If witness testimony was presented to the lower court, the reviewing court must give “great weight” to those findings.⁶¹ However, documentary evidence is not entitled to this same deference and the appellate court may review such evidence freely.⁶²

When reviewing a petition for habeas relief, a court will evaluate the petition and make an initial determination as to whether the petitioner has stated a prima facie case for relief.⁶³ The petitioner bears the initial burden of alleging all of the facts that would entitle him to habeas relief.⁶⁴ This is a heavy burden because the court will interpret all presumptions in favor of the judgment.⁶⁵ Furthermore, all claims known to the petitioner at the time the petition is filed must be included in the initial petition.⁶⁶

55. Medwed, *supra* note 10, at 1456 (citing CAL. CONST. art. VI, § 10).

56. *People v. Steele*, 32 Cal. 4th 682, 692 (2004) (“[B]oth trial and appellate courts have jurisdiction over habeas corpus petitions, but a reviewing court has discretion to deny without prejudice a habeas corpus petition that was not filed first in the proper lower court.”); *In re Hillery*, 202 Cal. App. 2d 293, 294 (1962) (“Generally speaking, habeas corpus proceedings involving a factual situation should be tried in superior court rather than in an appellate court, except where only questions of law are involved.”).

57. Medwed, *supra* note 10, at 1458 (“The penal code does not provide for direct appellate review of a superior court decision rejecting a habeas corpus petition.”).

58. *Id.* (“[W]hile technically prevented from appealing a superior court’s denial of a habeas corpus petition, litigants may simply file a new petition in the court of appeal.”).

59. *Id.*

60. *Id.* at 1459 (“[T]he appellate court need not afford tremendous deference to the ruling of the superior court.”).

61. *Id.*

62. *Id.*; *In re Cudjo*, 20 Cal. 4th 673, 687–88 (1999) (“Because the referee observes the demeanor of testifying witnesses, and thus has an advantage in assessing their credibility, this court ordinarily gives great weight to the referee’s findings on factual questions, but this deference is arguably inappropriate when the referee’s factual findings are based entirely on documentary evidence.”).

63. Medwed, *supra* note 10, at 1457 (“Upon receipt of a petition, the court must evaluate whether it states a prima facie case[.]”).

64. Medwed, *supra* note 10, at 1455 (“As for the level of evidentiary proof, California state petitioners for the writ bear a heavy burden in both initially pleading for relief and later proving their claims.”).

65. *Id.*

66. *In re Clark*, 5 Cal. 4th 750, 780–81 (1993) (“The court must and will assume, however, that a petition

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If the court finds a prima facie case has been stated, it will issue an order to show cause, which is addressed to the custodian of the petitioner.⁶⁷ Once the order to show cause has issued, the custodian must reply with his reasons for keeping the petitioner in custody.⁶⁸ The petitioner may then file a “traverse” in response to the custodian’s allegations.⁶⁹ If the court decides that the petitioner has alleged facts which, if true, would entitle the petitioner to relief, the court may order an evidentiary hearing if any further factual development is necessary.⁷⁰ If the court finds that habeas relief is warranted, the petitioner may be released from custody.⁷¹

On the other hand, if the court finds that the petitioner is not entitled to habeas relief, the court may deny the petition summarily.⁷² In doing so, the court is not required to write a full opinion explaining the denial of the petition.⁷³ While superior courts are required to give a “brief statement of the reasons for the denial,”⁷⁴ courts of appeal and the California Supreme Court may deny the petition without explanation.⁷⁵ If the court denies relief, the petitioner may file a new petition with a higher court.⁷⁶ Once the petitioner’s claim has been denied by

for writ of habeas corpus includes all claims known to the petitioner.”).

67. CAL. CT. R. 4.551(c). The order to show cause may be directed to the custodian or the real party in interest, such as the Attorney General. *People v. Romero*, 8 Cal. 4th 728, 737 (1994); *see also* *In re Williams*, 7 Cal. 4th 572, 586 (1994) (explaining the Attorney General’s response to the order to show cause). The custodian must be a person and is often the warden or the superintendent of the prison in which the petitioner is held. *See* CAL. PENAL CODE §1477 (West 2006) (describing the custodian as “the person who has custody over the petitioner”); PRISON LAW OFFICE, STATE HABEAS PROCEDURE: A MANUAL FOR CALIFORNIA PRISONERS, 16 (2008) available at <http://www.prisonlaw.com/pdfs/STATEHABEAS2008.pdf> (directing petitioners to list the warden or superintendent of the prison as the custodian on their state habeas petitions) (on file with the *McGeorge Law Review*). Once the order to show cause has issued, “the court must appoint counsel for any unrepresented petitioner who desires counsel but cannot afford counsel.” CAL. CT. R. 4.551(c).

68. Medwed, *supra* note 10, at 1457.

69. *Id.* at 1457–58.

70. *Id.* at 1458.

71. *Id.* at 1453 (“The form of habeas corpus relief, if and when granted, often consisted of release from custody and a rescission of further proceedings against the petitioner.”).

72. *Id.* at 1457; *In re Clark*, 5 Cal. 4th at 781 (“Summary disposition of a petition that does not state a prima facie case for relief is the rule.”).

73. Seligman, *supra* note 35, at 471 (“State courts do not always issue written opinions in deciding criminal cases Instead, state courts frequently issue ‘summary dispositions,’ which are decision unaccompanied by a written opinion.”); *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011) (addressing cases in which “a state court’s order is unaccompanied by an opinion explaining the reasons relief has been denied”).

74. CAL. CT. R. 4.551(g) (“Any order denying a petition for writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition ‘denied’ is insufficient.”).

75. Seligman, *supra* note 35, at 471 (“State courts do not always issue written opinions in deciding criminal cases Instead, state courts frequently issue ‘summary dispositions,’ which are decision unaccompanied by a written opinion.”); *Harrington*, 131 S. Ct. at 784 (addressing cases in which “a state court’s order is unaccompanied by an opinion explaining the reasons relief has been denied”). “A summary denial may simply state, in a single sentence, that the petition is denied.” Seligman, *supra* note 35, at 502. For the purposes of this Comment, “summary denial” refers to cases in which no opinion was issued.

76. Medwed, *supra* note 10, at 1458 (“[W]hile technically prevented from appealing a superior court’s denial of a habeas corpus petition, litigants may simply file a new petition in the court of appeal.”).

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the California Supreme Court, the petitioner is deemed to have exhausted state remedies for that claim and may move on to pursue habeas relief in federal court.⁷⁷

D. Repetitious Claims and Successive Petitions

After a petitioner seeking habeas relief has filed his first habeas petition in state court, two procedural issues arise should the petitioner have additional claims or disagree with the court about the treatment of the initial claims: repetitive claims and successive petitions. The general rule is that a habeas court will not consider repetitive claims.⁷⁸ Once a habeas court has considered a claim and rejected it, the court will not consider repeated applications for habeas corpus relief for that same claim.⁷⁹

A successive petition refers to any petition filed after the initial petition is filed. Because a court assumes that all known claims were included in the initial petition, a court's default position is that it will not hear successive petitions.⁸⁰ While the reviewing court has discretion to hear successive petitions and does so on occasion, the California Supreme Court is critical of this practice.⁸¹

In evaluating whether to hear a successive petition on the merits, the reviewing court will consider whether the petitioner has pursued his claims with due diligence.⁸² The petitioner must explain why the new claims were not presented in the initial habeas petition; and the court will evaluate whether or not the given justification is adequate.⁸³ The petitioner bears the burden of alleging the facts on which he relies to explain the delay and justify the successive

77. *Harris v. Superior Court*, 500 F.2d 1124, 1128–29 (1974) (“However, when the California Supreme Court denies a habeas petition without opinion or citation, or when it otherwise decides on the merits of the petition, the exhaustion requirement is satisfied.”); see also Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 576 (2009) (“To raise a claim under 2254, a petitioner must first exhaust the claim by presenting it to the highest state court, unless state law lacks an avenue for doing so.”).

78. *In re Clark*, 5 Cal. 4th at 767.

79. *Id.* (“It has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims that have previously been rejected.”).

80. *In re Clark*, 5 Cal. 4th at 774 (“[T]he court has emphasized that repetitive successive petitions are not permitted . . . Before a successive petition will be entertained on its merits the petitioner must explain and justify the failure to present claims in a timely manner in his prior petition or petitions.”). “With the exception of petitions which allege facts demonstrating that a fundamental miscarriage of justice has occurred, an exception addressed below, unjustified successive petitions will not be entertained on their merits.” *Id.* at 775.

81. 36 Cal. Jur. 3d Habeas Corpus §7 (citing *In re Clark*, 5 Cal. 4th at 768–69) (“Indeed, the supreme court has noted, critically, that on the occasion the merits of successive petitions have been considered regardless of whether the claim was raised on appeal or in a prior petition, and without consideration of whether the claim could and should have been presented in a prior petition.”).

82. *In re Clark*, 5 Cal. 4th at 774–75 (“A petitioner will be expected to demonstrate due diligence in pursuing potential claims.”).

83. *Id.*

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petition.⁸⁴ If the petitioner alleges that the facts underlying the claim were not known at the time of the initial petition, then the new claims must have been filed as “promptly as reasonably possible.”⁸⁵

E. Timeliness

California’s timeliness requirements for habeas petitions are governed by three major cases:⁸⁶ *In re Clark*, *In re Robbins*,⁸⁷ and *In re Gallego*.⁸⁸ Unlike most other states, California does not have a defined period in which petitions for habeas relief must be filed.⁸⁹ Instead, California courts apply a “general ‘reasonableness’ standard.”⁹⁰ A habeas petition is timely filed if it is filed “as promptly as the circumstances allow.”⁹¹ A petitioner must seek relief without “substantial delay;” a petition that is substantially delayed may be denied as untimely.⁹² Delay is measured from “the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.”⁹³

To inform the court’s assessment, a petitioner must state when he first learned of the claim asserted and explain why he did not file the petition earlier.⁹⁴ In capital cases, a petitioner is entitled to a presumption of timeliness if the petition is filed within ninety days of the final due date for filing the appellant’s reply brief on direct appeal.⁹⁵ In non-capital cases, the petitioner bears “the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of timeliness.”⁹⁶

84. *Id.*

85. *Id.*

86. *Walker v. Martin*, 131 S. Ct. 1120, 1125 (2011).

87. 18 Cal. 4th 770 (1998).

88. 18 Cal. 4th 825 (1998).

89. *Walker*, 131 S. Ct. at 1125.

90. *Id.*

91. *Id.* at 1124 (citing *In re Clark*, 5 Cal. 4th 750, 765 (1993)).

92. *Id.* at 1124–25.

93. *Id.* at 1124 (citing *In re Robbins*, 18 Cal. 4th 770, 787 (1998)).

94. *Id.* (citing *In re Robbins*, 18 Cal. 4th at 780). For example, in *In re Perez*, a three-year delay was sufficiently explained by petitioner’s allegations “that when he entered the state prison system he had not yet completed seventh grade in school and knew nothing of legal rights or procedures, and that he has diligently used the limited opportunities available to prisoners for legal research and the preparation of legal documents.” 65 Cal. 2d 224, 228 (1966). “By contrast, an 11-year delay in making a claim of ineffective assistance of counsel based on failure to present evidence diminished capacity known to defendant at the time of trial and when earlier petitions had been filed was held to be unjustified” in another case. *In re Clark*, 5 Cal. 4th at 786 (citing *People v. Jackson*, 10 Cal. 3d 265, 268–69 (1973)).

95. *In re Robbins*, 18 Cal. 4th at 779.

96. *Walker*, 131 S. Ct. at 1124 (citing *In re Robbins*, 18 Cal. 4th at 780).

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When a petition is not timely filed and the delay is not justified, the court will deny the petition.⁹⁷ If a petition is untimely, the court may signal this by denying the petition summarily and citing one of the three governing decisions (i.e., *Clark*, *Robbins*, or *Gallego*).⁹⁸ However, the California Supreme Court may also deny untimely petitions on the merits.⁹⁹ This is possible because California courts have discretion to excuse an untimely petition in order to deny it, summarily or otherwise, on the merits.¹⁰⁰

F. Procedural Default and California's Fundamental Miscarriage of Justice Exception

The general rule in California is that successive and/or untimely petitions will be summarily denied, unless the petitioner provides justification for failing to present all known claims in a single, timely petition.¹⁰¹ However, like federal law, there is an exception to this rule for actual innocence claims.¹⁰² In order to qualify for this exception, the petitioner must allege facts that if true, would establish a “fundamental miscarriage of justice occurred as a result of the proceedings leading to conviction.”¹⁰³ This exception allows the court to hear the claim on the merits, even though it is being raised for the first time in a successive petition or a petition that has been delayed without sufficient justification.¹⁰⁴ Although actual innocence is a ground for habeas relief, the California Supreme Court has cautioned against relying on “eleventh-hour” habeas petitions to attain a stay of execution, as doing so would constitute an abuse of the writ and would not necessarily be granted.¹⁰⁵

97. *Id.*

98. *Id.* at 1125.

99. *Id.* at 1126; *see, e.g., In re Robbins*, 18 Cal. 4th at 779 (“[A]ll of the claims raised in the petition must be rejected on the merits, and . . . most claims must also be rejected on various procedural grounds.”).

100. *Id.*

101. *In re Clark*, 5 Cal. 4th 750, 797 (1993).

102. *Id.* at 797–98. The fundamental miscarriage of justice exception actually provides four avenues for the exception, only one of which is actual innocence. *Id.*

103. *Id.*

A fundamental miscarriage of justice will have occurred in any proceeding which it can be demonstrated: (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error, no reasonable jury or judge would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; (4) that the petitioner was convicted or sentenced under an invalid statute.

Id. Under the fundamental miscarriage of justice exception, a petitioner alleging actual innocence must convince the court that the new evidence would “undermine the entire prosecution case and point unerringly to innocence,” which is a “heavy burden” to satisfy. *Id.* at 798 n.33.

104. *In re Clark*, 5 Cal. 4th at 798.

105. *Id.*; *Catlin v. Superior Court*, 51 Cal. 4th 300, 308 (2011).

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Significantly, California law does not require that there be an independent constitutional violation that contributed to the verdict in order to grant habeas relief in the case of a petitioner claiming actual innocence.¹⁰⁶ If the petitioner claiming actual innocence can satisfy the evidentiary burden, habeas relief may be granted even absent an independent constitutional violation.¹⁰⁷

IV. FEDERAL BARRIERS TO RELIEF FOR CALIFORNIA PETITIONERS

The significance of the problems with the current state of habeas corpus law is highlighted by an examination of how federal and state habeas law work together to limit each other, and thereby limit potential relief for prisoners. This Part discusses the barriers that California state prisoners face in obtaining federal post-conviction relief. This Part then explains why it is crucial that state habeas petitioners are provided with a meaningful opportunity for relief in state court.

A. Roadblocks to Federal Review

Much has been written about the current state of federal habeas corpus law, and many scholars are convinced federal habeas relief is no longer a viable option for most state prisoners.¹⁰⁸ The current federal system has been described as “unworkable” and “perverse,”¹⁰⁹ and a habeas petitioner’s chances of success in federal court as “microscopic.”¹¹⁰ Empirical research supports this conclusion: federal habeas relief is granted in less than one-percent of cases.¹¹¹

1. Statute of Limitations

The unavailability of federal habeas relief for state prisoners is due, in large part, to the procedural roadblocks created by the Anti-Terrorism and Effective

106. *In re Clark*, 5 Cal. 4th at 797.

107. *Id.*

108. See Primus, *supra* note 33, at 4 (“Federal habeas review has become unworkable . . . the system grants relief to almost nobody.”); Medwed, *supra* note 10, at 1444 (“Federal habeas corpus has effectively vanished as a viable post-conviction remedy for potentially innocent state prisoners over the past decade.”); Tankard, *supra* note 33, at 780–82 (“As one commentator put it, federal habeas review ‘has become a waste of resources while providing almost no real relief, even to deserving petitioners.’”); Garcia Uhrig, *supra* note 30, at 1227 (“[AEDPA] substantially narrowed the legal parameters of federal habeas review”).

109. Primus, *supra* note 33, at 1 (“Experts have described the current [federal habeas] system as ‘chaos,’ an ‘intellectual disaster area,’ ‘a charade,’ and ‘so unworkable and perverse that reformers should feel no hesitation about scrapping large chunks of it.’”) (internal citations omitted).

110. Tankard, *supra* note 33, at 782 (describing the rate of success of federal habeas petitions as “microscopic”); Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 89 (2012) (“In the words of Professors Nancy King and Joseph Hoffman, federal habeas review of state convictions has become futile, illusory, and so improbable as to be ‘microscopic.’”).

111. Tankard, *supra* note 33, at 781–82 (2011) (“Forty-two percent of habeas petitions are dismissed without reaching the merits of any claim, while 0.34 percent of petitions are granted.”).

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Death Penalty Act (AEDPA) of 1996.¹¹² AEDPA created a one-year statute of limitations for federal review of state habeas claims and changed the standard of review.¹¹³ Under AEDPA, a petitioner must file his petition for federal review within one year of the date his state court conviction became final.¹¹⁴ In practice, the AEDPA statute of limitations provision is exceedingly complex, and it is difficult for prisoners and attorneys alike to figure out when a particular prisoner's federal petition is actually due.¹¹⁵ This hardship is compounded by the fact that the overwhelming majority of habeas petitioners are pro se and therefore proceed without the assistance of an attorney.¹¹⁶

The one-year statute of limitations poses grave problems for California petitioners who are not able to obtain habeas relief in California state court. If a petitioner misses the federal filing deadline, the petitioner's claim will be considered time-barred and the federal court may not hear the petitioner's claim, no matter how meritorious it may be.¹¹⁷ California prisoners may be particularly at risk for missing the federal filing deadline due to potential confusion stemming from California's unique statute of limitations. Since California's statute of limitations is open-ended, it is possible for the federal one-year statute of limitations to expire before the California statute of limitations has expired. Petitioners, who are mostly pro se litigants, may not be sophisticated enough to realize this, at their peril.¹¹⁸

2. Procedural Default

The doctrine of procedural default creates another potential roadblock for the California prisoner seeking federal habeas review.¹¹⁹ If the prisoner fails to

112. Primus, *supra* note 33, at 10.

113. *Id.* at 10–11.

114. 28 U.S.C. §2255(d) (2006).

115. See Garcia Uhrig, *supra* note 30, at 1252 (“The complexity of calculating AEDPA’s statute of limitations multiplies exponentially in light of other procedural requirements under the statute. For the typical pro se inmate, the interplay between these procedural doctrines can covert an otherwise herculean task to a literally impossible one.”).

116. *Id.*; Tankard, *supra* note 33, at 782 (“An overwhelming ninety-five percent of habeas petitions are filed pro se.”).

117. 28 U.S.C. §2255(d). However, it is possible that a petitioner who can make a credible showing of actual innocence may be entitled to equitable tolling of the statute of limitations. The US Supreme Court heard oral argument on this issue on February 25, 2013 in *McQuiggin v. Perkins*, 133 S. Ct. 527 (2012). One commentator noted that at least five justices appeared to be open to the idea that an actual innocence exception exists that would allow a petitioner averring such claim to have his federal petition reviewed, despite failure to comply with the statute of limitations. However, even in that case there would likely still be a diligence requirement that the petitioner would have to meet in order for the exception to apply. *Actual Innocence*, HABEAS CORPUS BLOG, http://habeascorpusblog.typepad.com/habeas_corpus_blog/actual-innocence/ (last visited March 20, 2013) (on file with the *McGeorge Law Review*).

118. Garcia Uhrig, *supra* note 30, at 1248.

119. Under the doctrine of procedural default, a petitioner's otherwise legitimate claim for habeas relief may be barred in federal court if the petitioner did not properly exhaust the claim in state court. *Maples v.*

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comply with any of California's procedural rules when applying for state habeas relief, the prisoner will likely find federal review of his claim barred on procedural grounds.¹²⁰ Under the current system, a federal habeas court may not review a state prisoner's claim on the merits if the prisoner's claim is procedurally defaulted (meaning the prisoner failed to comply with a state procedural rule).¹²¹ For example, if a California petitioner did not file his petition for state habeas relief within a "reasonable time," and the California state court therefore refused to review the petition, the federal reviewing court must also refuse to review the claim because the petitioner did not comply with California's timeliness requirement and the claim is now procedurally defaulted.¹²²

Procedural default can have harsh effects on California petitioners because it effectively means that no court has reviewed the petitioner's claim on the merits. Fortunately, federal case law provides for an actual innocence exception that allows a state petitioner's claim to be heard on the merits, despite being procedurally defaulted, if the petitioner makes a credible showing of actual innocence.¹²³ However, satisfying this exception is yet another roadblock a petitioner must maneuver around in order to have his claim heard in federal court.

3. *Federal Grounds for Relief*

The standard of review in federal court poses an additional problem for the California petitioner seeking federal habeas relief. Even if the petitioner has timely filed his federal petition and has complied with the necessary California procedural rules, the petitioner is still unlikely to obtain relief in federal court.¹²⁴ Under AEDPA, "if the state court denies the [petitioner's] claim on the merits, the claim is barred in federal court unless one [of two] exceptions . . . applies."¹²⁵ First, where a claim has been adjudicated on the merits in state court, a federal court may grant relief if the state court proceeding "resulted in a decision that

Thomas, 132 S. Ct. 912, 922 (2012).

120. *Id.* A federal court may not hear a state petitioner's claims on the merits "when (1) 'a state court has declined to address those claims because the prisoner failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" *Id.*

121. *Id.*

122. *See* Walker v. Martin, 131 S. Ct. 1120, 1128 (2011) (holding that California's timeliness rule constituted an independent and adequate state law for purposes of procedural default).

123. Mattingly, *supra* note 18, at 535. To qualify for the actual innocence exception, the petitioner must demonstrate that an alleged constitutional violation has "probably resulted in the conviction of one who is actually innocent." Hertz & Liebman, *supra* note 12, at 1523 (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)).

124. *See* Primus, *supra* note 33, at 11 ("For the few petitioners able to maneuver through the procedural barriers and have their claim heard on the merits, the federal courts could only grant relief if the underlying state decision was 'contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.'").

125. Harrington v. Richter, 131 S. Ct. 770, 787 (2011).

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was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”¹²⁶ Significantly, it is not enough that the state court’s application of federal law was wrong—it must have been *unreasonably* wrong.¹²⁷ Otherwise, the federal court is prohibited from granting relief.¹²⁸

The requirement that the state court’s decision has to be unreasonably wrong is further complicated by California state courts’ practice of summarily denying the majority of state habeas petitions.¹²⁹ When a petition is denied summarily, the court is not required to explain its reasons for denying the petition.¹³⁰ Furthermore, the United States Supreme Court specifically held that a claim denied summarily (i.e., without explanation) is presumed to have been adjudicated on the merits.¹³¹ The petitioner bears the burden of rebutting this presumption and may only do so by “showing there was no reasonable basis for the court to deny relief.”¹³²

Thus, due to the frequent use of summary denials, the majority of California state habeas petitioners face a significant obstacle¹³³ in obtaining federal review of their claims: in the absence of any indication as to why each state court denied

126. 28 U.S.C. §2254(d)(1) (2006).

Federal habeas relief may not be granted for claims subject to 2254(d) [of AEDPA] unless it is shown the earlier state court’s decision was ‘contrary to’ federal law then clearly established in the holdings of [the U.S. Supreme Court]; or that it ‘involved an unreasonable application of’ such law; or that it ‘was based on an unreasonable determination of the facts’ in light of the record before the state court.

Harrington, 131 S. Ct. at 785 (internal citations omitted).

127. Primus, *supra* note 33, at 11 (“Under AEDPA, it is not enough if a state court decision was wrong: it has to have been reasonably wrong.”); *Harrington*, 131 S.Ct. at 785 (“For purposes of (AEDPA), ‘an unreasonable application of federal law is different from an incorrect application of federal law.’”).

128. 28 U.S.C. §2254(d). For example, in *Harrington v. Richter*, the Supreme Court emphasized that in a *Strickland* case (ineffective assistance of counsel) adjudicated in California state court, the question is not whether the attorney’s performance fell below the *Strickland* standard of care, but whether the state court’s application of the *Strickland* standard was unreasonable. 131 S. Ct. at 785 (“The pivotal question is whether the state court’s application of *Strickland* was unreasonable. This is different from asking whether defense counsel’s performance fell below the *Strickland* standard.”). Thus, even if it were clear that the attorney’s performance fell below the *Strickland* standard, the federal court could not grant relief because the petitioner had not shown that the state court’s application of *Strickland* was unreasonable. *See id.* at 792 (reversing the Ninth Circuit’s grant of habeas relief because the “California Supreme Court’s decision on the merits . . . required more deference than it received”).

129. *See* Seligman, *supra* note 35, at 471 (noting that ninety-seven percent of state habeas petitions are denied summarily).

130. *Harrington*, 131 S. Ct. at 785 (“This Court now holds and reconfirms that 2254(d) [of AEDPA] does not require a state court to give its reasons before its decisions can be deemed to have been ‘adjudicated on the merits.’”).

131. *Id.* at 784–85 (“When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.”).

132. *Id.* at 784.

133. *Id.* at 786 (describing the requirement that petitioners show the state court’s decision was unreasonable as “difficult to meet”).

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their claims, these petitioners must convince the federal court that either their claims were not adjudicated on the merits (despite the presumption otherwise), or the state court was unreasonably wrong in denying relief.¹³⁴ Significantly, even if a petitioner can demonstrate he has a strong case for relief, that will not be enough to show the state court's application of federal law was unreasonable. Thus, even a strong case for relief is likely to be unsuccessful in federal court.¹³⁵

The only other situation in which a federal court can grant relief when a claim has been adjudicated on the merits in state court is where the state court proceeding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."¹³⁶ The federal court, however, is required to presume that any factual determinations made by the state court are correct.¹³⁷ To obtain relief, the petitioner must rebut "the presumption of correctness by clear and convincing evidence."¹³⁸ As will be discussed in Part V, the clear and convincing evidence standard is a formidable hurdle and is extremely difficult to meet.¹³⁹

Furthermore, the actually innocent California petitioner will not be able to satisfy this standard if he cannot allege a constitutional violation in addition to his claim of innocence.¹⁴⁰ While under California law a petitioner may state a claim for habeas relief by alleging a bare claim of actual innocence,¹⁴¹ this is not true in federal court.¹⁴² Under federal law, innocence is not enough.¹⁴³ Consequently, California prisoners who are unable to allege a separate constitutional violation will be unable to obtain relief in federal court; for such prisoners, California state court is the only possible forum in which habeas relief can be obtained.¹⁴⁴

B. Opportunity for State Relief Is Crucial in Light of Barriers to Federal Relief

Given the procedural jungle awaiting California prisoners, those seeking federal habeas relief are almost certain to face a closed door when they proceed to federal court.¹⁴⁵ Of course, those in favor of narrowing the availability of

134. Primus, *supra* note 33, at 11.

135. See *Harrington*, 131 S. Ct. at 786 ("It bears repeating that even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable.").

136. 28 U.S.C. § 2254(d)(2) (2006).

137. *Id.* § 2254(e).

138. *Id.*

139. *Id.* §2254(d).

140. Hertz & Liebman, *supra* note 12, at 99 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

141. *In re Clark*, 5 Cal. 4th 750, 797 (1993).

142. Hertz & Liebman, *supra* note 12, at 99 (citing *Herrera*, 506 U.S. at 404).

143. *Id.*

144. See *infra* Part II.

145. See *supra* Part IV. See also Tankard, *supra* note 33, at 781–82 (2011) ("Forty-two percent of habeas petitions are dismissed without reaching the merits of any claim, while 0.34 percent of petitions are granted.").

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federal habeas review would see the difficulty of obtaining federal relief as a cause for celebration, indicating the system is working as intended.¹⁴⁶ From this perspective, the bar of federal habeas relief must be set high because state courts—not federal courts—are the intended forums for resolving post-conviction claims attacking state court judgments.¹⁴⁷ Indeed, AEDPA modified federal habeas law with this principle of federalism in mind.¹⁴⁸ But even this perspective underscores one critical point: it flows from the premise that state prisoners’ post-conviction claims are being given a full and fair hearing in state court.¹⁴⁹

The premise that state courts provide fair and meaningful opportunities for post-conviction relief is a significant one. It underlies arguments in support of the status quo as well as those in favor of narrowing the scope of federal habeas review.¹⁵⁰ Because so much depends on this premise, its importance cannot be overstated. As one scholar suggests, the entire constitutionality of AEDPA may depend on state courts providing a fair opportunity for review.¹⁵¹ If state courts are not providing this opportunity, not only is the state system failing to perform its assigned duty, but also the foundation of the current deferential federal system will fall apart.

At least this much is clear under the current habeas system: if state courts are supposed to function as the primary vehicle for resolving state post-conviction claims, then it is crucial these courts provide prisoners with a meaningful opportunity for relief. If this is not done, state prisoners are essentially left

146. *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (Kennedy, J.) (“If this standard is difficult to meet, that is because it was meant to be.”).

147. *Id.* (“[AEDPA] Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.”).

148. *Id.*; Marceau, *supra* note 110, at 85 (citing *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (“[E]xplaining that Congress enacted AEDPA both to codify preexisting judge-made doctrines that restricted the habeas corpus remedy for state prisoners and to impose some new restrictions, all for the purpose of furthering the principles of comity, finality, and federalism.”) (internal citations omitted); Degrate, *supra* note 15, at 86 (“Federalism is deeply rooted in [AEDPA].”)).

149. *See Harrington*, 131 S. Ct. at 787 (“[AEDPA] Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that *state courts are the principal forum* for asserting constitutional challenges to state convictions.”) (emphasis added).

150. Joseph L. Hoffmann & Nancy J. King, *Right Problem; Wrong Solution*, 1 CAL. L. REV. 49, 53 (2010) (“[F]ederal courts continue to entertain, on a routine basis, vast numbers of habeas petitions filed by convicted state prisoners. This remains true even though such prisoners today generally enjoy the *full opportunity to seek judicial review in state court* for asserted violations of their federal constitutional rights.”) (emphasis added); Primus, *supra* note 33, at 4–5 (“[Hoffman and King] propose eliminating federal habeas review entirely for most state prisoners and reallocating the resources currently expended on federal habeas to improve the quality of defense representation throughout the country.”).

151. Marceau, *supra* note 110, at 89 (observing that “AEDPA’s deference is conditional—there is a quid pro quo that states earn the newfound deference enshrined in AEDPA by developing state review systems that are fair and reliable” and that “AEDPA’s constitutionality may be dependent upon full and fair state procedures.”).

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without a remedy since federal habeas relief is unlikely.¹⁵² If California courts are not willing to grant relief to deserving petitioners, and federal courts are not able to grant relief or even to review the claims, these prisoners are out of options.¹⁵³ For many of California inmates, this could mean years behind bars—or even death in some cases—for crimes they did not commit.¹⁵⁴

V. PROBLEMS WITH CALIFORNIA LAW

This Part first discusses the infrequency with which California state courts grant habeas relief, and argues that the rate of wrongful convictions demonstrates there are prisoners in California who deserve habeas relief, but are not receiving it. This Part then considers two possible explanations for why relief is not granted more frequently in California: claims may not be reviewed with sufficient care, and the legal standard for presenting new evidence for actual innocence claims is too high.

A. *Frequency of Habeas Relief in California and the Incidence of Wrongful Convictions*

As discussed above, it is crucial that California state courts provide petitioners with a meaningful opportunity for post-conviction relief.¹⁵⁵ However, it is unclear whether state courts are actually providing such opportunities. In California, over ninety-seven percent of state habeas claims are summarily denied.¹⁵⁶ Evidentiary hearings are rarely granted.¹⁵⁷

One possible explanation is that the courts are rightly denying the majority of state habeas petitions because most petitioners are not deserving of relief. However, the wave of exonerations over the last two decades¹⁵⁸ suggests that the infrequency with which California grants state habeas relief does not accurately reflect the numbers of prisoners deserving relief.¹⁵⁹ As of the time of this

152. *Id.* (“As the role of deciding the substantive law, often with binding and nearly unreviewable finality, falls to the states, it becomes increasingly important to ensure that states’ post-conviction systems are procedurally fair and reliable on an individual and a systemic level.”).

153. Jessica D. Gabel & Margaret D. Wilkinson, “Good” Science Gone Bad: *How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 HASTINGS L.J. 1001, 1020 (2008) (“When a motion for post-conviction relief or a new trial petition are no longer available, even an innocent prisoner has little hope of gaining freedom.”).

154. *Id.* California inmate Kevin Cooper is one casualty of the current system. Despite Judge Fletcher’s proclamation in *Cooper v. Brown* that “[t]he State of California may be about to execute an innocent man,” Mr. Cooper remains on death row. 565 F.3d 581, 581 (2009).

155. *See supra* Part IV.

156. Seligman, *supra* note 35, at 471.

157. Medwed, *supra* note 10, at 1458 (2007).

158. *Id.* at 1439.

159. *Id.* at 1466–67 (describing how potential post-conviction remedies in California intersect to make it difficult for actually innocent state prisoners to achieve relief in California using newly discovered evidence

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Comment, over 1,200 prisoners have been exonerated nationwide,¹⁶⁰ but there is no consensus on what this figure means.

While United States Supreme Court Justice Scalia has suggested that these exonerations show that the system is working,¹⁶¹ social science research supports a different conclusion: exonerations represent only a small percentage of all false convictions.¹⁶² Thus, the logical conclusion is that there are people who were falsely convicted, but have not yet been exonerated and remain in prison.¹⁶³

B. Is Lack of Proper Scrutiny the Problem?

Due to the elusive nature of wrongful convictions, it is difficult to predict with specificity how frequently they occur.¹⁶⁴ However, social science researchers have made certain estimates based on the wrongful convictions about which we know.¹⁶⁵ The results of these studies suggest part of the reason more prisoners are not exonerated is because not all claims are reviewed with the same level of care.

Understandably, courts scrutinize death sentences most closely because of the severity and irreversible nature of the punishment.¹⁶⁶ In one comprehensive study, researchers concluded that “if we reviewed prison sentences with the same level of care that we devote to death sentences, there would have been *over 28,500 non-death-row exonerations in the past 15 years* rather than the 255 that have in fact occurred [at the time of the study].”¹⁶⁷

Other examples support the conclusion that additional review would lead to additional exonerations. For example, in one study of habeas petitions filed by

claims and commenting that “[t]his phenomenon is at odds with recent developments, both in California and across the nation, which suggest that wrongful convictions occur with greater frequency than ever imagined.”)

160. NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited April 20, 2013) (on file with the *McGeorge Law Review*). This statistic is not limited to DNA-based exonerations.

161. Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. L. REV. 965, 979 (2008) (“In his remarkable 2006 concurrence in *Kansas v. Marsh*, Justice Scalia asserts that the recent revelation of actually innocent exonerees ‘demonstrates not the failure of the system but its success.’”); *Kansas v. Marsh*, 548 U.S. 163, 193 (2006) (Scalia, J., concurring) (“[The dissent] speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than as a consequence of our legal system. Reversal of an erroneous conviction on appeal or on habeas . . . demonstrates not the failure of the system but its success.”).

162. Samuel R. Gross and Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. OF EMPIRICAL STUDIES 927, 940 (2008) (“[W]e do not know how many false convictions occur, but it is clear that there are many more false convictions than exonerations.”); *id.* at 938 (“There are virtually no exonerations for the misdemeanors and nonviolent felonies that constitute the vast majority of all criminal convictions, and *probably include the majority of false criminal convictions as well.*”) (emphasis added).

163. *Id.* at 927.

164. *Id.* at 958–59.

165. *Id.*

166. Tavis, *supra* note 10, at 130.

167. *Id.*

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death row inmates, researchers found that when courts fully reviewed the cases, “courts reversed an alarming sixty-eight percent of fully reviewed verdicts ‘due to serious errors.’”¹⁶⁸ In another instance, a district attorney in Dallas took the initiative to review previously denied innocence claims within his county (with the help of the Texas Innocence Project).¹⁶⁹ From that review alone, twenty-one exonerations resulted over a four-year period.¹⁷⁰

These results are particularly troubling because in many cases there is no way to determine from the state court record whether the court conducted a thorough review of the case.¹⁷¹ Since the majority of habeas claims are denied summarily, there is often no explanation of why the court denied relief.¹⁷² Thus, it is unclear whether California prisoners are truly receiving meaningful review of their habeas claims in state court.

C. *Legal Standard for Relief Is Too High*

Even if a potentially innocent petitioner’s claim is heard on the merits and meaningfully considered, there is still the problem of the legal standard for relief: the petitioner must provide new evidence that “point[s] unerringly to innocence.”¹⁷³ This burden is almost impossible to meet, even for innocent prisoners.¹⁷⁴

The incidence of improper forensic evidence illustrates the problem with this stringent standard.¹⁷⁵ Use of improper or unvalidated forensic science is a known cause of wrongful convictions.¹⁷⁶ To illustrate this concern, suppose an innocent petitioner was convicted based largely on forensic evidence presented at trial.

168. Tankard, *supra* note 33, at 783 (concluding, based on this figure, that the “reason for the low success rate of non-capital habeas claimants likely has at least as much to do with a lack of representation [by an attorney] as with a scarcity of meritorious claims”).

169. Joseph L. Hoffman, *Innocence and Federal Habeas After AEDPA: Time for the Supreme Court to Act*, 24 FEDERAL SENTENCING REPORTER 4, 303 (2011).

170. *Id.*

171. Medwed, *supra* note 10, at 1467 n.158 (2007) (“As California’s prison population and incarceration rate continue to increase, a sample of habeas petitions filed within San Diego fails to demonstrate that prisoners’ claims are uniformly being given (1) prompt and fair consideration (2) on the merits (3) with appropriate assistance of counsel.”).

172. Seligman, *supra* note 35, at 471.

173. *In re Clark*, 5 Cal. 4th 750, 766 (1993); *In re Hardy*, 41 Cal. 4th 977, 1016 (2007).

174. Gabel, *supra* note 153, at 1016 (using California’s newly discovered evidence standard to illustrate that “even where [a claim of bare innocence] is cognizable, the standards a prisoner must meet to establish entitlement to relief can be quite strict and nearly impossible to meet”); Medwed, *supra* note 10, at 1439 (2007) (describing the “points unerringly to innocence” standard as “remarkably severe”).

175. Gabel, *supra*, note 153, at 1021–22.

176. *Unreliable or Improper Forensic Evidence*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited March 20, 2013) (on file with the *McGeorge Law Review*) (“In more than 50% of DNA exonerations, unvalidated or improper forensic science contributed to the wrongful conviction.”). Unvalidated or improper forensic science is the “second-greatest contributor to wrongful convictions that have been overturned with DNA testing.” *Id.*

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Suppose further that after the trial and appeal phase, the particular type of forensic evidence used against the petitioner is conclusively proven to be junk science, i.e., not sufficiently reliable to form the basis for a criminal conviction. So far, things are looking up for this innocent petitioner: the foundations of the evidence against him have been completely discredited.

However, when the petitioner presents a California state court with his newly discovered evidence claim, a peculiar situation results. Although the petitioner can prove the forensic evidence has been discredited and therefore calls the basis of his conviction into question, he still does not meet the standard for relief in California.¹⁷⁷ This is because discrediting the evidence against him is not the same as providing affirmative evidence that points unerringly to his innocence.¹⁷⁸ The absence of evidence against him does not *affirmatively* indicate that he is innocent.¹⁷⁹ Thus, the innocent petitioner who cannot provide affirmative evidence pointing to innocence could be kept in prison, despite having discredited the bulk of the evidence against him.¹⁸⁰

VI. POTENTIAL SOLUTIONS

This Part will discuss two possible solutions for the current habeas problem with respect to wrongful convictions. First, the legal standard of relief should be lowered to the standard for new trial motions. Second, all courts should be required to provide at least a skeletal explanation of their reasoning when issuing summary denials.

A. Lower the Legal Standard for Relief

Recognizing the significant obstacles that actually innocent prisoners face under California law, legal scholar Daniel Medwed has proposed that California change its legal standard for claims based on newly discovered evidence.¹⁸¹ Rather than requiring prisoners to provide evidence that “points unerringly to innocence,” Professor Medwed suggests that prisoners be required to provide

177. Gabel, *supra* note 153, at 1021 (“[D]iscrediting of a forensic testing technique may not be able to make a sufficient showing of innocence.”); *id.* at 1023 (“Thus, a prisoner challenging his or her conviction in a jurisdiction that requires a strong showing of innocence probably will not be entitled to relief even if he or she conclusively shows that a forensic testing technique has insufficient value.”)

178. *Id.* at 1021–22 (“The discrediting of forensic technique probably cannot be considered ‘affirmative evidence’ that ‘unquestionably establishes’ a prisoner’s innocence. Even assuming that a forensic technique was shown to be completely unreliable, it will not provide affirmative evidence of a prisoner’s innocence.”).

179. *Id.*

180. *Id.*

181. Medwed, *supra* note 10, at 1475–76. Medwed offers this suggestion as one of several “feasible micro-level solutions” that, while piecemeal, would be a “marked improvement” to California law. However, he ultimately recommends that California undertake a more full-scale “revamping of [its] treatment of newly discovered evidence claims” and adopt a system more similar to that of New York. *Id.* at 1475–78.

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“evidence that would have probably changed the outcome at trial” (hereafter “the new trial standard”).¹⁸² Under this standard, a prisoner seeking state habeas relief based on newly discovered evidence would be required to show that the new evidence:

- (1) could not, with reasonable diligence, have been discovered and produced at trial;
- (2) is not merely cumulative;
- (3) is not merely impeaching or contradicting a witness;
- (4) would render a different result probable on retrial of the case; and
- (5) is shown by the best evidence of which the case admits.¹⁸³

This standard would greatly benefit actually innocent prisoners because it is less burdensome to meet and would therefore provide deserving prisoners with a fair chance of obtaining relief in state court.¹⁸⁴ As Professor Medwed explains, this standard is “rigorous . . . [but] not insurmountable for defendants” and “afford[s] prisoners a chance to pursue their claims in full and fair fashion.”¹⁸⁵ Should California adopt the new trial standard, it would not be alone: Arizona¹⁸⁶ and Florida¹⁸⁷ use a similar standard for newly discovered evidence claims.

182. *Id.* at 1475. This is the same standard that California state prisoners seeking a new trial must satisfy. *Id.*

183. *Id.* at 1469 (2007).

184. *Id.* (describing the new trial standard as “rigorous . . . [but] not insurmountable”).

185. *Id.*

186. *Id.* at 1475 n.207 (citing ARIZ. R. CRIM. P. 32.1(e))

Arizona’s criminal procedure code provides post-conviction relief when: “Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if: (1) The newly discovered material facts were discovered after the trial. (2) The defendant exercised due diligence in securing the newly discovered material facts. (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.”

Id.

187. *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991). At the time *Jones* was decided, Florida law required that petitioners bringing newly discovered evidence claims present facts that are “of such vital nature that had they been know to the trial court, they conclusively would have prevented an entry of judgment.” In *Jones*, however, the Florida Supreme Court concluded that that standard was “almost impossible to meet and [ran] the risk of thwarting justice.” Thus, the court lowered the standard and held that newly discovered evidence must only be “of such nature that it would *probably* produce an acquittal on retrial.” *Id.*

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1. Is the New Trial Standard Stringent Enough?

Proponents of a stringent legal test for actual innocence claims based on newly discovered evidence argue that the current high standard is fair because petitioners have already had a trial and been convicted.¹⁸⁸ However, this argument is misguided in light of the incidence of wrongful convictions.¹⁸⁹ Clearly, innocent people are convicted and fail to prevail on appeal.¹⁹⁰ The fact that a petitioner has had both a trial and an appeal does not indicate that justice was done or that the petitioner must be guilty.¹⁹¹ The evidence regarding wrongful convictions makes at least that much clear.¹⁹² Furthermore, this argument improperly values procedural “fairness” over determinations of guilt and innocence.¹⁹³ Procedural fairness is not an end goal in itself; it is the means by which justice is achieved.¹⁹⁴

188. See, e.g., Jennifer Gwynne Case, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 697 (2008).

By the time a petitioner reaches the habeas stage of his postconviction proceedings, he has been convicted of a crime by a jury of his peers. Accordingly, the petitioner is no longer entitled to the presumption of innocence. The higher up the postconviction process, the greater the number of chances the petitioner has had to demonstrate his innocence. The more chances afforded a petitioner to appeal his sentence, the smaller the risk that he has been wrongly convicted. In the rare cases like [wrongfully convicted prisoner] Beverly Monroe’s, the judicial system is likely to detect a wrongful conviction before the need to petition a federal court for review because of the numerous constitutional and statutory safeguards available in criminal cases. Moreover, executive clemency, the ultimate safeguard, will always be a possibility for the truly innocent prisoner.

In re Lawley, 42 Cal.4th 1231, 1240–41 (2008).

The rationale for applying a different, higher standard to actual innocence habeas corpus claims is readily explained. . .[A]ctual innocence claims based on newly discovered or nonperjured false testimony do not attack the procedural fairness of the trial. They *concede* the procedural fairness of the trial, but nevertheless attack the accuracy of the verdict rendered and seek a reexamination of the very question the jury answered: Is the defendant guilty of the charges presented? A conviction obtained after the constitutionally adequate trial is entitled to great weight. Accordingly, a higher standard properly applies to challenges to a judgment whose procedural fairness is conceded than to one whose procedural fairness is challenged. Metaphorically speaking, an actual innocence claim based on newly discovered evidence seeks a second bite of the apple. . .[without contending] that the first bite was rotten.

Id.

189. Gross, *supra* note 162, at 940.

190. *Id.*

191. *Id.*

192. *Id.*

193. Little, *supra* note 161, at 976 (“The point is that, ultimately, our concern about wrongful convictions has to do with substantive guilt, not merely the fairness of the process.”).

194. Peter Sessions, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1548 (1997) (“Finality is not a desirable goal in itself and of itself; it is only desirable as a means to justice.”); *Rozier v. United States*, 701 F.3d 681, 690–91 (11th Cir. 2012) (J. Hill, dissenting).

Due process is the defining virtue of our system of criminal justice. But we should ask ourselves why. Is it because it achieves finality? Or is it because we believe that, more often than not, we will

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Moreover, the new trial standard is not too lenient. While it is lower than the current standard for relief, it is still difficult to satisfy.¹⁹⁵ As one scholar noted, even innocent prisoners will not always be able to meet the new trial standard, as it can be difficult to meet each of the several requirements.¹⁹⁶ Thus, proponents of a stringent legal standard for newly discovered evidence claims need not be concerned should California adopt the still-demanding, new trial standard.

While the legal standard for relief should be somewhat rigorous, it should not be impossible to satisfy. Since we cannot completely eliminate wrongful convictions, “there will always be the perceived need “for some kind of ‘safety valve’ by which wrongful convictions can be overturned.”¹⁹⁷ For this reason, the new trial standard is preferable to other standards, such as the clear and convincing evidence standard. Although the clear and convincing evidence standard may seem like a natural choice because it is the same standard used to grant habeas relief in federal court,¹⁹⁸ it is still too harsh.¹⁹⁹ For example, in California death-row inmate Kevin Cooper’s case, Judge McKeown expressed grave doubt about Cooper’s guilt and concern about using the clear and convincing evidence standard in actual innocence cases:

The habeas process does not account for lingering doubt or new evidence that cannot leap the clear and convincing hurdle of AEDPA. Instead, we are left with a situation in which confidence in the [evidence] is murky at best, and lost, destroyed or tampered evidence cannot be factored into the final analysis of doubt. The result is wholly discomfoting, but is one that the law demands.²⁰⁰

Unlike the clear and convincing evidence standard, the new trial standard heeds the “lessons of the DNA revolution” by recognizing that wrongful convictions occur and providing a fair opportunity for wrongfully convicted prisoners to prove that they are being held unjustly.

2. *Will Lowering the Standard Allow Guilty People to Go Free?*

Whenever the notion of expanding habeas relief arises, this question surfaces without fail: what if guilty petitioners are set free? Admittedly, there is always a

reach a correct result where certain process is due the criminal defendant. The goal is a correct result—not simply the provision of process.”).

195. Gabel, *supra* note 153, at 1015.

196. *Id.* (“The requirements that a prisoner must meet in order to [satisfy the] new trial [standard] all but ensure that an innocent person in many jurisdictions will not be able to do so.”).

197. Hoffman, *supra* note 169, at 301.

198. 28 U.S.C. §2254(d) (2006).

199. *See* Gabel, *supra* note 153, at 1023 (describing the requirement under Texas law that a prisoner establish a bare claim of actual innocence by clear and convincing evidence as a “Herculean task”).

200. *Cooper v. Brown*, 510 F.3d 870, 1007 (9th Cir. 2007) (McKeown, J., concurring).

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chance that guilty prisoners would be set free under the new trial standard. But this scenario seems unlikely. The new trial standard is hardly a free pass for prisoners to be released from custody—there are still standards that need to be met, and significant ones at that.²⁰¹ Changing the legal standard for relief does not create new evidence that would allow a guilty prisoner to go free. If a prisoner is guilty, he will still have difficulty providing evidence of his innocence sufficient to meet the new trial standard.²⁰²

It is true that some petitioners would be able to secure habeas relief under the new trial standard who would not be able to do so under the current standard.²⁰³ However, the fact that these prisoners would be set free is not a bad thing; in fact, it is desirable. If a prisoner is able to satisfy the requirements of the new trial standard, it means he has successfully and credibly called his guilt into question.²⁰⁴ A court which grants relief to such a prisoner is not letting a guilty person go free, but merely freeing someone who never should have been imprisoned at all.

Furthermore, the risk that a guilty person will go free under a particular legal standard is both acceptable and necessary.²⁰⁵ At the foundation of our criminal justice system lays the principle that it is preferable to let a guilty person go free than to convict an innocent person.²⁰⁶ The “beyond a reasonable doubt” standard in criminal trials reflects this principle. Under that standard, a guilty person goes free not because he is innocent, but because the state could not prove he is guilty.²⁰⁷ Our system is structured to err on the side of innocence²⁰⁸ because a wrongful conviction is considered the ultimate injustice.²⁰⁹ As one scholar observes, “[i]t is impossible to overestimate the magnitude of the wrong done to

201. *Up the River*, *supra* note 11, at 689.

202. *Id.* ([E]ven if a factually guilty defendant were to have his new evidence claim assessed during a post-trial evidentiary hearing. . . he would still likely struggle to carry the burden of proving that all of the requirements for relief are met.”)

203. *See* Medwed, *supra* note 10, at 1469 (describing the new trial standard as “rigorous . . . [but] not insurmountable”); Gabel, *supra* note 153, at 1016 (describing California’s newly discovered evidence standard as “nearly impossible to meet”).

204. Medwed, *supra* note 10, at 1469 (“If a defendant satisfies [the new trial] requirements. . . the defendant has raised credible doubts about his or her guilt.”).

205. Little, *supra* note 161, at 976.

206. *Id.* (“[I]t is ‘a fundamental value determination of our society’ that a number factually guilty criminal offenders should go free, rather than risk even a few wrongful convictions.”).

207. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1977–2009, 32 (2010), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs> (“The presumption of innocence . . . places upon the state the burden of proving the defendant guilty beyond a reasonable doubt . . . The presumption is based on the basic concept that is worse to convict an innocent person than to let a guilty person go free.”).

208. *Id.* at 84 (“But that is the balance we have struck, recognizing that it is better that some guilty go free than the fairness of the trials be compromised and the innocent convicted.”).

209. *See id.* at 4 (“This case raises the one issue that is the most feared aspect of our system – that an innocent man might be convicted.”).

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an innocent person wrongfully convicted of a crime. The psychological, emotional, and economic harm can be equivalent to the destruction of a life.²¹⁰

Against this backdrop, the allegation that a guilty person might be set free does not detract from the new trial standard's legitimacy.

3. *Federalism and State Sovereignty Concerns*

One benefit of adopting the new trial standard is that it comports with the principles of federalism and respect for state sovereignty enshrined in the structure of the federal habeas system. Under the framework of AEDPA, state courts are the primary forum for resolving post-conviction constitutional challenges to state judgments.²¹¹ The reason federal habeas review is difficult to obtain is because federal review of state court judgments is considered undesirable. It strains the relationship between the federal and state courts as “[s]tate courts may resent federal, trial-level courts accepting habeas petitions and thus undertaking to second-guess judgments that may have been affirmed by the states’ highest courts.”²¹² Adoption of a lower legal standard of habeas relief in California is consistent with the principle of federalism because it increases the likelihood that state prisoners will obtain meaningful review of their post-conviction claims in state court, and thus have their claims resolved in the preferred forum: state court.²¹³

Under the current legal standard for relief, it is possible that California courts are not considering post-conviction claims as carefully as they could be because the standard for relief is almost impossible to meet. State courts could correctly presume the overwhelming majority of petitioners will not be able to meet the standard and could scrutinize the claim less closely on that basis.²¹⁴ However, if the legal standard for relief were lower, it would increase the likelihood that deserving petitioners could satisfy the standard, so state courts would have a greater need to evaluate thoroughly prisoners’ claims.²¹⁵ If California courts

210. *Id.* at 66.

211. *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (“[AEDPA] Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.”).

212. *Degrate*, *supra* note 15, at 77 (“[T]he balance of power between the state and federal government in the enforcement of the criminal laws of this nation has shifted back to the states based on the ‘deference’ [AEDPA] mandates to state court conclusions of fact and law.”).

213. *Up the River*, *supra* note 11, at 698 n.230 (“Augmenting state review of newly discovered evidence claims also affirms principles of state sovereignty by limiting the likelihood of federal habeas corpus review.”).

214. *See Gabel*, *supra* note 153, at 1016 (describing California’s newly discovered evidence standard as “nearly impossible to meet”).

215. *See Medwed*, *supra* note 10, at 1469 (discussing how the new trial standard creates a “rigorous . . . [but] not insurmountable hurdle” for defendants and arguing that adopting this standard for newly discovered evidence claims would help to provide potentially innocent prisoners with a more full and fair opportunity for relief.); *In re Clark*, 5 Cal. 4th 750, 803 (1993) (Mosk, J., dissenting) (acknowledging that considering each claim its particular facts would require more judicial resources).

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provide a better opportunity for relief to deserving petitioners, then these claims would be resolved in state court and would not require federal review. California could thus take advantage of having the first opportunity to address meritorious claims while avoiding unwanted meddling by federal district courts.²¹⁶

4. Finality of Judgments

Naturally, a state has an interest in maintaining the finality of its judgments.²¹⁷ Thus, respect for the finality of judgments is a concern in any habeas analysis.²¹⁸ A legal standard that provides a realistic opportunity for state prisoners to obtain habeas relief is arguably harmful to the state's interest in finality because it increases the likelihood that some judgments will be overturned.²¹⁹ However, finality is just one policy objective:²²⁰ it must be balanced against other competing policy objectives.²²¹

Specifically, the interest in finality must be balanced against the need for justice and accuracy in criminal judgments.²²² The conviction of an innocent person is an injustice that represents a breakdown in the process.²²³ Should an innocent person's conviction stand, merely for the sake of finality?

Finality cannot be permitted to trump justice.²²⁴ As Justice Stevens explains “[a]lthough we have frequently recognized the State's interest in finality we have never suggested that that interest is sufficient to outweigh the individual's claim to innocence . . . [T]he criminal justice system occasionally errs and . . . when it does, finality must yield to justice.”²²⁵

216. See *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (“Federal habeas review of state convictions frustrates both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”).

217. Mattingly, *supra* note 18, at 533, 545.

218. Sessions, *supra* note 194, at 1544–45.

219. See *Up the River*, *supra* note 11, at 687–88 (discussing the need to provide potentially innocent prisoners with a chance to prevent their newly discovered evidence in state court without unduly harming the interest in finality).

220. Sessions, *supra* note 194, at 1555.

221. *Id.* (describing “competing principles of accuracy and justice”).

222. *Up the River*, *supra* note 11, at 688 (“Valuing finality and efficiency as assets in the world of post-trial litigation . . . does not mean they should trump competing policy objectives, particularly the accuracy of criminal judgments.”); Sessions, *supra* note 194, at 1548 (“Balanced against our concern for the finality of state court judgments must be a concern for the legitimacy of those judgments.”).

223. See *Hertz & Liebman*, *supra* note 12, at 97 (“The courts properly ought to take the fact that an innocent person may have been convicted . . . as one, among other, indicators that an unconstitutional breakdown in the process has occurred.”).

224. *Rozier v. United States*, 701 F.3d 681, 690–91 (11th Cir. 2012) (Hill, J., dissenting) (“If these new [procedural] rules require that finality trump justice, then perhaps . . . they are unconstitutional. In any event, I cannot join in this elevation of form over substance; of finality over fairness.”).

225. Mattingly, *supra* note 18, at 545 (citing *Sawyer v. Whitley*, 505 U.S. 333, 364 (1992) (Stevens, J., concurring)).

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The state has no interest in keeping an innocent person in prison. Doing so is not only unjust, but also puts society at risk because it may mean the guilty person remains free.²²⁶ Thus, the interest in finality should not stand in the way of California adopting the new trial standard. Rather, the new trial standard is desirable because it properly “reconciles the goal for finality with the desirability of affording prisoners a chance to pursue their claims in full and fair fashion.”²²⁷

5. *Judicial Economy and the Cost of Justice*

The final concern warranting consideration is judicial economy. Can the court system afford to lower the legal standard for relief? Will a change in the legal standard open the floodgates and drown the court system in habeas claims? The unfortunate answer is the floodgates are already open.²²⁸ Both state and federal courts are already submerged in habeas claims.²²⁹ Neither a higher nor lower standard for habeas relief is likely to change the number of claims filed for relief.

There will always be guilty prisoners who file frivolous claims. These prisoners have nothing to lose by petitioning for habeas relief, regardless of the standard for relief.²³⁰ Innocent petitioners are similarly unlikely to be deterred or encouraged by a particular standard for relief.²³¹ If a petitioner is innocent, he will likely pursue post-conviction relief regardless of the legal standard. Thus, the primary effect of changing the legal standard is not so much that the number of total habeas petitioners will change, but that more of the petitioners who warrant relief will be able to obtain it.²³²

226. For example, Michael Morton spent twenty-five years in prison after a court wrongfully convicted him in 1987 for his wife’s murder. In 2011, DNA testing revealed that Morton was not the killer and implicated another man. While Morton was in prison, the other man killed another woman. *Know the Cases: Michael Morton*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Michael_Morton.php, (last visited April 2, 2013) (on file with the *McGeorge Law Review*).

227. Medwed, *supra* note 10, at 1469.

228. Tankard, *supra* note 33, at 782 (“Despite [the] microscopic rate of success, the cases keep pouring in: nearly one in five cases on the federal civil docket is filed by a prisoner and more than half of those filings are petitions for post-conviction relief.”).

229. *Id.*; Walker v. Martin, 131 S. Ct. 1120, 1125–26 (2011) (“[The California Supreme Court] rules on a staggering number of [habeas] petitions each year.”).

“In fiscal year 2008–2009, the California Supreme Court issued dispositions in 3,258 original habeas actions . . . During a similar time period, a total of 2,210 habeas cases were on [the] Court’s docket.” *Id.* at 1126 n.2; Harrington v. Richter, 131 S.Ct. 770, 784 (2011) (“[T]he California Supreme Court disposes of close to 10,000 cases a year, including more than 3,400 original habeas corpus petitions.”).

230. Hoffman, *supra* note 169, at 301 (“[I]f—as seems inevitable—the convicted defendant cannot be made to bear any significant costs for invoking such a procedure, then most if not all defendants, whether they are guilty or innocent, will seek to avail themselves of the procedure [by which they may succeed on a claim of factual innocence]. They have everything to gain, and virtually nothing to lose.”).

231. *Id.*

232. *See Up the River*, *supra* note 11, at 689 (arguing for a relaxation of the procedural barriers to habeas

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It is true that if California adopts the new trial standard, state courts will be required to expend additional judicial resources on each claim. Because a lower standard increases the likelihood that innocent state prisoners will be able to meet the legal standard for habeas relief, there will be more close cases, and courts will spend more time analyzing these cases.²³³ But in the grand scheme of the criminal justice system, this result is not undesirable.²³⁴ We now know that our system errs and that innocent people are convicted.²³⁵ Now more than ever, our courts have an obligation to carefully consider each claim for relief, despite the time it will take or the concern over expending resources on petitioners who may abuse the writ.²³⁶ Justice Mosk describes this obligation as follows:

I know of only one sure way to discover abuse without defeating justice: to examine each petition on its own facts. True, scrutiny of this sort requires the expense of considerable judicial resources, particularly in capital cases. That, however, is the cost of justice. Out of fidelity to our judicial oath, we must pay the price.²³⁷

Wrongfully convicted prisoners exist within our criminal justice system²³⁸ and deserve a fair opportunity to have their habeas claims heard. California should not deny innocent prisoners the opportunity for relief merely because it costs too much.²³⁹ “[I]n extraordinary cases, the societal interests of finality, comity, and conserving judicial resources ‘must yield to the imperative of correcting a fundamentally unjust incarceration.’”²⁴⁰

Can California afford to adopt the new trial standard for state habeas relief? In the interest of justice, California must do so. While more court resources will

relief and asserting that “the legal and evidentiary standards pertaining to new trial motions . . . [are] by no means effortless hurdles to clear The enforcement of these . . . standards should provide the requisite safeguard to prevent guilty prisoners from slipping through the opening created by removing some procedural roadblocks that confront newly discovered new evidence claims.”)

233. *In re Clark*, 5 Cal. 4th 750, 802 (1993) (Mosk, J., dissenting).

234. *See id.* (Mosk, J., dissenting) (arguing that the additional use of resources that would be required to consider each claim on its particular facts is “the cost of justice”).

235. *See About the Registry*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Feb. 18, 2013) (on file with the *McGeorge Law Review*) (evidencing wrongful convictions by the number of exonerations).

236. *See In re Clark*, 5 Cal. 4th at 802 (Mosk, J., dissenting) (asserting that courts should “examine each petition on its own facts”); Marceau, *supra* note 110, at 89 (“As the role of deciding the substantive law, often with binding and nearly unreviewable finality, falls to the states, it becomes increasingly important to ensure that states’ post-conviction systems are procedurally fair and reliable on an individual and a systemic level.”).

237. *In re Clark*, 5 Cal. 4th at 802 (Mosk, J., dissenting).

238. Gross, *supra* note 162, at 940.

239. *See supra* note 237 and accompanying text.

240. *Lee v. Lampert*, 653 F.3d 929, 935 (9th Cir. 2011) (quoting *Murray v. Carrier*, 477 U.S. 478, 495 (1986)).

be required, that is the quid pro quo of doing business in a fallible criminal justice system.²⁴¹

B. The Problem of Summary Denials

In addition to adopting the new trial standard, California should consider reforming its use of summary denials for habeas corpus petitions in order to increase transparency and foster confidence in the criminal justice system. As discussed previously, California dismisses over ninety-seven percent of state prisoners' habeas claims through summary denial.²⁴² This means that in the majority of cases where habeas relief is denied, the court does not provide a written opinion explaining its reasons for the denial.²⁴³

This lack of explanation causes a number of problems for wrongfully convicted prisoners. When a California court summarily denies a prisoner's claim, the prisoner will have difficulty obtaining federal habeas review because summary denials are considered adjudicated on the merits, despite the fact that the court may have provided no explanation as to whether the petition was denied on the merits or on procedural grounds.²⁴⁴ For a prisoner whose claim was summarily denied, it will be difficult to convince a federal court the state court's decision was "unreasonably wrong," since the state court judgment contains no opinion.²⁴⁵ The lack of explanation accompanying summary denials operates to the petitioner's direct detriment.

The lack of explanation is a cause for concern on a broader level as well. The federal habeas system gives deference to state courts because it accepts that state courts are providing prisoners with a full and fair opportunity for judicial

241. In re Clark, 5 Cal. 4th 750, 802 (1993) (Mosk, J., dissenting).

242. Seligman, *supra* note 25, at 471. "These data demonstrate that summary dispositions are the dominant form of resolution of state habeas proceedings in California—far more so than the previously available data from other states suggested." *Id.* at 505–06 (explaining that this study used data from six courts of appeal in California over a four year period from 2006 to 2009, and concluding that "a California state habeas petition is almost certain to be denied summarily").

243. *Id.* While superior courts are required to provide a brief statement of reasons when summarily denying a petition, they are not required to issue a full opinion. As a result, summary denial orders from trial courts may only contain a few sentences. *See, e.g.*, In re Stamos, 2006 WL 5710785 (2006) (denying habeas relief in a two-sentence order). As discussed in Part III.C, courts of appeal and the California Supreme Court are not required to provide any explanation at all.

244. *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011) (holding that a state court is not required "to give its reasons before its decision can be deemed to have been 'adjudicated on the merits.'").

245. Seligman, *supra* note 35, at 494–95 (discussing the rule that state court decisions must be unreasonable, rather than just incorrect, in order for a federal habeas court to review a state habeas petition and observing that "[a]pplying this rule to summary dispositions is not straightforward. The obvious method of evaluating whether a state court decision is unreasonable is to evaluate whether the state court's accompanying written opinion is unreasonable. [But] this is not an option with summary dispositions."); *see also Harrington*, 131 S. Ct. at 786 (describing the requirement that petitioners show the state court's decision was unreasonable as "difficult to meet").

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review.²⁴⁶ However, when courts summarily dismiss the majority of claims,²⁴⁷ it is impossible to evaluate whether all state courts are truly providing prisoners with this opportunity.²⁴⁸ As one scholar observes:

Summary dispositions are opaque, giving no outward indication of the deliberative processes utilized by the issuing court. A summary disposition may result from a conscientious evaluation of the evidence in light of a reasonable interpretation of governing federal law. . . . Or, it may result from a haphazard glance at the evidence and a cursory review of the law. . . . [State courts] may, in short, automatically issue summary denials of relief to every prisoner's petition.²⁴⁹

We know little about why the courts summarily deny so many claims.²⁵⁰ Certainly it could be because relief is unwarranted, but the continuous stream²⁵¹ of wrongfully convicted prisoners suggests otherwise.

The inability to review state courts' reasoning is particularly troubling when combined with the lack of oversight surrounding state court judgments. There is neither mandatory oversight within California's state court system,²⁵² nor real federal oversight of California courts.²⁵³ When a lower California state court denies a petition for habeas relief, the petitioner cannot appeal the denial, but must file a new petition with a higher California court.²⁵⁴ Consequently, a higher court never directly reviews the lower court's summary denial.²⁵⁵ At the same time, state judgments are similarly shielded from federal review as a result of AEDPA's extremely deferential standard of review of state judgments.²⁵⁶

246. Hoffman & King, *supra* note 150, at 53 (“[State] prisoners today generally enjoy the full opportunity to seek judicial review in state court for asserted violations of their federal constitutional rights.”).

247. Seligman, *supra* note 35, at 471.

248. *Id.* at 474 (“Summary dispositions . . . giv[e] no outward indication of the deliberative processes utilized by the issuing court.”).

249. *Id.*

250. *Id.* at 501 (“Summary dispositions are the dark matter of the judicial universe. By definition they lack a written opinion, and so they are not published in reporters of decisions and thus do not appear in standard searches of cases. As a result, their prevalence is not easily ascertainable via the typical tools of legal research. The existing scholarly literature contains snippets of data.”).

251. Gross, *supra* note 162, at 940.

252. Medwed, *supra* note 10, at 1471.

253. Marceau, *supra* note 110, at 89 (“[T]he deterrence model of federal oversight” is regarded by scholars as “nothing more than a misguided ‘fairytale.’”).

254. Medwed, *supra* note 10, at 1471.

255. *Id.* (“[T]he lack of direct appellate review for the denial of a habeas corpus petition creates a situation in which there is no explicit check on the lower court’s treatment of an innocence claim. As a result, there is no genuine limit on a superior court’s ability to wield its habeas corpus power arbitrarily.”).

256. *See supra* Part IV.A (discussing roadblocks prisoners face in obtaining habeas relief).

*McGeorge Law Review / Vol. 45**1. Some Explanation Should Be Required in Close Cases*

To combat this problem, California should require that all courts provide at least some explanation for why a habeas petition is being denied. While it may not be feasible to do this in every case, all courts should at a minimum provide a skeletal outline delineating the basis for denial in close cases. One potential definition for a “close case” is one where unanimity is lacking; if one justice believes relief should not be denied, the court must provide reasoning for the denial.

However, there is a credible argument for requiring at least minimal explanation in every case. The overwhelming majority of habeas petitioners are pro se and have little assistance preparing their petitions for relief.²⁵⁷ As a result, these petitions can often be “hard-to-decipher.”²⁵⁸ When prisoners are unable to obtain habeas relief in California state court, the next step is to petition for relief in federal court.²⁵⁹ When federal staff attorneys initially screen petitions for federal habeas relief, they must make decisions “based on the often-hard-to-decipher petition itself and the written record of the state proceedings,” since federal courts have “neither the time nor the resources to conduct their own investigations to determine the potential merits of a habeas petition.”²⁶⁰ Thus, minimal explanations for all summary denials would assist federal courts in evaluating the merits of each petition by making the written record of the state proceeding more substantial.

2. Arguments Against Requiring Explanation

In *Harrington v. Richter*, Justice Kennedy articulates two reasons why state courts should not be required to issue written opinions in every case.²⁶¹ First, “requiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition.”²⁶² Second, the ability to issue summary decisions without a written opinion “can enable a state judiciary to concentrate its resources on the cases where opinions are most needed.”²⁶³ Thus, any proposed change to state summary disposition procedures must factor in these two concerns.

257. Hoffman, *supra* note 169, at 302; Garcia Uhrig, *supra* note 30, at 1252.

258. Hoffman, *supra* note 169, at 302.

259. *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (“Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court.”).

260. Hoffman, *supra* note 169, at 302.

261. *Harrington*, 131 S. Ct. at 784.

262. *Id.*

263. *Id.*

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3. A “Form” of Solution

In order to provide at least a minimal explanation of why a particular petition is denied, California should consider requiring all courts to fill out a standardized form whenever they summarily deny habeas petitions. The form would contain a list of potential reasons for denial—for example, “untimely” or “procedurally defaulted.” The judges would check the boxes next to the applicable reasons. Any explanatory comments could be written in the space next to the box. There would also be a section where the court could indicate, by checking the appropriate box, whether the petition had been denied on procedural grounds, on the merits, or both. The superior courts in Riverside County already use this type of form. The Riverside County form could serve as a model for the courts of appeal and the California Supreme Court.²⁶⁴

Requiring a standardized form for every summary denial strikes an appropriate balance between the need for some kind of explanation and Justice Kennedy’s concerns about conserving judicial resources and preserving the case-law tradition. Because the California Supreme Court and appellate courts summarily deny thousands of habeas petitions each year, judicial economy is understandably a significant concern. The standardized form represents a middle ground solution because it requires scant additional time or effort on the part of the judges, yet still provides some insight into why the petition was denied. Since the form requires only that the judges check the applicable boxes, the form can literally be completed within minutes, if not less.

Furthermore, the form does not require that the judges engage in additional analysis beyond what they would already be doing. As Justice Moreno of the California Supreme Court explains, the court performs “the rigorous analysis of the facts and of the law” regardless of whether the claim ultimately results in a written opinion or a summary denial.²⁶⁵ The only difference is that for written opinions, judges must spend more time “converting the in-chambers analysis into a written opinion fit for publication.”²⁶⁶ Thus, requiring a court to fill out a form after the initial analysis is complete will not necessitate more than a few extra minutes of the judges’ time. Of course, should the court wish to spend additional time writing comments on the form, it would be within its discretion to do so.²⁶⁷

264. See, e.g., *In re Ryan*, 2010 WL 6830319 (2010) (using a form to indicate the petitioner’s failure to state a prima facie case for habeas relief).

265. Seligman, *supra* note 35, at 498.

266. *Id.*

267. See e.g., *In re Espinoza-Matthews*, 2010 WL 6830323 (2010). In *Espinoza-Matthews*, a case from Riverside County, the superior court checked the box next to “The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner’s release.” Next to the box marked “Other,” the court added: “Your appeal was denied by California Department of Corrections ‘for excessive verbage.’ Your Petition is also full of excessive words. Many arguments are repeated. I still don’t know what happened other than you had a bad stomach ache. Your Petition is 60 pages long. If you file another Petition, get to the point and be more succinct.” *Id.*

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The standardized form would also appease Justice Kennedy's concern that requiring a statement of reasons for every judicial decision would undermine the case-law tradition. Under this proposal, the standardized forms would have no precedential value. Instead, the reviewing court would simply be required to fill out the form and make the contents available both to the petitioner and the public, much in the same way unpublished opinions are currently available. Thus, the form would not serve as precedent, but would still provide a record at each level of court offering at least some insight into why the petition was denied.

Even this type of minimal record from each court would help the habeas petitioner by providing some indication of why the petition is deficient. This will give the petitioner an idea of what problems need to be addressed should he continue on to federal court. This is especially important since, in order to qualify for federal review, the petitioner whose claim was summarily denied bears the burden of proving there was no reasonable basis for the state court to deny relief.²⁶⁸ Although still difficult, this burden becomes slightly more bearable if the petitioner at least knows what category of problem each state court relied on in denying relief.

In addition, if California required all of its courts to provide at least a minimal explanation of why they chose to deny a petition, it would create a more substantial record for federal review. This would conserve judicial resources for the system as a whole by reducing the time federal staff attorneys spend reviewing petitions filed by state prisoners.²⁶⁹ It would also further the interests of federalism by placing the state court's actual reasoning (versus imputed reasoning) at the center of the federal court's reviewing process.²⁷⁰ Finally, such an increase in transparency would provide an important check on California state courts, which in turn could increase public confidence in the criminal justice system.

268. *Harrington*, 131 S. Ct. at 784. "While it is the state court decision, and not the written opinion, that is the object of a federal court's analysis according to AEDPA's text 33, a written opinion may provide the best, and perhaps only, ground for determining the reasonableness of the decision that it accompanies." Seligman, *supra* note 35, at 473.

269. *See Hoffman*, *supra* note 169, at 302 (explaining that federal staff attorneys have little to work with when initially screening federal habeas petitions because they have only the petition itself and the written record of the state court proceedings).

270. *See Harrington*, 131 S. Ct. at 786 ("Under [AEDPA], a [federal] habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the [U.S. Supreme] Court."). "Federal habeas review of state convictions frustrates . . . the State's sovereign power." *Id.* at 787.

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VII. CONCLUSION

It is no secret that wrongful convictions occur across the nation; and California is not immune from this tragic scenario.²⁷¹ Even worse than the wrongful conviction of an innocent person is that once convicted, an innocent person is unlikely to be able to secure his release from prison as a result of current habeas corpus law.²⁷² In California, it is not the case that “the truth will set you free.” Rather, only evidence that “point[s] unerringly to innocence” will do so.²⁷³ Yet, this standard is almost impossible to meet.²⁷⁴

The “lessons [of] the DNA revolution”²⁷⁵ cannot be ignored. Our criminal justice system convicts innocent people “with stunning regularity.”²⁷⁶ Unfortunately, it is unlikely that we will ever be able to completely eliminate wrongful convictions.²⁷⁷ Our judicial system will always be at the mercy of human error.²⁷⁸ It is precisely because we cannot eliminate the risk of wrongful convictions that it becomes crucial to have a contingency plan in place for when the system fails.²⁷⁹ Habeas corpus was designed to be that contingency plan.²⁸⁰ As one scholar comments, “[w]e know even more today than we did in [the past] about the existence of wrongful convictions, yet we continue to fail in our societal responsibility to develop a reasonable method for dealing with such troubling situations.”²⁸¹

California must find a way to provide a full and fair opportunity for wrongfully convicted prisoners to end their unjust incarceration. A legal standard that requires them to perform an almost impossible feat is simply unfair and fails to balance the competing policy objectives of our society. By adopting the new trial standard for actual innocence claims based on newly discovered evidence and requiring all courts to provide at least a minimal explanation when courts

271. Medwed, *supra* note 10, at 1442–1443.

272. Gabel, *supra* note 153, at 1016 (using California’s newly discovered evidence standard to illustrate that “even where [a claim of bare innocence] is cognizable, the standards a prisoner must meet to establish entitlement to relief can be quite strict and nearly impossible to meet.”).

273. *In re Clark*, 5 Cal. 4th 750, 766 (1993); *In re Hardy*, 41 Cal. 4th 977, 1016 (2007).

274. Gabel, *supra* note 153, at 1016.

275. Medwed, *supra* note 10, at 1470.

276. *Id.*

277. Hoffman, *supra* note 169, at 301.

“[N]o matter how much we may try to reform our investigative and trial processes, mistakes will still occur. In any system operated by human beings, even perfect procedures cannot completely guarantee perfect out-comes. And whether we like it or not, victims, eyewitnesses, police, prosecutors, defense attorneys, judges, and jurors are all fallible human beings.”

Id.

278. *Id.*

279. *Id.*

280. Hoffman, *supra* note 169, at 303 (describing Judge Friendly’s view that “habeas should primarily protect against the wrongful conviction of innocent defendants”).

281. *Id.* at 305.

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deny claims, California can take a much-needed step towards rectifying that “most feared aspect” of our criminal justice system—the conviction of an innocent person.²⁸²

282. See Ridolfi and Possley, *supra* note 207, at 4 (“This case raises the one issue that is the most feared aspect of our system—that an innocent man might be convicted.”).