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Miscarriages of Justice: Litigating Beyond Factual Innocence

A Guide From the Academy for Justice's Miscarriages of Justice Initiative

In 2022, a collaborative working group of legal scholars, Conviction Integrity Unit directors, public defenders, civil rights attorneys, and innocence litigators compiled innovative and creative approaches to addressing miscarriages of justice claims in post-conviction litigation. The resulting guide, *Miscarriages of Justice: Litigating Beyond Factual Innocence*, was spurred on by three related trends: (1) Supreme Court decisions limiting federal habeas corpus and the increased focus on post-conviction relief in state courts; (2) Conviction Integrity Units in prosecutors' offices increasingly reviewing and vacating convictions based on miscarriages of justice rather than solely based on proof of innocence; and (3) post-conviction litigators successfully bringing claims based on a holistic review of the evidence, interest of justice, and expanded applications of state constitutional and statutory provisions.

Additionally, in recent years, legislatures have passed statutes allowing for the review of convictions based on the presence of racial bias, the age of the convicted person at the time of the crime or sentence, or excessive or otherwise unfair sentences. Given the increasing focus on state post-conviction proceedings as a primary source of relief, the Guide collects and analyzes cases gathered from across the country to highlight the ways in which stakeholders are finding relief for miscarriages of justice. This article provides a summary of the Guide.

I. Mass Group Claims Based on Official Misconduct

"[Official] misconduct … distorts the evidence used to determine guilt or innocence [and] … produces unreliable, misleading or false evidence of guilt. . . ."[1]

The National Registry of Exoneration's 2020 annual report found that official misconduct contributed to more than half of all documented exonerations, and overwhelmingly those of Black and Latino defendants. The pervasive nature of official misconduct taints not only the conviction but also the entire process in ways that warp the legitimacy of the whole criminal legal system, destroying the public trust in all stakeholders from police to prosecutors, analysts, and judges.

❖ **Creative group claims, and Conviction Integrity Units, can act to legally reconsider convictions obtained through the work of tainted government actors.**

BY VALENA BEETY, KAREN NEWIRTH, AND KAREN THOMPSON

Post-conviction attorneys and Conviction Integrity Units can create mechanisms to address these harms on a wide legal scale.[2] Scrutiny of misconduct allows for relief not just on an individual basis, but also for falsely or improperly accused people as a class. The information gained through the exoneration of a factually innocent person can benefit similarly situated people — whether proven to be factually innocent or not — who suffered the same violations of rights. The resources poured into the single exoneration should be spread wide.

These claims are not new, recalling the LAPD Ramparts litigation and the Tulia Texas scandal, however a successful recent example includes the ongoing case *In re Corruption of Former Chicago Police Sergeant Ronald Watts.*[3]

❖ **Individual claims relying on mass misconduct, and class claims seeking mass relief, can also be brought in response to forensic analyst misconduct.**

Mass and group exonerations provide inspiration for new and innovative approaches to exonerating large numbers of individuals in ways different from the traditional, individualized approach that characterizes most of the work of innocence organizations. In addition to police misconduct examples, practitioners can consider the work deployed by the ACLU of Massachusetts and the Committee for Public Counsel Services (CPCS) in addressing two separate scandals involving corrupt lab analysts in Massachusetts, as well as the Oklahoma and West Virginia crime lab scandals of the 1990s.[4]

❖ **Sex-based crimes by law enforcement may constitute another significant area of consideration for mass exoneration claims.**

Officer-involved sexual misconduct describes an entire subset of police misconduct that runs the spectrum from non-criminal complaints such as consensual sexual activity that occurs while an officer is on duty, to sexual harassment, up to felony acts of sexual assault or child molestation. Sexual misconduct was the second most common form of police misconduct reported in 2010, and sexual assault rates were significantly *higher* for police when compared to the general population.[5] Women survivors are often not believed, and men survivors frequently remain silent about sexual abuses they endure at the hands of law enforcement. Recently, the Midwest Innocence Project called for a meaningful review of cases involving former Kansas police detective Roger Golubski.[6]

❖ **Building a coalition of prosecutors, public defenders, and innocence organizations can compel corrupt police case dismissals.**

Many cases involving officials who have been proven to commit misconduct remain unexamined.[7] Some departments, such as the Civil Rights Division of the Orleans Parish District Attorney's Office, are working to create protocols and procedures to audit the cases of officers who have been proven to commit misconduct. An organized coalition of invested institutions ultimately compelled more than 700 vacated convictions across New York City in 2021-2022 because the convictions were tainted by the work of 13 corrupt police officers.[8]

Parties defined corrupt police officers as:

(1) those who had been charged with or *convicted of crimes* committed *in the course of their official duties or by abusing their authority;*

(2) those who appeared on *district attorneys'* so-called *"do not call lists"* — lists of police officers whose conduct had rendered them so untrustworthy that they would not be called as witnesses in court;

(3) those who had substantially above-average *numbers of civil rights cases filed against them* alleging serious rights violations or who had substantially above-average *adverse Civilian Complaint Review Board findings* or who were known in the community or by defenders or otherwise reported in the media as being bad actors; and

(4) those who *participated in known wrongful convictions* that *involved manufactured police evidence* (false confessions or directed misidentifications or misuse of confidential informants).

When post-conviction attorneys and public defenders become aware of corrupt police officers, they can demand the dismissal of pending cases and the vacatur of past cases involving corrupt officers as those cases arise (e.g., when officers are deemed untrustworthy or convicted of a crime in the course of their duties or a conviction that otherwise goes to their credibility). Wrongful conviction practitioners can go further and *craft protocols for handling the inevitable discovery of a bad actor, so that one part of the automatic response to such revelations is a full case review,* as the Massachusetts Supreme Judicial Court did in its ultimate resolution of the drug lab scandal cases.

❖ **Petitioner's "newly discovered evidence" post-conviction can include a pattern of police misconduct — even when there is no direct evidence of misconduct in Petitioner's individual case.**

In cases from New York and Chicago, "new evidence" now can include patterns of misconduct from other cases, including patterns that could have been used for impeachment.[9]

II. Faulty Forensic Evidence Claims: Changed Science Writs and Due Process

❖ **A legal Catch-22 exists for faulty forensic evidence discovered in post-conviction: if *any* studies challenging the evidence's reliability were available at the time of trial, the court may find that proof of unreliability is not "newly discovered evidence"; however, if defense counsel failed to rely on those less-known studies at trial, the court may find this does not rise to the level of "ineffective assistance of counsel."**

Even with proof that the state presented false evidence and false testimony at trial, a habeas petitioner may be without a remedy because the *proof does not align with the court's precedential decisions on what is newly discovered evidence, and what is ineffective assistance of counsel.* The failure to litigate the reliability of the evidence at trial may foreclose any avenues of relief — regardless of the discovery of changed science. Junk science may end up as neither technically newly discovered, nor its use as ineffective assistance of counsel.

❖ **Changed Science Writs specifically allow petitioners to challenge convictions based on now-discredited scientific evidence that was used against them at trial.**

The Texas "Junk Science Writ," the first in the country, allows individuals to challenge their convictions that were based on now-discredited scientific evidence, *including changes in scientific conclusions by a testifying expert.* [10] California's changed science writ, amended in 2022, ensures that the definition of false testimony and false evidence includes opinions based on flawed scientific research or outdated technology that is now unreliable or moot, and opinions about which a reasonable scientific dispute has emerged regarding its validity. Other states that have adopted some form of changed science writs include Connecticut, Wyoming, Michigan, West Virginia, and Nevada.

Changed science writs provide an avenue for courts to examine the evidence today and make a substantive decision on the evidence itself. Given the fluctuation and rapid development in various forensic fields, these petitions are particularly applicable for criminal convictions reliant on forensic evidence. As the Ninth Circuit has opined, "recognizing [a due process claim] is essential in an age where forensics that were once considered unassailable are subject to serious doubt."[11]

❖ **A due process claim based on the state's use of now-discredited evidence at trial — "false evidence" — may be successful regardless of whether the state knew the evidence was unreliable.**

In *Ex Parte Henderson,* the Texas Court of Criminal Appeals granted a new trial, stating that *regardless of whether the prosecutor was aware* of the reliability of the evidence, *use of now-discredited evidence by the state is a due process violation.*[12] The Second and Ninth Circuits have held the same.[13] The Ninth Circuit correlated "a conviction based in part on false evidence" as incompatible with "fundamental fairness," and entitling the defendant to a new trial "if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different." Importantly, the Third Circuit in *Lee v. Glunt* discussed how a conviction based on now-invalidated scientific evidence violates the defendant's due process rights, regardless of whether one could have known at trial that the science was imperfect.[14]

III. Racial Bias in Jury Selection, Conviction, and Sentencing

❖ **The California Racial Justice Act (2020) prohibits defendants from being charged, convicted or sentenced based on race, ethnicity, or national origin.**

The Supreme Court's 1987 *McCleskey v. Kemp* decision protected laws and sentences from being challenged by data, like the National Registry of Exonerations Reports, which show a racially disparate impact. In 2020, California became the first state legislature to counter the legacy of *McCleskey v. Kemp* by passing the California Racial Justice Act. The California Racial Justice Act prohibits defendants from being charged, convicted or sentenced based on race, ethnicity, or national origin.[15]

Whether the evidence of racial bias is brought pre-trial or post-conviction, judges can respond in a number of ways: dismissing the charge, bringing in a new jury, declaring a mistrial, or vacating the conviction or sentence. If the defendant can show that they were convicted of a more serious offense than a similarly situated defendant of another race, or given a longer sentence, that can be sufficient to reverse a conviction — at any point in time. This is a way, whether on an individual or mass basis, to bring data back into the conversation, with the Act explicitly allowing defendants to present "statistical evidence, aggregate data, [and] expert testimony." The defendant does *not* need to prove intentional discrimination.

❖ **If a sentencing court relied on racist myths — such as the superpredator myth — a petitioner may successfully challenge their wrongful sentence as a due process violation.**

In January 2022, the Connecticut Supreme Court reversed Keith Belcher's 60-year sentence, imposed when he was a teenager, for sexual assault and armed robbery committed when he was 14 years old.[16] Belcher had moved to correct his sentence on the basis that *his sentence was imposed in an illegal manner violative of due process:* the sentencing judge had *relied on materially false information* by adopting *the discredited, false, and racist superpredator myth* and applying it to Mr. Belcher in imposing his sentence.

❖ **Implicit bias in jury selection — and juror removal — can be the basis of a successful due process claim to reverse a conviction.**

In the recent New Jersey Supreme Court decision *State v. Andujar*, defendant Edwin Andujar, who did not plead actual innocence, argued that he was denied the right to a fair trial because racial discrimination infected the jury selection for his murder trial.[17]

The appeal centered on the juror selection process for F.G., a Black male from Newark. *The State challenged F.G. for cause and asked that he be removed.* The trial court denied the State's motion, explaining that "[e]verything [F.G.] said and the way he said it leaves no doubt in my mind that he … does not have any bias towards the State nor the defense. . . . I think he would make a fair and impartial juror."[18]

After the court's ruling to keep F.G. on the jury, *the prosecution ran a criminal history check on F.G.* The next day, the court revealed that the prosecutor "came to see me yesterday" and there were "warrants out for F.G." and "[t]hey were going to lock him up." Defense counsel noted there was *"one warrant out of Newark Municipal Court." The State renewed its application to remove F.G. for cause.* When the court asked for the defense's position, counsel responded, "I don't oppose the State's application." F.G. was removed and the jury ultimately convicted Andujar.

In its decision on appeal, the *New Jersey Supreme Court held,* "Courts, not the parties, oversee the jury selection process," and found that *"any party seeking to run a criminal history check on a prospective juror must present a reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge."*[19] In addition to finding that none of these basic criteria were met, the Court noted that "[b]ased on all of the circumstances, we infer that *F.G.'s removal from the jury panel may have stemmed from implicit or unconscious bias on the part of the State,* which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can." While the court found the defense's objection to the prosecutor's use of the criminal background check to be feeble, imprecise, and untimely, it noted that "we cannot ignore the *evidence of implicit bias* that appears in the extensive record. Under the circumstances, we find that defendant's right to be tried by an impartial jury, selected free from discrimination, was violated. We therefore reverse his conviction and remand for a new trial."

IV. Review Multiple Errors Together as a Miscarriage of Justice: Holistic Review of the Evidence

❖ **A holistic review of the evidence standard in post-conviction litigation empowers a judge to consider all claims and all evidence together, including race and gender bias, acknowledging how individual factors in a case influence each other, and moving beyond the individual claim and harmless error standard.**

Even after discovering evidentiary errors, *barriers to post-conviction relief* persist. These barriers include individual error review, harmless error, and the prohibition against raising successive claims (multiple errors are often discovered sequentially rather than at the same time). Taken singly, one by one, each error may be insufficient to meet the burden on the client to reverse the conviction. *Courts often simply refuse to consider the entirety of the errors* that were committed, and the result is denial of relief.

Holistic review of the evidence empowers a judge to *consider the law, facts, and surrounding circumstances in a case* and to *declare a conviction, or a sentence, unjust.* A holistic review of the evidence standard can also be called *confluence of factors, evidence as a whole, and cumulative error.*

❖ **Under the Massachusetts <u>confluence of factors</u> review, a motion judge looks beyond the individual grounds for post-conviction relief to assess whether, in light of the record as a whole, a number of factors acting together create a "substantial risk of a miscarriage of justice."**

The confluence of factors approach to post-conviction review means that when a defendant files a motion for a new trial (the standard process in Massachusetts), *the court holistically looks at trial errors and evidence as a flexible confluence of factors, to determine whether a conviction was wrongful and whether justice may not have been done, instead of haphazardly reviewing individual errors.*[20]

The court can examine and rule based on the aggregate influence of many errors, from investigation, through trial, to post-conviction. The approach accounts for forensic and investigative errors, and a *cascade where one error infects the rest of the evidence,* leading to other errors. These errors can affect the overarching investigative process, and can affirm confirmation bias — where prosecutors and police only take into account evidence that supports their case.[21]

❖ **High courts in 27 states and the District of Columbia actively recognize the doctrine of <u>cumulative error</u> and have used the doctrine to reverse convictions and overcome the "harmless error" standard; high courts in eight states have accepted cumulative error as a doctrine but not yet reversed a conviction based on it.**

High courts in 32 states and the District of Columbia recognize and accept the doctrine of cumulative error, where even if the errors *individually* are insufficient to reverse a conviction, *together* they constitute more than "harmless error."[22] These states are split on whether they have yet applied the doctrine to reverse a conviction, and whether the doctrine is used on direct appeal or post-conviction.[23]

❖ **The Second, Fifth, Eighth, Ninth, and Tenth Circuits have reversed convictions by finding that <u>cumulative error</u> may not be "harmless error," even if the errors are deemed so individually, because of their combined influence on the jury and the outcome at trial.**

Federal courts have also examined petitions for post-conviction relief, as well as cases on direct appeal, through cumulative error review. Five U.S. Courts of Appeals have actively recognized the doctrine of cumulative error and reversed a conviction on this basis;[24] three U.S. Courts of Appeals have accepted the doctrine, but not yet reversed a conviction.[25]

❖ **Some states reject *Arizona v. Youngblood*'s "bad faith" standard for a due process claim based on lost evidence, adopting instead a factors-balancing approach irrespective of whether police intentionally failed to preserve potentially exculpatory evidence.**

Within a decade of *Arizona v. Youngblood,*[26] relying on the power of Justice Stevens' concurrence as well as their own constitutions, some state courts carved out a jurisprudence rejecting *Youngblood*'s bad faith standard and articulating a state-based due process approach.[27] This approach (1) enunciates a *broader protection for due process in state constitutions* than those in the United States Constitution; and (2) sees *principles of fundamental fairness as necessary elements of due process,* that, when adjudged within the context of the entire record, find that a State's failure to preserve evidence could be favorable to the defendant. In Alabama, Alaska, Connecticut, Illinois, Massachusetts, and West Virginia, state and district courts concluded that *the good or bad faith of the police in failing to preserve potentially exculpatory evidence was not dispositive of an alleged violation of the defendant's due process rights under the applicable state constitutions,* that a balancing of factors was required to determine harm, and that the defendant's rights were, in fact, violated under this balancing approach.

V. A New Reading of the Antiterrorism and Effective Death Penalty Act (AEDPA)

❖ **The U.S. Supreme Court and AEDPA have largely restricted federal habeas relief, however AEDPA language may allow for holistic review of the evidence.**

Since the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, this critical piece of legislation — enacted before DNA exonerations data was available — overhauled federal habeas corpus procedure and imposed further roadblocks and barriers to prisoners seeking post-conviction relief.

However, one opening may be in the language of AEDPA itself, which has been interpreted to encourage a holistic review of all petitions and all evidence previously submitted in a case. Even in light of *Shinn v. Ramirez,*[28] if the evidence has been put before a state court, federal courts can review the entire record holistically, looking at the "evidence as a whole."

❖ **The Fourth and Sixth Circuits have applied AEDPA's "evidence as a whole" provision to consider all evidence from original and successive petitions together when analyzing a post-conviction case.**

AEDPA added the § 2244(b)(2)(B)(ii) and § 2255(h)(1) "evidence as a whole" standards to the controlling statutes in 1996, making it applicable in federal court to litigants in federal and state prisons.

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The standard itself was derived from pre-AEDPA Supreme Court decisions, where litigants needed to show either "cause and prejudice" or factual innocence, implicating a "fundamental miscarriage of justice."[29]

Federal courts looking at the "evidence as a whole" may consider evidence from original and successive petitions by reviewing evidence excluded at trial or submitted in prior unsuccessful post-conviction proceedings, as well as newly discovered evidence. "Simply put, the 'evidence as a whole' is exactly that: all the evidence put before the court at the time of its … evaluation."[30]

VI. Conclusion

This summation seeks to assist in efforts to help address miscarriages of justice more holistically, within a lens of seeking justice, strengthening constitutional protections for all criminal defendants, and putting the power of the courts and stakeholders nearest to the individuals and communities most directly impacted in eminent positions.

No one is an island. From listening to the words of clients regarding rogue public officials and how "rumors" could be endemic evidence of misdeeds, to working with Conviction Integrity Units, prosecutors, and public defender offices, defense attorneys must contextualize their cases and develop the most fulsome records possible prior to any post-litigation filing. Who might be doing mass exoneration work in counsel's area? What civil rights organizations have been fighting misconduct or using transparency to shine light on malfeasance? Knowing the full universe of facts and actions from all the stakeholders presents opportunities and possibilities that could help defense counsel move the needle in cases that might seem stuck in other ways (lost evidence, recalcitrant actors, jurisdictions with low tolerance or active disinterest in correcting wrongful convictions of any sort, or that have long histories of using bias as a means of legal justification). Fusing different strands of legal approaches strengthens the litigation itself by adding more legs to the chair.

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Notes

1. Samuel R. Gross et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, Nat'l Registry Exonerations, i, ii (2020), https://perma.cc/V7AR-5HAU.

2. *See Overturning Convictions — And an Era*, the Philadelphia District Attorney's Conviction Integrity Unit Report (January 2018 — June 2021), https://perma.cc/W9UE-NNNR.

3. *In re Corruption of Former Chicago Police Sergeant Ronald Watts,* Cir. Ct. of Cook County, Ill. (Cook County's first ever mass exoneration, where over 230 convictions have been overturned as a result of a decade of misconduct by disgraced former CPD Sergeant Ronald Watts and his tactical team).

4. *In re Investigation of the W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W. Va. 1993); *Commonwealth v. Cotto,* 471 Mass. 97 (2015); *Bridgeman v. Dist. Att'y for Suffolk.*, 476 Mass. 298 (2017).

5. Cato Institute, *National Police Misconduct Reporting Project Annual Report* (2010), https://perma.cc/VYM9-YAA3; *See also, generally,* Andrea Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color (2017).

6. *Statement from the Midwest Innocence Project and Morgan Pilate LLC* (Nov. 21, 2022), https://perma.cc/4QGA-2LN7.

7. Jonathan Abel, *Cop Tracing,* 107 Cornell L. Rev. 926 (2022), https://perma.cc/RC8V-MRNV.

8. Letter from Karen A. Newirth et al., (May 3, 2021), https://perma.cc/T66U-PZXK. *See also* Brooklyn DA Eric Gonzalez to Dismiss 378 Convictions That Relied on 13 Officers Who Were Later Convicted of Misconduct While on Duty, Brooklyn Dist. Att'y Off. (Sept. 7, 2022), https://perma.cc/H6XU-HP4J.

9. *People v. Hargrove*, 26 N.Y.S.3d 726 (N.Y. Sup. 2015); *People v. Harris,* 2021 IL App (1st) 182172.

10. Tex. Code Crim. Proc. Ann. Art. 11.073.

11. *Gimenez v. Ochoa*, 821 F.3d 1136, 1143–44 (9th Cir. 2016).

12. *Ex parte Henderson*, 384 S.W.3d 833 (2012).

13. *See United States v. Young*, 17 F.3d 1201, 1203–04 (9th Cir. 1994); *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988).

14. *Lee v. Glunt*, 667 F.3d 397, 407 (3d Cir. 2012).

15. Cal. Racial Justice Act of 2020, AB-256 § 2(4)(C)(1) (2021-2022).

16. *State v. Belcher*, 342 Conn. 1 (2022).

17. *State v. Andujar,* 247 N.J. 275 (2021).

18. Stenographic Transcript of Jury Selection at 49, *State v. Andujar,* 462 N.J. Super. 537 (2020) (No. A-000930-17-T1).

19. *Andujar*, 247 N.J. at 284.

20. *Com. v. Rosario*, 477 Mass. 69, 78 (Mass. 2017); *Com. v. Epps*, 474 Mass. 768 n.28 (2016).

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21. Stephanie Roberts Hartung, *The Confluence of Factors Doctrine: A Holistic Approach to Wrongful Convictions,* 51 Suffolk U. L. Rev. 369, 372-73 (2018), https://perma.cc/4GQ8-NA5Y.

22. States where defendants have actively and successfully used cumulative error to reverse a case are: Colorado (*Howard-Walker v. People*, 443 P.3d 1007 (2019)); Delaware (*Starling v. State*, 130 A.3d 316 (Del. 2015)); D.C. (*Price v. United States*, 697 A.2d 808 (D.C. 1997)); Florida (*McDuffie v. State*, 970 So.2d 312 (Fla. 2007)); Idaho (*State v. Field*, 144 Idaho 559 (2007)); Iowa (*Moore v. State*, 843 N.W.2d 477 (Iowa Ct. App. 2014)); Kansas (*State v. Smith-Parker*, 301 Kan. 132 (2014)); Kentucky (*Funk v. Commonwealth,* 842 S.W.2d 476, 483 (Ky. 1992)); Illinois (*People v. Blue*, 189 Ill. 2d 99, 104 (2000)); Maine (*State v. Linnell*, 408 A.2d 693 (Me. 1979)); Michigan (*People v. Rosales*, 160 Mich. App. 304 (1987)); Minnesota (*State v. Penkaty*, 708 N.W.2d 185 (Minn. 2006)); Mississippi (*Murray v. Gray*, 322 So.3d 451 (Miss. 2021)); Montana (*State v. Smith*, 402 Mont. 206 (2020)); Nebraska (*State v. Hill*, 2003 WL 21321179 (Neb.App 2003)); Nevada (*Valdez v. State*, 124 Nev. 97 (2008)); New Jersey (*State v. Jenewicz*, 193 N.J. 440, 473 (2008)); New Mexico (*State v. Gaytan*, No. A-1-CA-38369, 2021 WL 3422968 (N.M. Ct. App. Aug. 5, 2021)); New York (*People v. Case*, 150 A.D.3d 1634 (2017)); Ohio (*State v. Gerald*, 2014 WL 4177102 (Ohio App. 4 Dist. 2014)); Oklahoma (*Chandler v. State*, 572 P.2d 285 (1977)); Rhode Island (*State v. Pepper*, 103 R.I. 310 (1968)); Tennessee (*Metz v. State*, No. M201900883CCAR3PC, 2021 WL 58197 (Tenn. Crim. App. Jan. 7, 2021)); Utah (*State v. Thompson*, 318 P.3d 1221 (2014)); Washington (*State v. Sick*, 114 Wash. App. 1053 (2002)); West Virginia (*State v. Smith*, 156 W. Va. 385 (1972)); Wisconsin (*State v. Thiel*, 264 Wis.2d 571 (2003)); Wyoming (*Black v. State*, 405 P.3d 1045 (Wyo. 2017)).

23. The following states recognize the cumulative error doctrine, but courts have not yet used cumulative error to overturn a conviction: Alabama (*Jones v. State*, 322 So.3d (Ala. Crim. App. 2019)); Alaska (*Fryberger v. State*, No. A-13443, 2022 WL 14761853, (Alaska Ct. App. Oct. 26, 2022)); California (*People v. Gordon*, No. F080257, 2022 WL 17073667 (Cal. Ct. App. Nov. 18, 2022)); Georgia (*State v. Lane*, 308 Ga. 10 (2020)); Hawai'i (*State v. Kahalewai*, 55 Haw. 127 (1973)); North Carolina (*State v. Allen*, 2021-NCSC-88, 378 N.C. 286 (2021)); South Carolina (*State v. Daise*, 421 S.C. 442 (Ct. App. 2017)); Texas (*Quintanilla v. State*, No. 13-18-00162-CR, 2019 WL 3953099 (Tex. App. Aug. 22, 2019)).

24. Circuits that have actively and successfully used cumulative error to reverse a case are: 2nd (*United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008)); 5th (*United States v. Houston*, 481 F. App'x 188 (5th Cir. 2012)); 8th (*United States v. Miller*, 621 F.3d 723 (8th Cir. 2010)); 9th (*United States v. Devlin*, 13 F.3d 1361 (9th Cir. 1994)); 10th (*Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003)).

25. The following circuits recognize the cumulative error but have not yet used cumulative error to overturn a conviction: 3rd (*Marshall v. Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002)); 4th (*United States v. Basham*, 561 F.3d 302 (4th Cir. 2009)); 7th (*United States v. Moore*, 641 F.3d 812 (7th Cir. 2011)); 11th (*United States v. Chalker*, 966 F.3d 1177 (11th Cir. 2020)).

26. *Arizona v. Youngblood,* 488 U.S. 51 (1988).

27. *See Gurley v. State,* 639 So. 2d 557 (Ala. Crim. App. 1993); *Thorne v. Dep't of Pub. Safety*, 774 P.2d 1326 (Alaska 1989); *State v. Morales*, 232 Conn. 707 (1995); *People v. Newberry*, 166 Ill. 2d 310 (1995); *Commonwealth v. Henderson,* 411 Mass. 309 (1991); *State v. Osakalumi*, 194 W. Va. 758 (1995).

28. *Shinn v. Ramirez,* 142 S. Ct. 1718 (2022).

29. *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991).

30. *United States v. MacDonald*, 641 F.3d 596, 598 (4th Cir. 2011). *See also Clark v. Warden*, 934 F.3d 483, 496 (6th Cir. 2019), *Long v. Hooks*, 972 F.3d 442 (4th Cir. 2020). ■