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## Free, but Still Behind Bars: Reading the Illinois Post-Conviction Hearing Act to Allow Any Person Convicted of a Crime to Raise a Claim of Actual Innocence

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# FREE, BUT STILL BEHIND BARS: READING THE ILLINOIS POST-CONVICTION HEARING ACT TO ALLOW ANY PERSON CONVICTED OF A CRIME TO RAISE A CLAIM OF ACTUAL INNOCENCE

HUGH M. MUNDY\*

**Abstract:** As the number of wrongfully convicted prisoners who are subsequently exonerated continues to rise, the importance of access to post-conviction relief also increases. Under the Illinois Post-Conviction Hearing Act, this access is restricted to petitioners who are currently imprisoned or otherwise facing a restraint on their liberty. Persons convicted of a crime who have completed their sentence are barred from pursuing post-conviction relief under the Act, regardless of the existence of exculpatory evidence that supports their innocence. Removing this procedural roadblock and interpreting the Act broadly to allow any person convicted of a crime to raise a claim of actual innocence is necessary to ensure that the wrongfully convicted can, eventually, have justice.

## INTRODUCTION

In 2013, eighty-seven wrongfully convicted prisoners in the United States were exonerated, “the highest number since researchers began keeping track more than 20 years ago.”<sup>1</sup> Contrary to popular perception, exculpatory DNA evidence is no longer the driving force in innocence cases, accounting for only one-fifth of exonerations.<sup>2</sup> In fact, biological evidence is unavailable in the

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\* Assistant Professor of Law, The John Marshall Law School. This article is dedicated to Maurice and Willa Dunn for their courage, perseverance, and optimism in pursuit of exoneration. The author also wishes to acknowledge The John Marshall Law School Pro Bono Clinic, Katie Anderson, Leighton Hendrickson, Jillian Kassel, Alex McDonald, Meghan Tribe, and his family for their invaluable research, support, and contributions.

<sup>1</sup> Laura Sullivan, *Exonerations on the Rise, and Not Just Because of DNA*, NAT’L PUB. RADIO (Feb. 4, 2014, 3:47 AM), available at <http://www.npr.org/2014/02/04/271120630/exonerations-on-the-rise-and-not-just-because-of-dna>, archived at <http://perma.cc/3D7W-RN5B>; see also Timothy Williams, *Study Puts Exonerations at Record Level in U.S.*, N.Y. TIMES, Feb. 4, 2014, at A12.

<sup>2</sup> Duaa Eldeib & Steve Mills, *3 Get Certificates of Innocence After Murder Convictions Dismissed*, CHI. TRIB., Jan. 23, 2014, available at [http://articles.chicagotribune.com/2014-01-23/news/chi-3-get-certificates-of-innocence-after-murder-convictions-dismissed-20140123\\_1\\_deon-patrick-jeffrey-lassiter-sharon-haugabook](http://articles.chicagotribune.com/2014-01-23/news/chi-3-get-certificates-of-innocence-after-murder-convictions-dismissed-20140123_1_deon-patrick-jeffrey-lassiter-sharon-haugabook), archived at <http://perma.cc/K7E2-9JDW> (stating that recent cases “suggest that the era of DNA exonerations may be nearing an end; . . . [a]s a result, future exoneration attempts likely will come in cases that do not have DNA”); Sullivan, *supra* note 1.

majority of cases.<sup>3</sup> The lack of DNA is especially commonplace in older cases, where police departments were not required to collect and preserve biological evidence.<sup>4</sup> Consequently, potentially exculpatory DNA was lost, destroyed, or degraded.<sup>5</sup> The majority of states, including Illinois, have since recognized the critical importance of obtaining biological evidence for both the prosecution and defense of criminal cases and the preservation of this evidence after trial.<sup>6</sup>

Without DNA, time-consuming, costly, and resource-intensive investigation is necessary to uncover other evidence of innocence.<sup>7</sup> Investigators must, at once, retrace the steps taken in the initial investigation while also searching for new or previously undiscovered evidence.<sup>8</sup> Of course, most prisoners cannot access the resources, and do not have the ability on their own, to build a case for innocence.<sup>9</sup> Instead, innocence investigations often depend on a will-

<sup>3</sup> Glenn A. Garber & Angharad Vaughan, *Actual-Innocence Policy, Non-DNA Innocence Claims*, N.Y. L.J., Apr. 4, 2008, at 1 (“[F]or every DNA exoneree there are hundreds if not over a thousand wrongfully convicted defendants whose cases do not contain biological evidence that could prove innocence.”); 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) (“[O]nly an estimated ten to twenty percent of criminal cases in the United States have any biological evidence suitable for DNA testing.”).

<sup>4</sup> See Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656–57 (2005).

<sup>5</sup> *Id.*

<sup>6</sup> NAT’L INST. OF STANDARDS & TECH., NISTIR 7928, THE BIOLOGICAL EVIDENCE PRESERVATION HANDBOOK: BEST PRACTICES FOR EVIDENCE HANDLERS (2013), available at <http://nvlpubs.nist.gov/nistpubs/ir/2013/NIST.IR.7928.pdf>; BRITTANY ERICKSEN & ILSE KNECHT, THE NATIONAL CENTER FOR VICTIMS OF CRIME, EVIDENCE RETENTION LAWS: A STATE-BY-STATE COMPARISON 2–12 (2013), available at <http://perma.cc/U4YH-XE6S>. Thirty-four states and the District of Columbia require the preservation of evidence after trial, although the statutes vary in terms of the length of time for which evidence must be preserved, the kinds of evidence that must be preserved, and the types of crimes for which evidence must be preserved. NAT’L INST. OF STANDARDS & TECH., *supra*; ERICKSEN & KNECHT, *supra*; see, e.g., 725 ILL. COMP. STAT. 5/116-4(e) (2012) (requiring the post-conviction preservation of “blood, hair, saliva, or semen”). Eight states only require the preservation of evidence once the state has received a post-conviction request for DNA testing. ALA. CODE § 15-18-200(d) (2011); IND. CODE ANN. § 35-38-7-14 (LexisNexis 2012); KAN. STAT. ANN. § 21-2512 (2013); 42 PA. CONS. STAT. § 9543.1 (2011); S.D. CODIFIED LAWS § 23-5B-5 (2014); TENN. CODE ANN. § 40-30-309 (2012); UTAH CODE ANN. § 78B-9-301 (2012); WYO. STAT. ANN. § 7-12-304 (2013). Washington gives sentencing courts authority to order the preservation of evidence in a felony case, either upon motion of the defendant or at the discretion of the court. WASH. REV. CODE ANN. § 10.73.170 (West Supp. 2012). Seven states do not have any statutes requiring the preservation of evidence after trial. NAT’L INST. OF STANDARDS & TECH., *supra*; ERICKSEN & KNECHT, *supra*.

<sup>7</sup> See Medwed, *supra* note 3, at 1440 (such evidence may include “recantations by trial witnesses, disclosures by previously unknown witnesses, or confessions by the true perpetrator”). In many cases, counsel must perform their own investigation and shoulder the responsibilities of tracking down trial witnesses and finding the true perpetrator. See, e.g., Medwed, *supra* note 4, at 663.

<sup>8</sup> See Medwed, *supra* note 4 at 658–59; see also Eldeib & Mills, *supra* note 2 (quoting Rob Warden, executive director of the Center on Wrongful Convictions, about non-DNA exonerations (“[T]hey’re hard. You’ve got to go back and you really have to reinvestigate the entire case . . . It’s not just a DNA test.”)).

<sup>9</sup> Keith A. Findley, *Defining Innocence*, 74 ALA. L. REV. 1157, 1200 (2010).

ingness by police departments and prosecutors to revisit closed cases.<sup>10</sup> While the creation of “conviction integrity units” in New York, Chicago, and several other cities reflect recent efforts to respond to the “sharp, cold shower” brought about by DNA-driven exonerations, prosecutors are still slow to reopen investigations—much less admit error in their own cases.<sup>11</sup> As a result, wrongfully convicted prisoners whose cases lack the lottery-winning odds of exculpatory DNA evidence may be left to rely on the equally remote chance that a prosecutor or law enforcement officer will take interest in their case.

Absent prosecutorial benevolence, a convicted prisoner’s best chance to pursue claims of innocence is typically to appeal the conviction in state court.<sup>12</sup> Even the state process, however, presents significant hurdles, especially for indigent post-conviction petitioners.<sup>13</sup> In Illinois, a claim of actual innocence must be based on “newly discovered evidence” that is “material to the issue and not merely cumulative of other trial evidence” and “of such conclusive character that it would probably change the result on retrial.”<sup>14</sup> Though the new evidence is not required to categorically prove a petitioner’s innocence, it must establish “that all of the facts and surrounding circumstances” of the trial and verdict “should be scrutinized more closely . . . .”<sup>15</sup> To compound the struggle, petitioners are not constitutionally entitled to counsel on post-conviction appeal.<sup>16</sup> Around the country, demand for representation through

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<sup>10</sup> Sullivan, *supra* note 1; see Williams, *supra* note 1 (“Fewer exonerations than in the past involved DNA evidence, a circumstance [the National Registry of Exonerations] attributed to the police and prosecutors exhibiting greater concern about the problem of false convictions.”).

<sup>11</sup> Sullivan, *supra* note 1 (quoting Samuel Gross, a University of Michigan law professor who tracks exonerations, as saying that “[t]he sharp, cold shower that DNA gave to the criminal justice system . . . was a serious wake-up call, because that showed we made mistakes in a lot of cases where it never occurred to anybody that a mistake had been made”); see Vivian Yee, *As Two Go Free, Brooklyn Conviction Challenges Keep Pouring In*, N.Y. TIMES, Feb. 7, 2014, at A18.

<sup>12</sup> ANDREA D. LYON ET AL., ILL. STATE BAR ASSOC., POST-CONVICTION PRACTICE: A MANUAL FOR ILLINOIS ATTORNEYS 19–20, 20 n.17 (2012) (“[F]or [a petitioner] to succeed on an actual innocence claim, it *must* happen in state court if it is going to happen at all,” except in “very limited circumstances” in which federal habeas relief may be available.). A federal petition for a writ of habeas corpus that advances a “substantial claim of actual innocence [is] extremely rare.” *Schlup v. Delo*, 513 U.S. 298, 321 (1995). While a claim of innocence may be raised in federal habeas proceedings, it cannot provide an independent or “freestanding” basis for relief. *House v. Bell*, 547 U.S. 518, 554–55 (2006). Rather, a meritorious innocence claim functions only as a “gateway” to allow a petitioner to raise otherwise defaulted constitutional claims. *Schlup*, 513 U.S. at 316; *Herrera v. Collins*, 506 U.S. 390, 404 (1993); Kathleen Callahan, Note, *In Limbo: In Re Davis and the Future of Herrera Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 633 (2011) (describing litigation of actual innocence claims in federal habeas proceedings as a “complicated process”).

<sup>13</sup> *People v. Ortiz*, 919 N.E.2d 941, 947–48 (Ill. 2009).

<sup>14</sup> *Id.* at 949–50 (quoting *People v. Morgan*, 817 N.E.2d 524, 527 (Ill. 2004)) (internal quotations omitted).

<sup>15</sup> *Id.* at 952 (quoting *People v. Molstad*, 461 N.E.2d 398, 402 (Ill. 1984)) (internal quotations omitted).

<sup>16</sup> See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 610–11 (1974). In Illinois, a court may appoint counsel to represent an indigent defendant only if the court first determines that the constitutional claims

Innocence Projects—legal aid offices that represent individuals pursuing exoneration—far outpaces available resources.<sup>17</sup> As a result, only a fortunate few benefit from counsel to investigate claims of innocence or otherwise “navigate the post-conviction labyrinth . . . .”<sup>18</sup>

As an additional impediment, Illinois restricts access to post-conviction relief to petitioners who are “imprisoned in the penitentiary.”<sup>19</sup> This limitation puts wrongfully convicted—though physically free—individuals in a kind of post-conviction purgatory, where they are more capable than an imprisoned petitioner of uncovering new evidence of innocence, but subsequently barred from presenting the evidence in a post-conviction petition.<sup>20</sup> In this Article, I will explore the impact of the Illinois “imprisonment” restriction on post-conviction review by examining the case of Maurice Dunn. In addition, I will discuss the history of the Illinois Post-Conviction Hearing Act, the emergence of actual innocence claims as a basis for relief under the Act, and the origin of limitations on access to relief for petitioners who have served a sentence of imprisonment. Finally, I will propose an interpretation of the Act, steeped in due process and anchored in recent amendments to the law, to allow for any person convicted of a crime to pursue a claim of actual innocence.

raised in a pro se post-conviction petition have merit. *People v. Watson*, 719 N.E.2d 719, 720 (Ill. 1999). According to the Illinois post-conviction statute, counsel shall be appointed if the petitioner is under a sentence of death, indigent, and requests the court appoint him or her counsel. 725 ILL. COMP. STAT. 5/122-2.1(a)(1) (2012). Illinois, however, abolished the death penalty in 2011. John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011, at A18.

<sup>17</sup> See E-mail from Alexander Simpson, Assoc. Dir., Cal. Innocence Project to author (Sep. 26, 2014) (on file with author). For instance, the California Innocence Project (“CIP”) receives between 1800 and 2000 requests for legal representation annually and, with the support of students who screen the cases, narrows this number to around one hundred cases. *Id.* CIP has approximately forty active cases, where some form of representation is being provided, at any given time. *Id.*

<sup>18</sup> Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel Has Endangered Access to the Writ of Habeas Corpus and What the Supreme Court Can Do in Maples and Martinez to Restore It*, 45 CREIGHTON L. REV. 185, 186 (2011) (offering a due process rationale for the right to counsel in state post-conviction proceedings).

<sup>19</sup> § 122-1(a) (“[a]ny person imprisoned in the penitentiary”). Although beyond the scope of this article, a further limitation on post-conviction review of actual innocence claims is the demanding standard of review in Illinois for leave of court to file successive petitions. For an in-depth discussion of that standard, see Vanessa J. Szalapski, Note, *Losing Our Innocence: The Illinois Successive Post-Conviction Actual Innocence Petition Standard After People v. Edwards*, 104 J. CRIM. L. & CRIMINOLOGY 195, 200–03 (2014).

<sup>20</sup> § 2-1401. Under very limited circumstances, a civil motion for Relief from judgment may offer another route for the presentation of newly discovered evidence of innocence. *Id.* Under this statute, a civil motion for Relief from judgment must be filed within two years of the entry of the judgment, unless the petitioner was “under legal disability or duress or the ground for relief [was] fraudulently concealed . . . .” *Id.* While claims of innocence may be raised under 735 ILL. COMP. STAT. 5/2-1401, such claims must comport with the statute of limitations. See, e.g., *People v. McDonald*, 937 N.E.2d 778, 784–85 (Ill. App. Ct. 2010) (affirming dismissal of motion for relief from judgment raising innocence claims for failure to timely file motion or advance colorable claim under fraudulent concealment exception).

I. “HONESTLY, THE PERSON IS STILL OUT THERE”<sup>21</sup>—POST-CONVICTION AND THE CASE OF MAURICE DUNN

The case of Maurice Dunn illustrates the struggle of indigent prisoners to discover new evidence of innocence and highlights the need for enlarged access to post-conviction relief. On September 25, 1980, Dunn was convicted of raping Constance Dourdy, despite flaws in the police department’s investigation and many inconsistencies in the testimony of eyewitnesses.<sup>22</sup> A recent investigation by The John Marshall Law School Pro Bono Clinic uncovered these many discrepancies, as well as potentially exculpatory evidence.<sup>23</sup> Because Dunn fully served his sentence and has since been released, he is no longer eligible to seek post-conviction relief from the state of Illinois or attempt to clear his name.<sup>24</sup>

The initial connections between Dunn and the rape of Constance Dourdy were tenuous at best. Dourdy was sexually assaulted on July 30, 1979 at approximately 7:45 AM while walking to a commuter train station in the Beverly neighborhood of Chicago.<sup>25</sup> Less than a day later, Dunn was identified as the primary suspect.<sup>26</sup> He and his wife, Willa, lived in Harvey, about fifteen miles from the site of the attack, and the teenage couple was expecting their first child.<sup>27</sup> Dunn could not find steady employment.<sup>28</sup> As a consequence, Willa moved to her parents’ home in Beverly.<sup>29</sup> The home was a short distance from the area of Dourdy’s assault, but it was separated by two fences, dense shrubbery, and railroad tracks.<sup>30</sup> Dunn visited Willa frequently, and he had no run-ins with the police while Willa lived in Beverly.<sup>31</sup>

At a pretrial hearing after Dunn’s arrest for the rape, a police officer’s testimony overstated Dunn’s prior criminal history. Before his arrest in the Dourdy case, Dunn had never been accused of a sexual assault.<sup>32</sup> He had a sin-

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<sup>21</sup> Brief and Argument for the Petitioner at D.8, *Dunn v. Pierce*, No. 90256 (filed Feb. 6, 2001 with Supreme Court of Illinois) (“I would like to say to Mrs. Dourdy that as my God is my witness I think there’s some mistake in your identity . . . Honestly, the person is still out there.”).

<sup>22</sup> See Transcript of Record at 321, *People v. Dunn*, (Ill. Crim. Ct. Sept. 23, 1980) (No. 79-CR-4915) [hereinafter Second Trial Transcript].

<sup>23</sup> See, e.g., Affidavit of Jillian Kassel at 2, *People v. Dunn*, (Ill. Crim. Ct.) (No. 79-CR-4915) (on file with author).

<sup>24</sup> See 725 ILL. COMP. STAT. 5/122-1(a) (2012).

<sup>25</sup> Transcript of Record at 215–16, *People v. Dunn*, (Ill. Crim. Ct. May 7, 1980) (No. 79-CR-4915) [hereinafter Pre-Trial Hearing Transcript].

<sup>26</sup> *Id.* at 23–24.

<sup>27</sup> *Id.* at 199–201.

<sup>28</sup> *Id.* at 200.

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

<sup>30</sup> *Id.* at 36–38.

<sup>31</sup> See Second Trial Transcript, *supra* note 22, at 200.

<sup>32</sup> *Id.* at 208.

gle prior felony conviction: a 1977 robbery, for which he received probation.<sup>33</sup> At the pretrial hearing, a police officer testified that six months earlier Dunn had been suspected of “purse snatchings” near the Rock Island commuter train station.<sup>34</sup> The officer did not support his claim against Dunn with documentation.<sup>35</sup> Rather, he obliquely referred only to the department’s interest in a “male subject,” and claimed that they did not question Dunn at the time because they could not locate him, despite the fact that Dunn’s prior arrest record listed both his Harvey address and his in-laws’ Beverly home.<sup>36</sup>

At the same pretrial hearing, another officer testified that he received a copy of a police report containing Dourdy’s description of her attacker.<sup>37</sup> Prepared hours after the assault, the report was created to help officers pinpoint a suspect.<sup>38</sup> Dourdy’s description was “sketchy” and not complete.<sup>39</sup> She could not provide any facial description of the suspect.<sup>40</sup> Rather, she described her attacker in broad generalities: black, “five foot four to five foot seven,” “medium build,” “short hair,” and “[t]wenty-three to thirty” years old.<sup>41</sup> Dourdy also said that her assailant wore a “jogging suit” and gym shoes.<sup>42</sup>

Although the officer confirmed through police department records that, contrary to the description of Dourdy’s attacker, Dunn stood approximately five-foot-nine and was nineteen years old, Chicago police contacted their Harvey counterparts with instructions to locate and arrest him.<sup>43</sup> This time, although armed only with the same addresses previously available to the department, the police apprehended Dunn at his Harvey home approximately two hours later.<sup>44</sup>

Even when viewed in a favorable light, the evidence gathered by the police did not point to Dunn as the likely culprit. All the police learned through their brief investigation was that Dunn was a black teenager with a prior criminal conviction, had a tenuous connection to Beverly, and was loosely suspected of a series of purse snatchings half-a-year earlier.<sup>45</sup> Moreover, police records indicated that Dunn’s height and age fell outside the broad range in Dourdy’s description. Nonetheless, the evidence, bolstered by the police department’s

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<sup>33</sup> *Id.* at 230–31.

<sup>34</sup> Pre-Trial Hearing Transcript, *supra* note 25, at 44.

<sup>35</sup> *Id.* at 45–47.

<sup>36</sup> *Id.* at 44–45.

<sup>37</sup> *Id.* at 28–29.

<sup>38</sup> *Id.* at 23.

<sup>39</sup> Second Trial Transcript, *supra* note 22, at 144.

<sup>40</sup> Pre-Trial Hearing Transcript, *supra* note 25, at 208.

<sup>41</sup> *Id.* at 29–31, 212.

<sup>42</sup> *Id.* at 186.

<sup>43</sup> *Id.* at 10, 29–30.

<sup>44</sup> *Id.* at 9–11.

<sup>45</sup> *See id.* at 44; Second Trial Transcript, *supra* note 22, at 230–31.

desire to make a quick arrest in the violent attack, was enough for police to end their search and tab Dunn as the culprit.

On July 31, 1979 at 1:00 AM, Dourdy was called to a Chicago police precinct to view a lineup.<sup>46</sup> The police alerted her to the presence of “a suspect” in the lineup.<sup>47</sup> Of the five individuals presented together in the lineup, only Dunn wore jogging clothes, including shorts and gym shoes.<sup>48</sup> The other individuals wore street clothing; only one other man wore gym shoes.<sup>49</sup> Dunn was only one of two men with short hair.<sup>50</sup> Dourdy identified Dunn.<sup>51</sup>

Susan Kelly, a neighborhood resident who walked past a man on the morning of the attack who said “something obscene” to her, also viewed the lineup.<sup>52</sup> Kelly described to the police a man with “short” hair wearing a “jogging shirt . . . .”<sup>53</sup> Even though the police told Kelly the suspect was present, she could not positively identify anyone in the lineup.<sup>54</sup>

Beverly Monks, who resided in the vicinity of the assault, also viewed the lineup.<sup>55</sup> Sometime after the assault, Monks saw from her second-floor window a suspicious-looking man run past her driveway and behind her home.<sup>56</sup> Like Kelly, Monks could not positively identify any individual in the lineup.<sup>57</sup> Nevertheless, based on Dourdy’s identification of Dunn, he was formally charged with rape and aggravated battery.<sup>58</sup>

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<sup>46</sup> Pre-Trial Hearing Transcript, *supra* note 25, at 199.

<sup>47</sup> *Id.* at 200.

<sup>48</sup> Lineup Photograph (on file with author).

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

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

<sup>51</sup> Pre-Trial Hearing Transcript, *supra* note 25, at 213.

<sup>52</sup> *Id.* at 68, 71.

<sup>53</sup> *Id.* at 70.

<sup>54</sup> *Id.* at 59, 71.

<sup>55</sup> *Id.* at 188.

<sup>56</sup> Transcript of Record at 604, *People v. Dunn*, (Ill. Crim. Ct. May 14, 1980) (No. 79-CR-4915) [hereinafter First Trial Transcript].

<sup>57</sup> Pre-Trial Hearing Transcript, *supra* note 25, at 183–84. While Monks did not testify at the pre-trial hearing, two police officers who conducted the lineup, Charles McCorkle and Joanne Ryan, both testified. Pre-Trial Hearing Transcript, *supra* note 25, at 55, 181. Neither officer stated affirmatively that Monks identified Dunn. *Id.* at 59, 188. Further, at the first trial, Monks admitted that she “never saw the front” of the individual who ran past her window and “was looking at the back of him.” First Trial Transcript, *supra* note 56, at 615.

<sup>58</sup> First Trial Transcript, *supra* note 56, at 480. A motion to suppress Dunn’s arrest led to unintended consequences regarding the lineup. *Id.* Barry Spector argued that Harvey Police arrested Dunn without probable cause and the subsequent identifications, both out-of-court and in-court, should be suppressed. Pre-Trial Hearing Transcript, *supra* note 25, at 2. In renewing this motion after the first trial ended in a mistrial, Spector hoped to quash the lineup as a fruit of the unlawful arrest and prevent Dourdy’s in-court identification of Dunn. First Trial Transcript, *supra* note 56, at 962. The court granted the motion, but then ruled that the lineup was not unreasonably suggestive and that Dourdy’s claim as to the number of times she saw her attacker provided an independent basis for her identification (“seven or three opportunities, or whatever, for five seconds is much more than ample”). First Trial Transcript, *supra* note 56, at 972. The court’s ruling effectively allowed the case to proceed. *See*



New lineup standards in Illinois highlight several fundamental flaws in Dunn's lineup.<sup>59</sup> First, the officer administering the lineup knew Dunn was the suspect and alerted Dourdy, Kelly, and Monks to his presence.<sup>60</sup> Illinois now requires that eyewitnesses viewing a lineup sign a form stating that "[t]he suspect might not be in the lineup," that "the eyewitness is not obligated to make an identification," and that "[t]he eyewitness should not assume that the person administering the lineup . . . knows which person is the suspect . . . ."<sup>61</sup> The new standards also call for the use of double-blind administration, in which neither the officer nor the witness knows if the suspect is in the lineup.<sup>62</sup> Further, the lineup was administered simultaneously; in other words, all five individuals were presented at once.<sup>63</sup> The 2003 standards endorsed a pilot study on the use of "[s]equential lineup procedures," in which one individual at a time is shown to the eyewitness, to further the "goal of a police investigation . . . to apprehend the person or persons responsible for committing a crime . . . ."<sup>64</sup> In addition, Dourdy was not asked to provide a confidence statement following her identification of Dunn.<sup>65</sup> Current Illinois standards require that the witness "state in his or her own words how sure he or she is that the person identified is the actual offender" after viewing a sequential lineup.<sup>66</sup> Most critically, the selection of "fillers," or other lineup members, proved extraordinarily prejudicial in Maurice Dunn's case.<sup>67</sup> Dunn was conspicuous in his attire, complexion, build, facial features, and age.<sup>68</sup> Illinois now forbids such suggestive practices.<sup>69</sup>

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*id.* For Dunn, the successful motion was more a curse than a blessing. *See* Second Trial Transcript, *supra* note 22, at 319–20. The retrial jury heard Dourdy's in-court identification but never received evidence regarding the investigation or lineup. *See id.* at 60, 319–20. The jurors' interest in both events was clear. *See id.* at 319. During deliberations, they asked, "When and where did [Dourdy] positively identify [Dunn]?" *Id.* The jury also inquired about the reasons behind Dunn's arrest. *Id.* The court instructed the jury to "[g]o back and deliberate" rather than "speculate." *Id.* at 320. In effect, the jurors were left without a clue about the porous police investigation and flawed lineup that led to Dunn's prosecution. *See id.* at 319–20.

<sup>59</sup> *See* 725 ILL. COMP. STAT. 5/107A-5 (2012). In 2003, the Illinois legislature enacted new standards for lineups intended to stem the tide of wrongful convictions, and conducted a pilot study "on the effectiveness of the sequential method for lineup procedures." *Id.* § 107A-10(a). These pilot programs have subsequently been expanded and made permanent through new legislation. *Id.*

<sup>60</sup> *See* Pre-Trial Hearing Transcript, *supra* note 25, at 59, 61, 63, 200.

<sup>61</sup> § 107A-5(b)(1), (b)(2).

<sup>62</sup> *See* §§ 107A-5(b)(1)–(b)(2), 10(c)(2).

<sup>63</sup> *See* Pre-Trial Hearing Transcript, *supra* note 25, at 59, 192, 209–10; Lineup Photograph (on file with author).

<sup>64</sup> 725 ILL. COMP. STAT. 5/107A-10(a), (c) (2012).

<sup>65</sup> *See* Pre-Trial Hearing Transcript, *supra* note 25, at 193, 213.

<sup>66</sup> § 107A-10(c)(3)(C).

<sup>67</sup> *See* § 107A-5(c); Lineup Photograph (on file with author).

<sup>68</sup> Lineup Photograph (on file with author).

<sup>69</sup> 725 ILL. COMP. STAT. 5/107A-5(c) (2012). Under Illinois law, "[s]uspects in a lineup or photo spread should not appear to be substantially different from 'fillers' or 'distracters' in the lineup or

After Dunn's first trial ended in May 1980 with the jury deadlocked, he was retried in September 1980, over a year after the assault took place.<sup>70</sup> Dunn was represented by O. Kenneth Thomas at his second trial, a civil lawyer who filed an appearance eleven days before the trial began.<sup>71</sup> Citing his lack of preparation and his competing obligations in an ongoing real estate matter, Thomas filed a motion to continue just three days before the retrial.<sup>72</sup> The court failed to rule on the motion and the retrial proceeded as scheduled.<sup>73</sup>

Thomas's inability to effectively represent Dunn at the retrial quickly became apparent. Dunn's lawyer at the first trial, Barry Spector, spoke with Thomas in the days before the retrial.<sup>74</sup> In a post-conviction affidavit, Spector described Thomas as "unprepared" to defend Dunn.<sup>75</sup> Thomas's lack of preparation and experience was obvious, starting with his agreement to waive both Dunn's presence during jury selection and the transcription of those proceedings.<sup>76</sup> His struggles continued throughout the retrial, most notably in his failure to challenge the State's witnesses with evidence of their prior inconsistent statements and in his botched efforts to present Dunn's alibi defense.<sup>77</sup>

At the retrial, eyewitnesses Susan Kelly and Beverly Monks made substantial changes to their testimony that went unchallenged by Thomas.<sup>78</sup> Susan Kelly—the passer-by who could not identify Dunn in the police lineup—pointed at him in court ("The Black man in the suit with the tie") and told the jury that Dunn "resembles the man that I saw" on the morning of the attack.<sup>79</sup> On cross-examination, Thomas's attempt to challenge Kelly regarding her previous failure to "positively identify anyone as the person who [she] saw passing on the street" only allowed Kelly to hedge her early testimony as being

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photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect." *Id.*

<sup>70</sup> First Trial Transcript, *supra* note 56, at 959; Second Trial Transcript, *supra* note 22, at 19.

<sup>71</sup> Defendant's Motion to Continue, *People v. Dunn*, (Ill. Crim. Ct.) (No. 79-CR-4915) (on file with author).

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

<sup>73</sup> See Second Trial Transcript, *supra* note 22, at 12.

<sup>74</sup> Affidavit of Barry A. Spector, *People v. Dunn*, (Ill. Crim. Ct.) (No. 79-CR-4915) (on file with author).

<sup>75</sup> *Id.*

<sup>76</sup> See Second Trial Transcript, *supra* note 22, at 9.

<sup>77</sup> See *id.* at 48–49, 79–86, 90–92, 105–06, 116–17, 147–48, 238–39. Under Illinois law, the prior inconsistent statements would have been admissible both to impeach the credibility of the testifying witnesses and for their truth as the statements were made under oath at a prior proceeding and were subject to cross-examination. See, e.g., *People v. Donegan*, 974 N.E.2d 352, 363 (Ill. App. Ct. 2012). Thomas's failure to sequester witnesses corroborating Dunn's alibi created a presentation of Dunn's alibi that was weak and easily attacked by the prosecutor. See Second Trial Transcript, *supra* note 22, at 197–98, 238.

<sup>78</sup> Second Trial Transcript, *supra* note 22, at 48–49, 105–06.

<sup>79</sup> *Id.* at 48–49.

“[n]ot completely” able to identify someone.<sup>80</sup> Beverly Monks—the neighbor who could not identify Dunn in the police lineup—testified at the first trial that the man she saw from her bedroom window was “five foot seven, maybe eight,” and “about maybe eighteen, twenty, twenty-two, twenty-three, something like that.”<sup>81</sup> Monks agreed that she told the police that the episode occurred between 8:35 AM and 8:45 AM.<sup>82</sup> At the retrial, Monks’s estimate shifted to “[a]pproximately after 8:00 o’clock [AM]” and her description of the suspicious man became clearer.<sup>83</sup> Again, Thomas did not confront Monks with her prior testimony.<sup>84</sup> The new time estimate added a critical piece to the State’s case: the construction of a logical, cogent timeline for the attacker to commit the assault and then escape on foot.<sup>85</sup>

Diane Tribble, the officer who interviewed Dourdy at the hospital just hours after the attack, also changed her testimony without facing any challenge from Thomas.<sup>86</sup> When first asked whether she could provide “any descriptions at all about any features of [her attacker’s] face,” Tribble responded in the negative.<sup>87</sup> Tribble conceded that her report of the incident included Dourdy’s statement that she “never saw [the attacker] as he held her from behind.”<sup>88</sup> At the retrial, Tribble equivocated, claiming she had “worded [her report] badly” and that she intended to write that Dourdy’s attacker “came up behind her and she didn’t see him as he was holding her . . . .”<sup>89</sup> Remarkably, Thomas did not question Tribble about Dourdy’s inability to describe her attacker’s facial features.<sup>90</sup>

Thomas also failed to challenge the police crime scene investigator, Vic Tosello, on the significant changes he made to his testimony at the retrial.<sup>91</sup> Tosello testified at the first trial that the attacker’s purported escape route required him to “vault[]” over two chain-link fences that separated residential properties from railroad tracks.<sup>92</sup> Tosello testified that he attempted to recreate the route by climbing over the fences and negotiating two steep embankments

<sup>80</sup> *Id.* at 51; Pre-Trial Hearing Transcript, *supra* note 25, at 71.

<sup>81</sup> First Trial Transcript, *supra* note 56, at 607.

<sup>82</sup> *Id.* at 631.

<sup>83</sup> Second Trial Transcript, *supra* note 22, at 101–02, 106.

<sup>84</sup> *Id.* at 105–06. Worse yet, Thomas allowed Monks to reassert that the episode took place “[a]pproximately after 8:00 [AM].” *Id.* at 106.

<sup>85</sup> *See id.* at 106.

<sup>86</sup> *See id.* at 147–48.

<sup>87</sup> Pre-Trial Hearing Transcript, *supra* note 25, at 117 (responding in the negative to the question posed by the attorney).

<sup>88</sup> First Trial Transcript, *supra* note 56, at 844.

<sup>89</sup> Second Trial Transcript, *supra* note 22, at 147–48.

<sup>90</sup> *Id.* at 141–53, 160–63.

<sup>91</sup> *Id.* at 116–17.

<sup>92</sup> First Trial Transcript, *supra* note 56, at 690–91.

on either side of the railroad tracks.<sup>93</sup> He acknowledged that portions of the fence were covered in thick brush and he had to search for a “clear spot” to attempt his maneuver.<sup>94</sup> At the retrial, Tosello made no mention of the dense brush; instead, Tosello testified that the alleged escape route was based on Monks’s observations, which led him behind her home and to the railroad tracks.<sup>95</sup> On cross-examination, Tosello stated that the only obstacle between Monks’s home and the railroad tracks was a fence that Tosello estimated to be forty-two inches high.<sup>96</sup> Thomas asked Tosello if it was possible, once someone was on the railroad bed, to “walk right straight on 93rd street” then “walk right straight to 94th Street,” the street on which Dunn’s in-laws lived.<sup>97</sup> Tosello agreed with the mischaracterization.<sup>98</sup> In effect, the jury was left with a portrait of the attacker running, unencumbered, from the scene of the assault into the backyard of Dunn’s in-laws.<sup>99</sup>

In addition, Dourdy’s confidence in her identification of Dunn increased significantly at the retrial.<sup>100</sup> Due to the absence of any physical evidence offered at either of the trials, the prosecutor’s case turned on Dourdy’s impassioned in-court identification of Dunn.<sup>101</sup> At a pretrial hearing, Dourdy acknowledged that in the hours after the attack she was unable to provide a “facial description” of her attacker to police.<sup>102</sup> Over a year later at the retrial, Dourdy pointed directly to Dunn in the courtroom and exclaimed to the jury that she would “never forget [Dunn’s] face.”<sup>103</sup>

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<sup>93</sup> *Id.* at 693–95, 698–99.

<sup>94</sup> *Id.* at 697–98.

<sup>95</sup> See Second Trial Transcript, *supra* note 22, at 110–11. On cross-examination, Thomas asked Tosello whether he indicated in his report that he was “unable to get from the railroad tracks to the fence because of heavy shrubbery.” *Id.* at 119. Tosello stated that he did not indicate this, and Thomas did not pursue the issue. *Id.*

<sup>96</sup> *Id.* at 116.

<sup>97</sup> *Id.* at 117.

<sup>98</sup> *Id.*

<sup>99</sup> See *id.* Tosello later investigated a 1981 rape-murder case in which another African-American teenager was charged as the perpetrator without any physical evidence. John Conroy, *The Good Cop*, CHI. READER, Jan. 4, 2007, <http://perma.cc/U847-XEVN>. Like Dunn, the teenager was identified by a single witness: the murder victim’s brother who had also been attacked. *Id.* The defendant was freed only after another Chicago Police Department detective came forward with evidence that a different person had committed the crime. *Id.* Though Tosello was never charged or disciplined, an ensuing investigation revealed that he and another officer concealed exculpatory evidence, including “[a] police crime lab report on [a pair of the victim’s] panty hose found at the scene that would’ve helped [the] defense . . .” *Id.*

<sup>100</sup> Compare Pre-Trial Hearing Transcript, *supra* note 25, at 208 (Dourdy unable to provide a “facial description” of her attacker to police), with Second Trial Transcript, *supra* note 22, at 67 (Dourdy made courtroom identification stating she would “never forget his face”).

<sup>101</sup> See Second Trial Transcript, *supra* note 22, at 67.

<sup>102</sup> Pre-Trial Hearing Transcript, *supra* note 25, at 208 (responding in the negative to the question posed by the attorney).

<sup>103</sup> Second Trial Transcript, *supra* note 22, at 67.

Dourdy's testimony describing the attack shifted, too, in subtle but significant ways. At the first trial, Dourdy testified that she was grabbed from behind as she walked to the train, lifted off her feet, and dragged from the sidewalk into bushes.<sup>104</sup> She fell down and landed side-by-side with her attacker for "about maybe five seconds."<sup>105</sup> Her attacker then began choking Dourdy from behind, with his "full weight" on her back.<sup>106</sup> Dourdy described an attempt to free herself before her attacker took her face and "smashe[d] it into the ground . . ."<sup>107</sup> He then pulled Dourdy's shirt over her face, undid her pants, and sexually assaulted her.<sup>108</sup> Once the assault was over, the attacker pushed Dourdy away.<sup>109</sup> She "looked around to see what he was doing . . . and he looked right at [her]."<sup>110</sup> Then Dourdy "just started to run . . ."<sup>111</sup> At the retrial, Dourdy highlighted her opportunities to see the man who raped her.<sup>112</sup> This time, she asserted that her attacker landed "[r]ight next" to her after the two fell and looked directly at her, shouting, "don't look at me, white bitch."<sup>113</sup> When asked if Dourdy could see her attacker, she answered, "I looked right at his face."<sup>114</sup> Dourdy identified Dunn in court as "the man over there with the blue suit and the yellow shirt and the Black face."<sup>115</sup>

In a misguided cross-examination, Thomas tried unsuccessfully to clarify Dourdy's vantage point during the attack.<sup>116</sup> Unlike her testimony at the first trial, Dourdy testified that her attacker was "on top" of her and that they were "rolling and laying on the side."<sup>117</sup> She also told the jury, "his face was stuck in mine."<sup>118</sup> Thomas never questioned Dourdy about her inability to offer a description of her attacker's face to the police after the assault or her marked testimonial shifts from the first trial. Instead, his questions offered her a blank canvas to remake the attacker in Dunn's likeness.<sup>119</sup> Dourdy told Thomas that her attacker "[looked] just like an evil animal . . . [i]t was an evil face."<sup>120</sup> On redirect examination, the prosecutor asked Dourdy if she saw "that same per-

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<sup>104</sup> First Trial Transcript, *supra* note 56, at 505, 523.

<sup>105</sup> *Id.* at 507, 524.

<sup>106</sup> *Id.* at 508, 525.

<sup>107</sup> *Id.* at 508–09.

<sup>108</sup> *Id.* at 509–10.

<sup>109</sup> *Id.* at 510.

<sup>110</sup> *Id.* at 511.

<sup>111</sup> *Id.*

<sup>112</sup> See Second Trial Transcript, *supra* note 22, at 59–61.

<sup>113</sup> *Id.* at 59, 61.

<sup>114</sup> *Id.* at 61.

<sup>115</sup> *Id.* at 60.

<sup>116</sup> *Id.* at 79–86, 90–92.

<sup>117</sup> *Id.* at 85.

<sup>118</sup> *Id.*

<sup>119</sup> See *id.* at 92.

<sup>120</sup> *Id.* at 93.

son with that evil, ugly face in court, today.”<sup>121</sup> Motioning towards Dunn, she replied, “I certainly do.”<sup>122</sup>

After Dourdy’s damning in-court identification, Thomas committed critical errors in orchestrating Dunn’s alibi defense. After calling three witnesses who saw Dunn in Harvey on the morning of the attack, Thomas rested his defense.<sup>123</sup> Moments later, he backpedaled and asked the judge to allow Dunn—who had been sitting in the courtroom throughout the trial—to testify.<sup>124</sup> Though the judge granted the request, Dunn’s subsequent testimony seemed less an independent account of his morning in Harvey than a parroting of the testimony of other alibi witnesses. Finally, Thomas called Willa Dunn to confirm that her husband had returned to Harvey on the night before the attack.<sup>125</sup> Again, as a consequence of his ad hoc approach, Thomas failed to instruct Willa to remain outside of the courtroom while the other defense witnesses testified. The judge permitted Willa’s testimony, but the prosecutor easily attacked

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<sup>121</sup> *Id.* at 94.

<sup>122</sup> *Id.* In retrospect, Dourdy’s steadfast testimony is unsurprising. See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 63–65 (2011). So-called “false confidence” misidentifications are often rooted in a witness’s first look at the accused in a flawed police lineup. *Id.* at 63–64. Victims who cannot effectively describe their attacker but then view a suggestive lineup often express complete, but erroneous, confidence in their subsequent identification. See *id.* (reporting on victims in three different DNA exoneration cases, one who testified that “there [was] absolutely no question in [her] mind” that the defendant attacked her, another who testified she “will never forget,” the defendant’s face, and a third who testified that she was “one hundred and twenty percent sure” that the defendant was the culprit, all of whom were mistaken). Importantly, the level of certainty that an eyewitness expresses in his or her testimony does *not* correlate with the level of accuracy of the identification. Justice Project, *Eyewitness Identification: A Policy Review* 5 (2007), available at [https://public.psych.iastate.edu/glwells/The\\_Justice%20Project\\_Eyewitness\\_Identification\\_%20A\\_Policy\\_Review.pdf](https://public.psych.iastate.edu/glwells/The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf), archived at <https://perma.cc/2SML-WNFR?type=pdf>. While a witness’s certainty or confidence in an identification “is one of the most powerful factors judges and juries consider when assessing eyewitness accuracy, a witness’s high level of confidence in an identification does not necessarily mean that the identification is more accurate.” *Id.* at 9. The opposite is often true. *Id.* More broadly, eyewitness misidentification is widely recognized as the leading cause of wrongful conviction in the United States, “accounting for more wrongful convictions than all other causes combined”. Justice Project, *supra*, at 2 (citing Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005)). In a study of 200 cases in which individuals were exonerated based on DNA evidence, almost three-quarters involved one or more eyewitness misidentifications at trial. Justice Project, *supra*, at 19. Cross-racial misidentifications are prevalent in this group. Innocence Project, Benjamin N. Cardozo Sch. of Law, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 8 (2009), available at <http://www.innocenceproject.org/news-events-exonerations/reevaluating-lineups-why-witnesses-make-mistakes-and-how-to-reduce-the-chance-of-a-misidentification>. Of the DNA-related exonerations in which eyewitness misidentifications played a critical role, over half were cross-racial misidentifications. *Id.* Finally, victims of assault—especially rape—are particularly susceptible to misidentification. GARRETT, *supra*, at 50–51 (noting that in a study of 190 DNA-related exonerations involving eyewitness misidentifications, seventy-three percent of the witnesses involved were victims, typically victims of rape).

<sup>123</sup> See Second Trial Transcript, *supra* note 22, at 197.

<sup>124</sup> *Id.* at 197–98.

<sup>125</sup> *Id.* at 236–37.

her credibility, suggesting that her testimony, too, was shaped to conform to the accounts of other alibi witnesses.<sup>126</sup>

At the conclusion of the trial, the prosecutor seized on several portions of the markedly different, but unchallenged, testimony as fundamental to his case. Susan Kelly, he told the jury during his closing argument, “saw a black man that resembled the defendant . . .” at approximately 7:30 AM near the scene of the rape.<sup>127</sup> Beverly Monks then observed a suspicious-looking man running past her window at around 8:00 AM.<sup>128</sup> Vic Tosello, the officer who investigated the attacker’s alleged escape route, discovered that Dunn’s in-laws lived “directly across the railroad tracks after a few low embankments and a fence . . . .”<sup>129</sup> The only logical conclusion, the prosecutor argued, was that after the rape, Dunn “ran as fast as he could to . . . his father-in-law’s house . . . .”<sup>130</sup> Once there, “he could explain away everything” by telling his in-laws that “it [was] raining outside and [he] slipped while [he] was jogging . . . .”<sup>131</sup> In addition, the prosecutor reminded the jury of Dourdy’s pledge that “she would never forget [Dunn’s] face as long as she lives . . . .”<sup>132</sup> “[S]he said believe me I’m not making a mistake,” the prosecutor told the jury, before imploring them to “[p]lease believe her.”<sup>133</sup>

At the end of the two-day retrial, Dunn was convicted of rape and aggravated battery.<sup>134</sup> He received a forty-year sentence of imprisonment, serving twenty-two years before his release on parole in 2002.<sup>135</sup> Dunn completed his full sentence on July 2, 2008.<sup>136</sup> In addition, as a consequence of his conviction, Dunn is a registered sex offender.<sup>137</sup>

In November 2013, the John Marshall Law School (“JMLS”) Pro Bono Clinic began an investigation into Dunn’s case in an effort to discover new evidence of innocence. The investigation focused on Vernon Watson, an Illinois inmate serving a life sentence of imprisonment for a series of rapes that bear chilling similarities to Dourdy’s attack. Watson’s first rape occurred in October 1980 in Beverly, the neighborhood where Dourdy was assaulted.<sup>138</sup> The victim

<sup>126</sup> *Id.* at 238.

<sup>127</sup> *Id.* at 261.

<sup>128</sup> *Id.* at 261–62.

<sup>129</sup> *Id.* at 262–63.

<sup>130</sup> *Id.* at 291.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 258.

<sup>133</sup> *Id.* at 293–94.

<sup>134</sup> *Id.* at 321.

<sup>135</sup> Telephone Interview with Maurice Dunn, Ill. Dep’t of Corrs. (Aug. 13, 2014).

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

<sup>137</sup> *Maurice Dunn Registered Sex Offender*, HOMEFACTS, <http://perma.cc/9SZC-JDXQ> (last visited Feb. 11, 2015).

<sup>138</sup> *People v. Watson*, 789 N.E.2d 375, 383 (Ill. App. 2003).

saw Watson jogging as she walked to work.<sup>139</sup> As she passed by, Watson grabbed her by the throat, pulled her into woods, and sexually assaulted her.<sup>140</sup> A jury convicted Watson for the assault, and he served nine years in prison, from 1980 through 1989.<sup>141</sup>

Just three weeks after his release from prison, Watson again committed a rape in May 1989.<sup>142</sup> This time, the victim was grabbed from behind at around 7:20 AM while walking to the train station near the same Beverly neighborhood.<sup>143</sup> Watson pushed her into the woods, pulled her sweater over her face, and assaulted her.<sup>144</sup> The victim later told police that her attacker was “black, between twenty and thirty years old, and approximately 5’7”, and 140 [pounds].”<sup>145</sup> When she was brought in for the lineup, she told police that “[her attacker] was 32, stood 5’8” tall, and weighed 143 [pounds].”<sup>146</sup>

Watson’s final assault took place a few months later, also in Beverly.<sup>147</sup> The victim was en route to the train station shortly after 6:00 AM.<sup>148</sup> Watson approached her, grabbed the front of her raincoat, and told her “if she screamed, he would kill her.”<sup>149</sup> He then dragged her into an alley and told her to remove her clothing.<sup>150</sup> At that point, the victim wrestled free and escaped to a nearby home.<sup>151</sup> She later identified Watson in a lineup.<sup>152</sup> Evidence of this assault was admitted to show identity during Watson’s trial for the May 1989 rape.<sup>153</sup> Watson was convicted of the May 1989 rape and sentenced to life in prison.<sup>154</sup>

In December 2013, JMLS lawyers interviewed Watson about Dourdy’s rape.<sup>155</sup> Watson had never before been formally questioned about his involvement in the assault. During the interview, Watson admitted that he “probably” raped Dourdy.<sup>156</sup> He acknowledged that he committed a series of sexual as-

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

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

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 378, 383.

<sup>143</sup> *Id.* at 378.

<sup>144</sup> *Id.* at 379.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 381.

<sup>147</sup> *Id.* at 383.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 384.

<sup>153</sup> *Id.* at 383–84.

<sup>154</sup> *Id.* at 377–78.

<sup>155</sup> Affidavit of Jillian Kassel, *supra* note 23, at 2.

<sup>156</sup> *Id.* (internal quotations omitted).



saults that were similar in nature to Dourdy's assault.<sup>157</sup> Those similarities, according to Watson, included his method of attacking his female victims from behind as they walked to commuter train stations near the site of Dourdy's attack.<sup>158</sup> Moreover, he said that he wore "'jogging'-type clothing" for the attacks.<sup>159</sup> Lastly, Watson stated that he lived on Chicago's Southside, "was around the Beverly neighborhood 'a lot,'" and was not incarcerated in July 1979.<sup>160</sup> Though Watson volunteered that he "did a lot of wrong," he claimed his memory of specific crimes was marred by his abuse of hallucinogenic drugs in the late 1970s.<sup>161</sup>

In addition to Watson's near confession, the JMLS investigation uncovered additional evidence undermining the integrity of the verdict against Dunn, including a ledger reflecting that a rape test kit administered on Dourdy by hospital personnel and subsequently turned over to the police had mysteriously disappeared on May 14, 1980, just two days before Dunn's first trial.<sup>162</sup> The investigation also confirmed that Dourdy's pants—though still in existence—had been poorly preserved after the assault and handled by jurors during both trials, leaving them severely compromised for DNA testing.

Throughout his incarceration and while on parole, Dunn attempted to build a case for his innocence—including successfully moving, in a petition filed pro se, for DNA testing of Dourdy's clothing.<sup>163</sup> During much of this process, he toiled without the active participation of counsel or investigative resources.<sup>164</sup> Though Dunn long suspected based on his own research in prison that Vernon Watson might be the true culprit, he could not interview Watson

<sup>157</sup> *Id.* The State of Illinois has also acknowledged the similarities between Watson's prior rapes and the one for which Dunn was convicted. Maurice Dunn's Petition for Post-Conviction Relief, Exhibit 9, Transcript of Status Conference, at 6, 8, *People v. Dunn*, 713 N.E.2d 568 (Ill. App. Ct. 1999) (No. 79-CR-4915) (Feb. 29, 2012) [hereinafter *Maurice Dunn's Petition for Post-Conviction Relief*]. Specifically, at a February 29, 2012, hearing on the existence of testable DNA in Dunn's case, Jeanne Bischoff, a former Cook County prosecutor, represented to a Cook County Circuit Court judge that she "gathered the files on Mr. Watson" and "intend[ed] to look into Mr. Watson just to do an investigation. . . ." *Id.* at 6. Bischoff noted "that Mr. Watson was committing rapes in the Beverly area at or around the time of [Dourdy's] rape." *Id.* at 8. To date, however, the State's Attorney's Office has not interviewed Watson or undertaken an investigation.

<sup>158</sup> Maurice Dunn's Petition for Post-Conviction Relief, *supra* note 157, at 8.

<sup>159</sup> Affidavit of Jillian Kassel, *supra* note 23, at 2.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (internal quotations omitted).

<sup>162</sup> Evidence Ledger, *People v. Dunn*, (Ill. Crim. Ct.) (No. 79-CR-4915) (on file with author).

<sup>163</sup> *Id.*; Maurice Dunn's Petition for Post-Conviction Relief, *supra* note 157, at 12.

<sup>164</sup> Maurice Dunn's Petition for Post-Conviction Relief, *supra* note 157, at 12. Indeed, Dunn's post-conviction counsel acted against his wishes and without his knowledge in withdrawing a motion to compel the State of Illinois to conduct DNA testing on Dourdy's clothing. *People v. Dunn*, 713 N.E.2d 568, 569–70 (Ill. App. Ct. 1999). The same counsel refused to amend Dunn's pro se post-conviction petition as "she felt that nothing could be added." *Id.* The case was remanded on appeal for DNA testing, which proved inconclusive. *Id.* at 571.

without legal assistance.<sup>165</sup> Even when Dunn was represented by counsel, the proceedings in his case were beset by delays, continuances, and filing extensions brought both by his various lawyers and the State's Attorney's Office.<sup>166</sup> A review of the Cook County Circuit Court records reveals over seventy-five continuances in Dunn's case between the inception of his post-conviction proceedings in 1989 and his eventual release from custody.<sup>167</sup> In the same vein, Dunn's first pro se petition for post-conviction relief languished in Cook County Circuit Court for seven years before its eventual dismissal.<sup>168</sup> Appellate review consumed another three years.<sup>169</sup>

In 2014, JMLS lawyers filed a post-conviction petition on Dunn's behalf, bringing forth the newly discovered evidence.<sup>170</sup> The State of Illinois responded, claiming that Dunn's successful completion of his sentence of imprisonment effectively terminated his rights under the Act.<sup>171</sup> A close reading of the Act, however, suggests otherwise.

## II. A BRIEF HISTORY OF THE ILLINOIS POST-CONVICTION HEARING ACT

The Illinois Post-Conviction Hearing Act was enacted in 1948 in response to a ruling by the United States Supreme Court that the state lacked an adequate remedy for prisoners to contest denials of federal rights after trial or a guilty plea.<sup>172</sup> The Act was originally designed to provide broad access to judicial review of alleged constitutional violations, and the contemporary Act maintains this emphasis on access by establishing a very low threshold for petitioners to meet to avoid dismissal of their claim.<sup>173</sup> The Act further delineates a three-stage process for the adjudication of post-conviction petitions.<sup>174</sup>

The U.S. Supreme Court case, *Young v. Ragen*, prompted Illinois to pass the Act.<sup>175</sup> The *Young* court described a "recurring problem" arising from the absence of a "clearly defined method" by which Illinois petitioners could pur-

<sup>165</sup> Maurice Dunn's Petition for Post-Conviction Relief, *supra* note 157, at 12.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Dunn*, 713 N.E.2d at 569–70.

<sup>169</sup> *Id.*

<sup>170</sup> Maurice Dunn's Petition for Post-Conviction Relief, *supra* note 157, at 1, 46.

<sup>171</sup> *Id.*; Response (May, 18, 2014). On December 3, 2014, the Cook County Circuit Court rejected Dunn's request to file a petition for post-conviction relief, holding that Dunn lacks standing under the Act due to his non-custodial status, and on December 19, 2014, Dunn filed a Notice of Appeal in the First District Court of Appeal.

<sup>172</sup> *People v. Correa*, 485 N.E.2d 307, 308 (Ill. 1985) (citing *Young v. Ragen*, 337 U.S. 235, 238–39 (1948)); *People v. Dale*, 92 N.E.2d 761, 767 (Ill. 1950).

<sup>173</sup> *See Correa*, 485 N.E.2d at 308–09; *see also* 725 ILL. COMP. STAT. 5/122-2.1(a)(2) (2012) (dismissal of petitions appropriate only when petitioner's claim is "frivolous" or "patently without merit").

<sup>174</sup> *See* § 122.

<sup>175</sup> *See Ragen*, 337 U.S. at 238–39; *Correa*, 485 N.E.2d at 308.

sue post-conviction relief.<sup>176</sup> In *Young*, the defendant pleaded guilty to burglary and larceny.<sup>177</sup> He subsequently filed a state petition for habeas corpus relief that alleged “substantial” due process violations.<sup>178</sup> The trial court denied the petition without a hearing or consideration of its merits on the basis that habeas corpus was “not an appropriate remedy” for due process claims.<sup>179</sup> On appeal, the Attorney General of Illinois conceded that the denial of consideration by the trial court “may be wrong,” but the question was one of state, not federal, procedure.<sup>180</sup> The Supreme Court—while acknowledging that states may independently establish and enforce remedial procedures—disagreed.<sup>181</sup> Chief Justice Fred Vinson wrote that “it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right.”<sup>182</sup> In Illinois, as in every other state, a petitioner raising due process or other federal claims must be afforded an opportunity to “submit proof of the truth of his allegations” in court.<sup>183</sup>

In response to the Supreme Court’s directive, the Illinois General Assembly enacted the Post-Conviction Hearing Act.<sup>184</sup> The Act in its original form was brief and broadly worded, consisting of seven sections consuming just “one and one half pages of text in the standard statutory textbooks.”<sup>185</sup> The Act’s brevity and breadth was purposefully designed to cast a wide remedial net.<sup>186</sup> The legislature intended that the Act would “fill the gaps” between existing remedies and provide access to the courts in cases “where direct review, *habeas corpus* and *coram nobis* were unavailable.”<sup>187</sup> Contrary to the “rigid

<sup>176</sup> *Ragen*, 337 U.S. at 236, 239.

<sup>177</sup> *Id.* at 237.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 240. The Attorney General conceded that, during the pendency of the appeal, subsequent decisions by the Illinois Supreme Court reversed course, holding that habeas corpus was the appropriate remedy for review of federal claims. *Id.* Still, the Supreme Court, “[o]ut of an abundance of caution,” remanded *Young* and pending petitions for a writ of certiorari alleging like denials, reasoning that “it is possible that [the change in Illinois procedure] was not brought to [the] attention [of the lower courts] . . .” *Id.* at 239–40.

<sup>180</sup> *Id.* at 238.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 239.

<sup>184</sup> *Correa*, 485 N.E.2d at 308.

<sup>185</sup> J. Patrick J. Quinn & J. John J. Hynes, *Impact of Recent Decisions Upon Proceedings Under the Post-Conviction Hearing Act*, 34 LOY. U. CHI. L.J. 639, 639 (2003); see 725 ILL. COMP. STAT. 5/122 (2012); Dale, 92 N.E.2d at 763 (describing the Act as “short”).

<sup>186</sup> *People v. Martin-Trigona*, 489 N.E.2d 1356, 1359 (Ill. 1986); *People v. Pier*, 281 N.E.2d 289, 290–91 (Ill. 1972); Stanley Levin, *Post Conviction Remedies in Illinois*, 40 J. CRIM. L. & CRIMINOLOGY 606, 610 (1950).

<sup>187</sup> *Martin-Trigona*, 489 N.E.2d at 1359; see also *People v. Loftus*, 81 N.E.2d 495, 498 (Ill. 1948). *Coram nobis*

is an ancient [procedure], and was a process at common law used for the purpose of correcting errors of fact occurring in the trial court, which facts, if known to the court,

application” of those remedies, the Act embodied a flexible and inclusive process designed to give convicted persons a chance to challenge the constitutional integrity of prior proceedings.<sup>188</sup> In that spirit, Illinois courts have long held that the Act must be liberally construed to ensure a spacious path to relief.<sup>189</sup>

The contemporary Act retains its historical emphasis on broad access to judicial review of asserted constitutional violations and provides a three-stage process for adjudicating post-conviction petitions.<sup>190</sup> In stage one, a petitioner “need only present the gist of a constitutional claim” to survive dismissal by the trial court.<sup>191</sup> The State may not respond at this juncture.<sup>192</sup> If the court concludes that the petition does not satisfy the “low threshold” required to proceed to the next phase, it must provide written reasons for dismissing the petition as “frivolous or . . . patently without merit . . . .”<sup>193</sup> An order of dismissal is appealable under a *de novo* review standard.<sup>194</sup> At the second stage, the court may in its discretion appoint counsel for an indigent petitioner, and counsel may amend the petition.<sup>195</sup> In response, the state may answer the petition or file a motion to dismiss.<sup>196</sup> If the court determines that the petition demonstrates a substantial showing of a constitutional violation, the process moves to the final stage: “an evidentiary hearing on the merits of the petition.”<sup>197</sup> At the hearing, the petitioner bears the burden of demonstrating a violation of his or her constitutional rights.<sup>198</sup>

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would have resulted in a different judgment . . . and generally included death of one of the parties prior to the judgment, infancy, coverture, insanity, fraud in procuring jurisdiction, etc.

*Lofthus*, 81 N.E.2d at 498.

<sup>188</sup> *Correa*, 485 N.E.2d at 308–09 (rejecting the State’s interpretation of the Act which “would cause the remedy under that [A]ct to resemble the relief available through *habeas corpus*” and instead “constru[ing] it liberally to accomplish the purposes for which it was enacted”); *Pier*, 281 N.E.2d at 290.

<sup>189</sup> *Martin-Trigona*, 489 N.E.2d at 1359; *Correa*, 485 N.E.2d at 308; *Pier*, 281 N.E.2d at 290.

<sup>190</sup> 725 ILL. COMP. STAT. 5/122-2.1 (2012); *see, e.g.*, *People v. Stivers*, 788 N.E.2d 395, 398 (Ill. App. Ct. 2003) (describing a “trend of recent cases” toward “curtail[ing] trial courts’ authority to dispose of postconviction petitions at the first stage”).

<sup>191</sup> *People v. Gaultney*, 675 N.E.2d 102, 106 (Ill. 1996); *see also* *People v. Hommerson*, 4 N.E.3d 58, 60–61 (Ill. 2014) (quoting *People v. Collins*, 782 N.E.2d 195, 199 (2002) (holding that requirement of a verification affidavit “confirm[ing] that the allegations are brought truthfully and in good faith” at the first stage of post-conviction proceedings would frustrate the Act’s purpose) (internal quotations omitted).

<sup>192</sup> § 122-2.1(a); *Gaultney*, 675 N.E.2d at 106.

<sup>193</sup> § 122-2.1(a)(2); *People v. Edwards*, 757 N.E.2d 442, 445 (Ill. 2001) (citing *Gaultney*, 675 N.E.2d at 221 to reiterate that demonstration of a constitutional claim at the first stage is a “low threshold”).

<sup>194</sup> *See* § 122-2.1(a)(2), 122-7.

<sup>195</sup> *Hommerson*, 4 N.E.3d at 60 (citing *People v. Boclair*, 789 N.E.2d 734, 741 (Ill. 2002)).

<sup>196</sup> *Id.* (citing 725 ILL. COMP. STAT. 5/122-5 (2010)).

<sup>197</sup> *Id.* (citing § 122-6).

<sup>198</sup> *See* LYON ET AL., *supra* note 12, at 3.

In contrast to the modest standard for measuring a constitutional claim at stage one, the Act imposes strictly enforced time limitations to file a petition at stage two.<sup>199</sup> A petitioner has six months after the denial of a direct appeal to seek post-conviction relief.<sup>200</sup> If a petitioner does not file a direct appeal, the post-conviction filing period ends three years from the date of the conviction.<sup>201</sup> In either case, the statute of limitations is inflexible unless a petitioner alleges facts proving “the delay was not due to his or her culpable negligence.”<sup>202</sup>

### III. HOW DOES AN INNOCENT MAN GET NO RELIEF?<sup>203</sup>—RAISING ACTUAL INNOCENCE CLAIMS UNDER THE ACT

The initial version of the Post-Conviction Hearing Act did not allow post-conviction petitioners to present a “free-standing” claim of innocence.<sup>204</sup> Rather, the Act limited claims to collateral constitutional violations that occurred at trial or as part of a guilty plea, such as the ineffective assistance of counsel.<sup>205</sup> For the next half-century, the viability of successfully litigating an actual innocence claim within the Act’s constitutional parameters remained uncertain.<sup>206</sup> In 1996, the Illinois Supreme Court used the case of *People v. Washington* to clarify the question in powerful, if surprising, fashion and to allow post-conviction petitioners to present “free-standing” claims of innocence.<sup>207</sup>

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<sup>199</sup> 725 ILL. COMP. STAT. 5/122-1(c) (2012). The six-month statute of limitations begins at the date of the denial of a petition for leave to appeal to the Illinois Supreme Court or the date for filing such a petition if none is filed. *Id.* As discussed in detail below, claims of actual innocence are not subject to the limitations period. *Id.*

<sup>200</sup> *Id.*

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

<sup>202</sup> *Id.*; see *People v. Cruz*, 985 N.E.2d 1014, 1017 (Ill. 2013) (characterizing the “culpable negligence” exception as a “special safety valve” allowing a petitioner to file an otherwise untimely post-conviction petition (citing 725 ILL. COMP. STAT. 5/122-1(c) (1998) and *People v. Rissley*, 795 N.E.2d 174, 184 (Ill. 2003))).

<sup>203</sup> Steve Mills, *What Killed Illinois’ Death Penalty*, CHI. TRIB., Mar. 10, 2011, <http://perma.cc/4S7L-AECD> (describing the reaction of then-Governor George Ryan in 1999 to the exoneration of Anthony Porter after Porter spent fifteen years on death row).

<sup>204</sup> *People v. Washington*, 665 N.E.2d 1330, 1331, 1333 (Ill. 1996); *People v. Dale*, 92 N.E.2d 761, 765 (Ill. 1950) (“The question of guilt or innocence of the petitioner will *not* be before the court on the post-conviction proceeding . . . .”) (emphasis added).

<sup>205</sup> *Dale*, 92 N.E.2d at 765; see *People v. Guest*, 655 N.E.2d 873, 877 (Ill. 1995) (“The purpose of a post-conviction proceeding is to determine if constitutional violations occurred at trial.”).

<sup>206</sup> Gregory R. Walters, *The Freestanding Claim of Innocence—The Supreme Court of Illinois Breaks Lockstep but Leaves Material Issues Unresolved*, 22 S. ILL. U. L.J. 763, 764–65 (1998). Illinois court had considered “freestanding claims of innocence” under the Act, but had never reached the constitutional issue. *Id.* “Moreover, none of these cases reached the more tenuous argument of how evidence discovered subsequent to a trial could ever amount to a constitutional violation that occurred at the proceedings that led to the conviction.” *Id.*

<sup>207</sup> *Washington*, 665 N.E.2d at 1331, 1333.

In *Washington*, a jury convicted Kurtis Washington of first-degree murder, despite an alibi defense placing him elsewhere during the crime.<sup>208</sup> Following the denial of his direct appeal, Washington filed a post-conviction petition.<sup>209</sup> To support a claim that his counsel failed to properly investigate the case, Washington alleged that a recently discovered witness would implicate another culprit.<sup>210</sup> After the witness testified at an in camera hearing, the trial court allowed Washington to amend his petition to include a claim founded exclusively upon the new evidence of his innocence.<sup>211</sup> The court then granted the petition and ordered a new trial, holding that if the witness had credibly testified it would have “had some significant impact” on the jury.<sup>212</sup> The appellate court affirmed the trial court’s decision on the same grounds.<sup>213</sup>

In affirming the ruling, the Illinois Supreme Court distinguished post-conviction claims of innocence derived from newly discovered evidence or “freestanding” claims from traditional post-conviction claims tied to constitutional violations occurring during trial.<sup>214</sup> The court reasoned that even if a claim of evidence is “freestanding,” it must still implicate “a federal or Illinois constitutional right” to seek relief under the Act because the Act “is limited to constitutional claims.”<sup>215</sup> Washington argued that his claim of actual innocence triggered due process protections under the both the federal and Illinois constitutions.<sup>216</sup>

In its emphatic and far-reaching due process analysis, the *Washington* decision established the unique station of “freestanding” innocence claims in post-conviction litigation and the critical need for judicial review of new evidence of innocence.<sup>217</sup> The court concluded that *Herrera v. Collins*, a “conflicted” United States Supreme Court decision, foreclosed relief under the Due Process Clause of the Fourteenth Amendment.<sup>218</sup> From there, the *Washington* court took a remarkable turn. Although acknowledging that the Illinois Due Process Clause mirrors its federal counterpart, the court rejected any “self-imposed constraint” to rule “in ‘lockstep’” with *Herrera*.<sup>219</sup> Instead, the court

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<sup>208</sup> *Id.* at 1331.

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

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

<sup>211</sup> *Id.* at 1331–32.

<sup>212</sup> *Id.* at 1332 (internal quotations omitted).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1332, 1333.

<sup>215</sup> *Id.* at 1333.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1333–37 (noting that given the limited ability the legislature had provided for making freestanding claims of innocence, that “[the] idea [that an innocent person should not be deprived of life or liberty given compelling evidence of innocence]—but for the possibility of executive clemency—would go ignored in cases like this one”).

<sup>218</sup> *Id.* at 1335 (citing *Herrera v. Collins*, 506 U.S. 390, 411 (1993)).

<sup>219</sup> *Id.* (citing *People v. McCauley*, 645 N.E.2d 923, 937 (Ill. 1994)).

relied on its own precedent to conclude that *both* procedural and substantive due process must be afforded to claims of innocence based on new evidence.<sup>220</sup> As a matter of procedural due process, “to ignore such a claim would be fundamentally unfair.”<sup>221</sup> In addition, imprisonment of the innocent would be so “conscience shocking” as to implicate substantive due process.<sup>222</sup> The court’s break from *Herrera* on substantive due process was particularly stark. In *Herrera*, the Court rebuffed the petitioner’s substantive due process argument, opining that a “substantive due process analysis would require the petitioner, in fact, to be innocent.”<sup>223</sup> As the petitioner was convicted in an “otherwise constitutionally proper trial,” he was not innocent.<sup>224</sup> Writing for the majority in *Washington*, Justice Charles Freeman countered *Herrera*’s curt analysis:

We think that the Court overlooked that a “truly persuasive demonstration of innocence” would, in hindsight, undermine the legal construct precluding a substantive due process analysis. The stronger the claim—the more likely it is that a convicted person is actually innocent—the weaker is the legal construct dictating that the person be viewed as guilty. A “truly persuasive demonstration of innocence” would effectively reduce the idea to legal fiction.<sup>225</sup>

In a nod to—if not taking a subtle jab at—the *Herrera* court Judge Freeman concluded: “[w]e believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence.”<sup>226</sup>

In the aftermath of the *Washington* decision, the Illinois General Assembly took further measures to ensure that claims of actual innocence are not lost to procedural technicalities.<sup>227</sup> In 2003, in the wake of ongoing revelations about the wrongful convictions of several Illinois death row inmates, the General Assembly amended the Act to allow a post-conviction petitioner to raise a claim of actual innocence unencumbered by *any* statute of limitations.<sup>228</sup> During debate on the amendment, the bill’s sponsor, Senator John Cullerton, said that the change would “allow someone who has new evidence and can prove actual innocence to have that right in a post-trial conviction.”<sup>229</sup> In a subsequent push for the amendment’s passage, Cullerton described a need for “revo-

<sup>220</sup> *Id.* at 1336.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1333 (citing *Herrera*, 506 U.S. at 407 n.6).

<sup>224</sup> *Id.* (citing *Herrera*, 506 U.S. at 407 n.6).

<sup>225</sup> *Id.* at 1336 (citing *Herrera*, 506 U.S. at 417).

<sup>226</sup> *Id.*

<sup>227</sup> See 2003 Ill. Laws 4304.

<sup>228</sup> See *id.*; see also Mills, *supra* note 203.

<sup>229</sup> *Senate Transcript of the Debate on S.B. 472*, 93d Gen. Assemb., Reg. Sess., at 52 (Ill. May 29, 2003) (statements of Sen. Cullerton) [hereinafter *Senate Transcript I*].

lutionary change” because “we don’t want to have happen [again] what happened in [Illinois] where we had thirteen, and maybe even seventeen, people who were exonerated for not committing the crime . . . .”<sup>230</sup> Ultimately, the amendment passed with no express restrictions on the individuals eligible to raise claims of actual innocence.<sup>231</sup> To the contrary, the amended language reflects the General Assembly’s intent to eliminate procedural barriers for innocence claims and minimize the risk of future wrongful convictions.<sup>232</sup>

#### IV. A “QUESTION OF GUILT OR INNOCENCE”<sup>233</sup>—ACTUAL INNOCENCE CLAIMS AND THE “IMPRISONMENT” REQUIREMENT

Under the Act’s plain language, “[a]ny person imprisoned in the penitentiary” may pursue post-conviction relief.<sup>234</sup> Emphasis on the Act’s elastic construction has resulted in an evolving and non-literal interpretation of “[a]ny person imprisoned in the penitentiary.”<sup>235</sup> Over time, the phrase has expanded to accommodate petitioners who are on bond pending appeal,<sup>236</sup> under mandatory supervised release,<sup>237</sup> on probation,<sup>238</sup> released on parole,<sup>239</sup> serving consecutive sentences,<sup>240</sup> or who were released from custody with a petition pending.<sup>241</sup> The Act’s protections are also available to petitioners convicted of misdemeanors, in addition to felonies.<sup>242</sup>

The Illinois Supreme Court, however, has interpreted the language “imprisoned in the penitentiary” to bar from the Act a petitioner who is no longer

<sup>230</sup> *Id.* at 52, 54. The Northwestern University Law School Center on Wrongful Convictions lists 167 total exonerations in Illinois. Bluhm Legal Clinic, Ctr. on Wrongful Convictions, *All Illinois Exonerations*, NORTHWESTERN UNIV. SCH. OF LAW, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/> (last visited Mar. 8, 2015).

<sup>231</sup> See 725 ILL. COMP. STAT. 5/122-1(c) (2012).

<sup>232</sup> See *id.*; see, e.g., *Senate Transcript of the Debate on S.B. 472*, 93d Gen. Assemb., Reg. Sess., at 44 (Ill. Nov. 5, 2003) (statement of Sen. Cullerton) [hereinafter *Senate Transcript 2*] (“In the case of post-conviction petitions, after a person’s been convicted, if they believe that they’ve got newly discovered evidence that shows a substantial basis the defendant might actually be innocent, they would [through the Act] have an opportunity to present that [evidence] . . .”).

<sup>233</sup> See *People v. Dale*, 92 N.E.2d 761, 765 (Ill. 1950) (opining that “[t]he question of guilt or innocence of the petitioner will *not* be before the court on the post-conviction proceeding . . .”) (emphasis added).

<sup>234</sup> § 122-1(a).

<sup>235</sup> *Id.*; *People v. Pack*, 862 N.E.2d 938, 943 (Ill. 2007); *People v. Martin-Trigona*, 489 N.E.2d 1356, 1359 (Ill. 1986); *People v. Correa*, 485 N.E.2d 307, 309 (Ill. 1985); *People v. Davis (Davis I)*, 235 N.E.2d 634, 636 (Ill. 1968); *People v. Montes*, 412 N.E.2d 1363, 1364 (Ill. App. Ct. 1980); *People v. Placek*, 357 N.E.2d 660, 662 (Ill. App. Ct. 1976).

<sup>236</sup> *Martin-Trigona*, 489 N.E.2d at 1359.

<sup>237</sup> *Correa*, 485 N.E.2d at 309.

<sup>238</sup> *Montes*, 412 N.E.2d at 1364.

<sup>239</sup> *Placek*, 357 N.E.2d at 662.

<sup>240</sup> *Pack*, 862 N.E.2d at 943.

<sup>241</sup> *Davis I*, 235 N.E.2d at 636.

<sup>242</sup> *People v. Warr*, 298 N.E.2d 164,167 (Ill. 1973).



subject to liberty restrictions.<sup>243</sup> The origin of the exclusion predates both *Washington* and the 2003 “actual innocence” amendment. In 1949, the Cook County State’s Attorney in *People v. Dale* filed a motion to dismiss a post-conviction petition on the basis that the Act violated Article III of the Illinois Constitution.<sup>244</sup> Because the Act provided an avenue “for rehearings and retrials on constitutional issues in causes finally adjudicated,” the State’s Attorney argued that it encroached on the exclusive purview of the judiciary.<sup>245</sup> Rejecting the challenge, the Illinois Supreme Court highlighted that “[t]he question of guilt or innocence of the petitioner will *not* be before the court on the post-conviction proceeding . . . .”<sup>246</sup> Rather, an “inquiry” under the Act “will be limited to constitutional issues not previously adjudicated.”<sup>247</sup> The court concluded that it did not disrupt the constitutional balance between the legislature and the judiciary because the Act offered no means of refuting or disputing the original findings and judgment.<sup>248</sup>

In *Dale*, the State’s Attorney argued against the Act’s constitutionality on the ground that it unreasonably foreclosed from access certain “classes of persons imprisoned in jails, reformatories and similar institutions . . . .”<sup>249</sup> The claim alleged that the Act’s inclusion of the word “penitentiary” could, theoretically, exclude from relief “one convicted of murder who is awaiting execution in the Cook County jail.”<sup>250</sup> The court again disagreed.<sup>251</sup> The legislature, it reasoned, rightly intended to “draw a distinction [in the Act] between convictions for minor offenses and those for serious crimes,” as well as between persons “actually being deprived of their liberty” and those who have “served their sentences and who might wish to purge their records of past convictions.”<sup>252</sup> On the other hand, the word “penitentiary” was “generic” and not intended to exclude other forms of confinement.<sup>253</sup>

In limiting the Act’s reach to persons “deprived of their liberty,” the *Dale* court did not envision a challenge to a conviction based on a freestanding actu-

<sup>243</sup> See, e.g., *Dale*, 92 N.E.2d at 766 (“The legislature, by the act in question, no doubt intended . . . to make the remedy available only to persons actually being deprived of their liberty . . . .”).

<sup>244</sup> *Id.* at 762–63.

<sup>245</sup> *Id.* at 763, 765.

<sup>246</sup> *Id.* at 765 (emphasis added).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

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

<sup>250</sup> *Id.* at 766 (emphasis added).

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

<sup>252</sup> *Id.* The *Dale* court’s distinction between “minor offenses” and “serious crimes” has since been rejected. *Warr*, 298 N.E.2d at 166 (citing *Dale*, 92 N.E.2d at 765). The Illinois Supreme Court opined in *People v. Warr* that “[a series of post-*Dale* United States Supreme Court] decisions make it appropriate, if not imperative, that a remedy be provided by which one who has been convicted of a misdemeanor may raise questions as to the constitutional validity of the procedures employed in obtaining his conviction.” *Id.*

<sup>253</sup> *Dale*, 92 N.E.2d at 766.

al innocence claim.<sup>254</sup> Indeed, the crux of the court's logic in declaring the Act constitutional was the Act's preclusion of "question[s] of guilt or innocence."<sup>255</sup> Consequently, the *Dale* court implicitly confined its standing limitation to non-imprisoned petitioners who attempt to wage a collateral constitutional attack on a prior conviction.<sup>256</sup> Post-*Dale* cases that rejected a non-imprisoned petitioner's efforts at "purging his record" support this reading.<sup>257</sup> For instance, in *People v. Carrera*, Jesus Carrera pleaded guilty to a drug offense and received a probationary sentence.<sup>258</sup> Months after he completed the sentence, the Immigration and Naturalization Service instituted deportation proceedings.<sup>259</sup> Carrera filed a post-conviction petition, arguing that his trial counsel was constitutionally ineffective for failing to advise him of the potential immigration consequences of the conviction.<sup>260</sup> Relying on *Dale*, the Illinois Supreme Court held that Carrera lacked standing under the Act for the purpose of "purg[ing] his record" to avoid deportation.<sup>261</sup>

Similarly, in *People v. West*, Thomas Paul West was denied post-conviction relief because he had completed his sentence.<sup>262</sup> West was convicted of manslaughter in 1981 and successfully completed a four-year prison sentence.<sup>263</sup> In 1988, West was convicted of murder in Arizona and sentenced to death.<sup>264</sup> In reaching the sentence, the court considered West's prior man-

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<sup>254</sup> See *id.* at 765–66.

<sup>255</sup> *Id.* at 765.

<sup>256</sup> See *id.* at 765–66.

<sup>257</sup> See, e.g., *People v. Carrera*, 940 N.E.2d 1111, 1114, 1121 (Ill. 2010) (relying on *Dale* to affirm that the Act's "remedial machinery" is not available for "purging his record" as a means for a non-prisoner petitioner to challenge his deportation); *People v. West*, 584 N.E.2d 124, 125 (Ill. 1991) (rejecting a non-prisoner petitioner's attempt to void his prior Illinois conviction to prevent its use as an aggravating sentencing factor for a subsequent conviction); *People v. Henderson*, 961 N.E.2d 407, 413–14 (Ill. App. Ct. 2011) (opining, in accordance with *Dale*, that a non-prisoner petitioner lacked standing to challenge the validity of his three negotiated guilty pleas); *People v. Rajagopal*, 885 N.E.2d 1152, 1158 (Ill. App. Ct. 2008) (holding, consistent with *Dale*, that a non-imprisoned petitioner "cannot now seek to avoid deportation or any other collateral consequence of his felony conviction by invoking the Act"); *People v. Thurman*, 777 N.E.2d 971, 972–73 (Ill. App. Ct. 2002) (holding the Act is unavailable to petitioner who has completed a state sentence and then collaterally attacks voluntariness of his guilty plea). *But cf.* *People v. Dent*, 948 N.E.2d 247, 249–50 (Ill. App. Ct. 2011) (citing *Dale* in support of holding that the petitioner could not assert a claim of innocence as to a prior conviction used to enhance a subsequent sentence, without addressing due process question); *People v. Steward*, 940 N.E.2d 140, 149, 151–52 (Ill. App. Ct. 2010) (holding that civil confinement under Sexually Violent Persons Commitment Act is not imprisonment under the Post Conviction Hearing Act and that the petitioner's actual innocence claims were not based upon newly discovered evidence, without addressing whether due process requires that a non-prisoner may assert innocence claims).

<sup>258</sup> *Carrera*, 940 N.E.2d at 1112.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 1113.

<sup>261</sup> *Id.* at 1120–21.

<sup>262</sup> *West*, 584 N.E.2d at 124.

<sup>263</sup> *Id.*

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

slaughter conviction as an aggravating factor.<sup>265</sup> West then filed a post-conviction petition in Illinois claiming several collateral constitutional violations at the manslaughter trial.<sup>266</sup> As West had completed his Illinois sentence four years earlier, the court rejected his attempts to void the prior conviction and sidestep the consequences of the Arizona crime.<sup>267</sup>

More recently, in *People v. Henderson*, the Illinois appellate court denied Donte Henderson post-conviction relief because he had completed his sentence.<sup>268</sup> Henderson pleaded guilty to possession and distribution of a controlled substance and battery of a correctional officer.<sup>269</sup> Following the completion of his sentence, Henderson filed a post-conviction petition contending that his guilty pleas were entered involuntarily because he was not admitted to a “boot camp” program “as allegedly promised.”<sup>270</sup> The court dismissed the petition, opining that relief is unavailable under the Act for petitioners who “have completely served their sentences and merely wish to purge their criminal records of past convictions.”<sup>271</sup>

#### V. READING THE ACT TO ALLOW ANY PERSON CONVICTED OF A CRIME TO RAISE A CLAIM OF INNOCENCE

Petitioners who have completed a custodial sentence but raise freestanding claims of actual innocence fall outside of *Dale*'s narrow standing restriction.<sup>272</sup> Such petitioners, however, are not without legal cover. To the contrary, recent case law, the due process rationale espoused by the court in *Washington*, and recent Illinois legislation all support a broader application of the Act to include petitioners who have completed their sentences.<sup>273</sup>

A line of post-*Dale* cases endorses the notion that the Act should not be “construed so narrowly” to bar petitioners in “every case” in which a petition

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

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

<sup>267</sup> *Id.* at 124–25.

<sup>268</sup> *Henderson*, 961 N.E.2d at 411, 415.

<sup>269</sup> *Id.* at 411.

<sup>270</sup> *Id.* at 411, 412.

<sup>271</sup> *Id.* at 413.

<sup>272</sup> See *People v. Dale*, 92 N.E.2d 761, 766 (Ill. 1950) (“The legislature, by the act in question, no doubt intended . . . to make the remedy available only to persons actually being deprived of their liberty and not to persons who had served their sentences and who might wish to purge their records of past convictions.”).

<sup>273</sup> See, e.g., 735 ILL. COMP. STAT. 5/2-702(b) (2012 & Supp. 2013) (prescribing that “[a]ny person convicted and subsequently imprisoned for one or more felonies by the State of Illinois which he or she did not commit may . . . file a petition for certificate of innocence”); *People v. Washington*, 665 N.E.2d 1330, 1336 (Ill. 1996) (holding that a claim of actual innocence is cognizable under Illinois constitutional law as a due process claim); *People v. Lynn*, 464 N.E.2d 1031, 1034 (Ill. 1984) (completion of sentence does not render moot petition under the Act challenging validity of conviction).

is filed after a sentence ends.<sup>274</sup> In *People v. Davis* and its progeny, the Illinois Supreme Court interpreted the Act as an instrument chiefly designed to challenge the “stigma and disabilities” of an unjust conviction, irrespective of any restraints on liberty.<sup>275</sup> In *People v. Lynn*, the court held that a challenge to “the validity of [a] conviction” is not rendered moot simply because the petitioner’s underlying sentence is complete.<sup>276</sup> Writing for the majority, Justice Thomas Moran opined, the “nullification of a conviction may have important consequences to a defendant.”<sup>277</sup> Unlike a challenge to the sentence itself, a petition attacking a conviction does not involve a “mere abstract proposition . . . .”<sup>278</sup> Conversely, the deleterious effects of a criminal conviction are tangible and enduring.<sup>279</sup> The logic of *Davis* and *Lynn* is especially compelling with respect to claims of actual innocence. Certainly, the catharsis of exoneration is of far greater consequence than “nullification of a conviction” on any other basis.<sup>280</sup> Further, the “stigma and disabilities” adjoining a criminal conviction, especially acute and lasting for registered sex offenders, all but vanish upon a determination of innocence.<sup>281</sup>

Moreover, interpreting the Act to allow any petitioner to advance a claim of actual innocence is consistent with the due process analysis of the *Washington* court.<sup>282</sup> In decisively breaking from federal precedent, *Washington* established that claims of actual innocence strike at the heart of both procedural and substantive due process concerns.<sup>283</sup> The *Washington* court’s procedural due process rationale applies with equal—if not greater—force to petitioners who suffer in prison for the entirety of a sentence without ready access to counsel or investigative tools.<sup>284</sup> Only upon their release do such petitioners have any real opportunity to discover new, non-cumulative, “material” and “conclusive” evidence of innocence.<sup>285</sup> Further, many petitioners endure interminable delays in

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<sup>274</sup> *People v. Davis (Davis II)*, 298 N.E.2d 161, 163 (Ill. 1973); *People v. Davis (Davis I)*, 235 N.E.2d 634, 636 (Ill. 1968); see *Lynn*, 464 N.E.2d at 1034; *People ex rel Palmer v. Twomey*, 292 N.E.2d 379, 382 (Ill. 1973); *People v. Neber*, 242 N.E.2d 179, 180 (Ill. 1968). *But see* *People v. Farias*, 543 N.E.2d 886, 889 (Ill. App. Ct. 1989) (“[W]e believe that [*People v.*] *Martin-Trigona*, implicitly retreated from the expansive reading of the Act adopted in [*Davis et al.*], although it cited *Davis II* with approval.” (internal citations omitted)).

<sup>275</sup> *Neber*, 242 N.E.2d at 180; *Davis I*, 235 N.E.2d at 636; see *Lynn*, 464 N.E.2d at 1034; *Davis II*, 298 N.E.2d at 163; *Twomey*, 292 N.E.2d at 382. *But see Farias*, 543 N.E.2d at 889.

<sup>276</sup> *Lynn*, 464 N.E.2d at 1034.

<sup>277</sup> *Id.* (internal citations omitted).

<sup>278</sup> *Id.*

<sup>279</sup> *See id.*

<sup>280</sup> *See id.*; *Davis I*, 235 N.E.2d at 636.

<sup>281</sup> *See Davis I*, 235 N.E.2d at 636.

<sup>282</sup> *See Washington*, 665 N.E.2d at 1336.

<sup>283</sup> *Id.*

<sup>284</sup> *See id.* at 1336.

<sup>285</sup> *See People v. Ortiz*, 919 N.E.2d 941, 950, 951 (Ill. 2009) (quoting *People v. Morgan*, 817 N.E.2d 524, 527 (2004)).

the post-conviction process like those experienced by Maurice Dunn. A petitioner, though, should not be penalized for long delays that characterize the post-conviction process over which he or she has no control.<sup>286</sup> In this light, to prevent a petitioner from pursuing post-conviction relief due to the completion of a sentence would “frustrate justice.”<sup>287</sup>

In addition, *Washington*’s substantive due process language has application to all post-conviction innocence claims, regardless of the custodial status of the petitioner.<sup>288</sup> As the court reasoned, “the stronger the claim” of innocence advanced in a post-conviction petition, the less valid a guilty verdict in an otherwise “constitutionally fair trial.”<sup>289</sup> For example, in Maurice Dunn’s case, the balance tilts strongly in favor of innocence. The prosecutor at the retrial offered no physical evidence linking Dunn to the crime, relying instead on eyewitness testimony.<sup>290</sup> The testimony of those witnesses was suspect, but went largely unchallenged.<sup>291</sup> Finally, Constance Dourdy’s in-court identification of Dunn—the prosecutor’s most compelling evidence—was compromised by a suggestive police lineup.<sup>292</sup> In stark contrast, Dunn’s newly discovered evidence is compelling, including the tacit confession of a rapist who committed three assaults almost identical to the one for which Dunn was convicted.<sup>293</sup> In essence, Dunn spent over two decades in prison based on a trial and verdict that was nothing more than a “legal fiction.”<sup>294</sup> Therefore, Dunn’s “conscience shocking” imprisonment entitles him to substantive due process protection.<sup>295</sup>

Further, by eliminating the statute of limitations for innocence claims, the Illinois General Assembly categorically expressed that procedural hurdles should not obstruct access to post-conviction relief for *any* wrongfully convicted person.<sup>296</sup> The legislature’s intent to ensure unfettered access to post-

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<sup>286</sup> *People v. Jones*, 969 N.E.2d 482, 488–89 (Ill. App. Ct. 2012). The court noted that

[i]t would frustrate justice to shut the door on the one avenue for Illinois prisoners to obtain relief from a criminal conviction on constitutional grounds because the State and Appellate Defender’s office delayed, through no fault of their own, a petitioner’s case for so long that he eventually serves his entire sentence and is released.

*Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *See Washington*, 665 N.E.2d at 1336.

<sup>289</sup> *Id.* at 1334, 1336.

<sup>290</sup> *See* Second Trial Transcript, *supra* note 22, at 48, 67, 101–02.

<sup>291</sup> *See id.* at 48–49, 79–86, 90–92, 105–06.

<sup>292</sup> *See* Pre-Trial Hearing Transcript, *supra* note 25, at 200 (police officers administering lineup alerted Dourdy to the presence of “a suspect” in the lineup); Lineup Photograph (on file with author) (only Dunn wore jogging clothes, Dunn was one of only two men with short hair).

<sup>293</sup> *See* Affidavit of Jillian Kassel, *supra* note 23, at 2.

<sup>294</sup> *See Washington*, 665 N.E. 2d at 1336.

<sup>295</sup> *See id.*

<sup>296</sup> *See* 725 ILL. COMP. STAT. 5/122-1(c) (2012) (statute of limitations “does not apply to a petition advancing a claim of actual innocence”).

conviction judicial review of innocence claims is made even clearer when the Act is read in tandem with a subsequent related law: the Illinois Certificate of Innocence (“COI”) statute.<sup>297</sup> Enacted in 2009, the COI law is designed to streamline the process for exonerated individuals to seek reparations for a conviction that is later reversed, dismissed, or set aside.<sup>298</sup> Before the law passed, a gubernatorial pardon—often years in the making—provided the only basis for a formal declaration of innocence.<sup>299</sup>

A close reading of the COI law reveals a presumption that procedural means of advancing innocence claims exist.<sup>300</sup> In its introduction, the law states firmly that “persons who have been wrongly convicted of crimes in Illinois and subsequently imprisoned . . . should have an available avenue to obtain a finding of innocence so that they may obtain relief . . . .”<sup>301</sup> While “relief” encompasses legal redress “through a petition in the Court of Claims,” the COI law presupposes the existence of a procedural mechanism to advance innocence claims.<sup>302</sup> In other words, to successfully obtain a certificate of innocence, a petitioner must establish that a conviction “was reversed or vacated, and the indictment or information dismissed . . . .”<sup>303</sup> For Maurice Dunn and similarly situated litigants, the Post-Conviction Hearing Act provides the only viable judicial process to pursue this end.

The legislative intent behind the COI law provides a further basis for enabling petitioners who have completed their sentences to file for post-conviction relief. Advocating for the passage of the COI law, Representative Mary Flowers discussed the disabilities that persist for the wrongfully convicted, even after their release from imprisonment.<sup>304</sup> They are, she said, “technically . . . still incarcerated because their name is not cleared.”<sup>305</sup> Indeed, wrongfully convicted individuals have stated that the persistent stigma of a wrongful conviction is an “awful nightmare of a cloud hanging over [them]” and a life-destroying burden.<sup>306</sup> With those sentiments in mind, the General Assembly endeavored to remove “a variety of substantive and technical obstacles”

<sup>297</sup> See 735 ILL. COMP. STAT. 5/2-702 (2012 & Supp. 2013).

<sup>298</sup> *Id.*; see Karen Sloan, *Illinois Law School Poised to Help Wrongly Convicted on a Shorter Path to Pardon, Compensation*, NAT’L L.J. 11–12 (Oct. 15, 2008).

<sup>299</sup> Sloan, *supra* note 298.

<sup>300</sup> See § 702(a).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> 735 ILL. COMP. STAT. 5/2-702(c)(2) (2012 & Supp. 2013).

<sup>304</sup> *House Transcript of the Debate on S.B. 230*, 95th Gen. Assemb., at 7 (2007) (statement of Rep. Flowers).

<sup>305</sup> *Id.*

<sup>306</sup> Jack Healy, *Wrongfully Convicted Often Find Their Record, Unexpunged, Haunts Them*, N.Y. TIMES, May 6, 2013, at A10 available at <http://www.nytimes.com/2013/05/06/us/wrongfully-convicted-find-their-record-haunts-them.html> (internal quotations omitted).

thwarting the pursuit of innocence by the wrongfully convicted.<sup>307</sup> In so doing, the COI law in the interest of justice gives “due consideration to difficulties of proof” caused by factors such as “the passage of time” and “the destruction of evidence” by government actors.<sup>308</sup> To prevent a petitioner from access to post-conviction relief merely because he or she has successfully completed a sentence is the kind of “technical” roadblock to justice decried by the General Assembly in the COI statute.<sup>309</sup> Instead, the “available avenue to obtain a finding of innocence” must extend through judicial review of all innocence claims brought under the Act, regardless of a petitioner’s custodial status.<sup>310</sup> Otherwise, the legislative promise of eventual justice for the wrongfully convicted rings hollow.

In response to the continued national trend of exonerations<sup>311</sup>, other state legislatures have crafted post-conviction routes to actual innocence claims for individuals who have completed a custodial sentence.<sup>312</sup> For instance, Utah allows for innocence claims by any “person who has been convicted of a felony offense . . . .”<sup>313</sup> Like the Illinois evidentiary requirements for a claim of innocence, the Utah law focuses on “newly discovered material evidence” and “not merely cumulative” evidence.<sup>314</sup> In similar fashion, Virginia recognizes a comparable post-conviction remedy for “a person who was convicted of a felony upon a plea of not guilty . . . .”<sup>315</sup> The petition must include “evidence [that] was previously unknown or unavailable to the petitioner” and that is “not merely cumulative, corroborative or collateral.”<sup>316</sup> In fact, several state statutes allow a post-conviction petitioner to raise *any* constitutional basis for relief, regardless of its nature, after a sentence has been fully completed.<sup>317</sup>

<sup>307</sup> § 702(a).

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

<sup>309</sup> *See id.*

<sup>310</sup> *See id.*

<sup>311</sup> Between 1989 and 2012, the number of exonerations in the United States increased from twenty to eighty-seven. *Figure 2: Number of Exonerations by Basis, Over Time*, NAT’L PUB. RADIO, available at <http://hereandnow.wbur.org/2014/02/04/record-criminal-exonerations>, archived at <http://perma.cc/3J38-XJPB>.

<sup>312</sup> *See, e.g.*, UTAH CODE ANN. §§ 78B-9-402(1) (LexisNexis 2012); VA. CODE ANN. § 19.2-327.10 (2008).

<sup>313</sup> UTAH CODE ANN. § 78B-9-402(1).

<sup>314</sup> § 78B-9-402(2)(a)(i), (iii).

<sup>315</sup> VA. CODE ANN. § 19.2-327.10.

<sup>316</sup> § 19.2-327.11.

<sup>317</sup> Those jurisdictions include Alaska, Arizona, Florida, Indiana, Iowa, Minnesota, Mississippi, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, and Utah. ALASKA STAT. § 12.72.010 (2014); ARIZ. REV. STAT. ANN. § 13-4231 (2010); IOWA CODE ANN. § 822.2 (West 2011); MINN. STAT. § 590.01 (2012); MISS. CODE ANN. § 99-39-5 (2007 & Supp. 2014); NEV. REV. STAT. § 34.720 (2013); N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2007); N.C. GEN. STAT. § 15A-1415 (2013); N.D. CENT. CODE § 29-32.1-01 (2006); OKLA. STAT. ANN. tit. 22 § 1080 (West 2003); OR. REV. STAT. § 138.510 (2013); R.I. GEN. LAWS § 10-9-1 (2012); S.C. CODE ANN. § 17-27-20 (2014); UTAH CODE ANN. § 78B-9-104 (LexisNexis

Along the same lines, American Bar Association (ABA) standards for post-conviction relief call for “comprehensive” and “sufficiently broad” remedies that cover challenges to “the validity of judgments of conviction, or of the legality of custody or supervision based upon a judgment of conviction.”<sup>318</sup> Among the bases for challenging the validity of a criminal conviction is the discovery of “evidence of material facts which were not, and in the exercise of due diligence could not have been . . . presented and heard in the proceedings leading to conviction and sentence, and that now require vacation of the conviction or sentence . . . .”<sup>319</sup> More critically, a custody requirement is not required under the standards.<sup>320</sup> Rather, “[t]he right to seek relief from an invalid conviction and sentence ought to exist . . . even though the applicant has *completely served* the challenged sentence . . . .”<sup>321</sup> In effect, the ABA standards establish parameters for post-conviction relief within which Maurice Dunn and comparably situated petitioners squarely stand.

#### CONCLUSION

The Illinois Post-Conviction Hearing Act was created to ensure that individuals convicted of a criminal offense are not victimized by “gaps” in the appellate process and left without recourse to challenge a conviction on constitutional grounds.<sup>322</sup> Since its passage, Illinois courts have interpreted the Act liberally and in keeping with its promise of open access to relief.<sup>323</sup> In *Washington*, the Illinois Supreme Court established that “freestanding” claims of actual innocence are paramount in state post-conviction litigation and entitled to both procedural and substantive due process protections.<sup>324</sup> The Illinois General Assembly, through its 2003 amendment opening the door for a claim of innocence raised at any time, echoed *Washington*’s endorsement and remained faithful to the Act’s core principles.<sup>325</sup>

For petitioners like Maurice Dunn, access to the Act is imperative. A wave of DNA exonerations over the last quarter-century exposed fundamental flaws in the prosecution and defense of criminal cases. Categorical proof of

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2012); Fla. R. Crim. P. § 3.850 (2012); Ind. R. of P. for Post-Conviction Relief § 1 (LexisNexis 2014); N.J. Ct. R. 3:22.

<sup>318</sup> AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, 22-1.1, 22-2.1 (1986) (emphasis added).

<sup>319</sup> *Id.* at 22-2.1.

<sup>320</sup> *Id.* at 22-2.3.

<sup>321</sup> *Id.* (emphasis added).

<sup>322</sup> See *People v. Martin-Trigona*, 489 N.E.2d 1356, 1358–59 (Ill. 1986); *People v. Pier*, 281 N.E.2d 289, 290 (Ill. 1972).

<sup>323</sup> *Martin-Trigona*, 489 N.E.2d at 1358; *Pier*, 281 N.E.2d at 290.

<sup>324</sup> *People v. Washington*, 665 N.E.2d 1330, 1336–37 (Ill. 1996).

<sup>325</sup> See *id.*



innocence through DNA in most cases, though, is a “television myth.”<sup>326</sup> In reality, establishing innocence entails meticulous case reconstruction and production of new evidence that would likely alter the outcome of a subsequent trial. The high bar for relief in Illinois is virtually impossible for any post-conviction petitioner to reach, much less those who are incarcerated and lack legal counsel. Only upon the completion of a sentence do many petitioners have even a remote chance to prove their innocence. More critically, while release from custody eases physical restraints for the wrongfully convicted, true liberty depends upon exoneration. As a result, Illinois post-conviction petitioners who claim innocence should not be barred from meaningful judicial review based on a standing restriction of antiquated origins. Rather, in light of the Act’s roots in due process and the centrality of innocence claims to fundamental concepts of justice, any petitioner convicted of a crime must be entitled to its protections.

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<sup>326</sup> David Protess, *Guilty Until Proven Innocent*, HUFFINGTON POST (Oct 17, 2011, 5:12 AM), [http://www.huffingtonpost.com/david-protess/illinois-wrongful-conviction-restitution\\_b\\_1014368.html](http://www.huffingtonpost.com/david-protess/illinois-wrongful-conviction-restitution_b_1014368.html) , archived at <http://perma.cc/5CJQ-ZCCZ>.