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What Happens After the Right to Counsel Ends? Using Technology to Assist Petitioners in State Post-Conviction Petitions and Federal Habeas Review

Margaret Smilowitz

Northwestern Pritzker School of Law

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WHAT HAPPENS AFTER THE RIGHT TO COUNSEL ENDS? USING TECHNOLOGY TO ASSIST PETITIONERS IN STATE POST- CONVICTION PETITIONS AND FEDERAL HABEAS REVIEW

Margaret Smilowitz*

The right to counsel ends after an individual loses his direct appeal. There are, however, several opportunities for judicial review available to a prisoner, including statutory post-conviction petitions and federal habeas review. Yet state prisoners often cannot pay for counsel during their collateral review, leaving most prisoners to file pro se. Filing for collateral review is a substantively and procedurally complicated process and pro se petitioners have little guidance. The Supreme Court's jurisprudence on prisoners' access to legal research and knowledge is unclear—prisoners must have meaningful access to court but prisons are not required to provide law libraries or legal assistance. Although other opportunities for legal advice are available—such as jailhouse attorneys, pro bono clinics, and information packets—they generally fail to provide enough assistance for pro se petitioners to meaningfully seek collateral review. Without legal assistance, pro se petitioners file procedurally defaulted claims, which back up state court and federal district court dockets. This Comment proposes that state prison systems provide a computer program for state prisoners who lose their direct appeals. The program would provide the prisoners with detailed assistance to make their way through collateral review. Petitions that are well-pled will better serve the constitutional right to habeas review and will promote judicial economy.

* J.D., Northwestern Pritzker School of Law, 2016; B.A., University of Virginia, 2010. Thanks to my friend, Brian Cox, who was a big help during this publication and who never stops advocating for people who live with fewer rights.

TABLE OF CONTENTS

INTRODUCTION.....	494
I. THE GREAT WRIT CONFINED BY STATE COURT PROCEEDINGS	498
II. THE LIMITS OF “MEANINGFUL ACCESS”	504
III. EXISTING METHODS OF LEGAL ADVICE AVAILABLE TO PRO SE	
POST-CONVICTION PETITIONERS	509
A. Legal Aid Clinics	509
B. The Jailhouse Lawyer.....	511
C. Form Packets	512
IV. A COMPUTER PROGRAM COULD PROVIDE INMATE LITIGANTS	
BETTER ACCESS TO THE COURT SYSTEM	514
A. Design Benefits of the Computer Program	514
B. Substantive Information Supplied by the Program.....	516
C. Potential Problems in Implementing the Computer Program...	517
D. The Computer Program Is an Improvement over Existing Options, and Helps Ensure Meaningful Access to the Courts.....	518
CONCLUSION.....	519

INTRODUCTION

In the criminal system, the amount of legal advice available to indigent defendants functions as a steep cliff—there is a constitutional right to counsel at the trial and direct appeals stages but not to other forms of collateral relief.¹ Once a state prisoner loses her direct appeal, state and federal law provide judicial review of the appellate court’s judgment, including discretionary review by a state supreme court, application for a writ of certiorari to the United States Supreme Court, federal habeas corpus, and state post-conviction proceedings.² The Sixth Amendment right to counsel, however, does not require the state to appoint an attorney for these types of collateral

¹ Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for A Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1224 (2012).

² See *id.* at 1225 (citing *Ross v. Moffitt*, 417 U.S. 600, 610–11 (1974)); see also *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (finding “[t]here is no constitutional right to an attorney in state post-conviction proceedings.”); see also Sarah L. Thomas, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1140 (2005) (explaining “[t]he U.S. Supreme Court and most state supreme courts do not require that counsel be provided as a matter of constitutional right to indigent petitioners in habeas corpus cases”).

relief.³ Thus, when state prisoners who cannot afford private counsel challenge their custody, they must file their claims pro se.⁴

A state prisoner seeking relief from a judgment by a court of appeals must begin with state post-conviction proceedings.⁵ State post-conviction proceedings are frequently procedurally complex so “that even seasoned post-conviction litigators can have difficulties navigating through them.”⁶ Understanding state post-conviction processes is further complicated by the fact that each state has its own rules for post-conviction proceedings.⁷

The procedural complexity of state collateral proceedings impacts the claims a federal court will hear on a petition for habeas corpus.⁸ In order for a prisoner in state custody to have his claims heard by a federal court, the petition must only plead violations of constitutional, federal, or treaty law,⁹ and the claims must have already been raised in a petition to the highest state court.¹⁰ A claim alleging a violation of a federal law that was dismissed by a state court because of state procedural rules may not be addressed on the merits by a federal court.¹¹ The only exception to this prohibition is if a petitioner can show cause, prejudice, some indication that

³ *Ross*, 417 U.S. at 600 (holding that there is no constitutional right to counsel in discretionary review by a state supreme court or for writs of certiorari to the United States Supreme Court); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (no constitutional right to counsel in state post-conviction proceedings); *Murray v. Giarratano*, 492 U.S. 1 (1989) (no constitutional right to counsel in state post-conviction proceedings for capital cases).

⁴ A pro se plaintiff is a plaintiff that is without counsel and is representing himself in the legal proceedings.

⁵ 28 U.S.C. § 2254 (2014). See, e.g., Emily Garcia Uhrig, *A Case for A Constitutional Right to Counseling Habeas Corpus*, 60 HASTINGS L.J. 541, 576 (2009).

⁶ Aaron G. McCollough, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 377 (2005).

⁷ See *Carey v. Saffold*, 536 U.S. 214, 219 (2002) (“In most States, relevant state law sets forth some version of the following collateral review procedures. First, the prisoner files a petition in a state court of first instance, typically a trial court. Second, a petitioner seeking to appeal from the trial court’s judgment must file a notice of appeal Third, a petitioner seeking further review of an appellate court’s judgment must file a further notice of appeal to the state supreme court” (citations omitted)). For a survey of post-conviction remedies across the states, see DONALD E. WILKES, JR., *STATE POST-CONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS* (2009).

⁸ See, e.g., M. Shanara Gilbert, *Racism and Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice*, 18 N.Y.U. REV. L. & SOC. CHANGE 51, 70 (1991).

⁹ 28 U.S.C. § 2254(a) (2015).

¹⁰ See 28 U.S.C. § 2254(b)(1) (2006); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995); *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982); *Young v. Ragen*, 337 U.S. 235, 238–39 (1949).

¹¹ *Harris v. Reed*, 489 U.S. 255, 261 (1989).

she is “actually innocent,” or “a ‘fundamental miscarriage of justice.’”¹² The narrow exception means that a petitioner may have potentially valid claims of constitutional violations that are dismissed for procedural default before a federal court can reach the merits.¹³

Dockets are burdened and time is wasted as courts adjudicate claims on procedural missteps, rather than on the merits.¹⁴ Adequate legal representation for pro se petitioners would mitigate the number of claims dismissed on procedural grounds, but it is unlikely that the Court will extend the right to counsel for collateral review.¹⁵ Because the right to be represented by a lawyer in collateral proceedings is unlikely, a way to allow federal courts to spend more time reviewing the substance of habeas claims is to inform pro se petitioners of how to navigate the procedural complications. Providing pro se petitioners with basic legal advice will promote judicial efficiency and better serve the constitutional protections honored by the right to habeas corpus.

This Comment proposes that state prison systems make a computer program available to pro se petitioners when they lose their direct appeal.¹⁶ The computer program should provide inmates with information on the process of collateral review as well as provide information on procedural requirements and relevant legal precedent. The goal of this Comment is not

¹² *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

¹³ Jonah Wexler, Note, *Fair Presentation and Exhaustion: The Search for Identical Standards*, 31 CARDOZO L. REV. 581, 584 (2009) (“Pro se petitioners are often the victims of this procedural bar as their lack of education and legal training frequently results in confused, legally imprecise, handwritten claims.”); see also *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (“The exhaustion doctrine is principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings.”); *Duncan v. Walker*, 533 U.S. 167, 192 (2001) (Stevens, J., concurring) (“Federal courts, understanding that dismissal for nonexhaustion may mean the loss of any opportunity for federal habeas review, may tend to read ambiguous earlier state-court proceedings as having adequately exhausted a federal petition’s current claims. For similar reasons, wherever possible, they may reach the merits of a federal petition’s claims without sending the petitioner back to state court for exhaustion.”); Aziz Z. Huq, 81 U. CHI. L. REV. 519, 519 (2014) (“Scholars of all stripes condemn habeas as an empty ‘charade’ lacking ‘coherent form.’”).

¹⁴ Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887, 887 (2012) (explaining that “federal judges continue to waste countless hours reviewing habeas petitions only to dismiss the vast majority of them on procedural grounds”).

¹⁵ See *Martinez v. Schriro*, 623 F.3d 731, 736 (9th Cir. 2010) (“The Supreme Court has never recognized a federal constitutional right to the assistance of counsel in collateral review proceedings.”).

¹⁶ See 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, 194 (2011) (explaining “the right to counsel ends on direct appeal”).

to write a blueprint for how a state might implement the program. Instead, this Comment seeks to draw attention to one way that computer technology could provide more and better legal information to inmates who lack other resources.

The program developed by Illinois Legal Aid Online (ILAO) provides a useful starting point.¹⁷ Although the ILAO program was developed for civil pro se litigants who are not in custody, a similar version could be developed for state and federal post-conviction petitions. ILAO's program is a useful model because it has a multimedia interface that guides pro se litigants through a variety of legal issues involved in filing a claim.¹⁸

Like ILAO's program, a computer program created for post-convictions filings would need to explain procedural information as well as provide an overview of claims available to inmates through a post-conviction appeal. The goal of the program would be to make judicial review of habeas petitions more meaningful by informing petitioners of the procedural process of both state post-conviction review and federal habeas review. If pro se petitioners are informed of the procedural requirements as well as the basic law relating to their case, the petitions that reach a federal judge can be reviewed on the merits. Without this basic legal information, many pro se petitioners' claims are procedurally defaulted. Although many of these claims are unreviewable on the merits, they still expend substantial government resources¹⁹—the state must still respond and a judge must still issue a decision on a procedurally invalid claim. Federal habeas claims will be better supported if inmates have access to legal resources at the crucial stage when they lose access to counsel.

To explain why this computer program is needed and is better than existing options of legal advice to pro se petitioners, Part I provides a brief history of the writ of habeas corpus and explains the writ's intimate connection with state post-conviction review, focusing on the procedural requirements of filing a habeas petition. Part II examines the limitations on the

¹⁷ Illinois Aid Online, <http://www.illinoislegalaidonline.org> (visited February 7, 2015).

¹⁸ See *Get Legal Help*, Illinois Legal Aid Online, http://www.illinoislegalaid.org/?_ga=1.180054701.848152227.1422755097 (visited February 4, 2015).

¹⁹ "In the district courts, 6.77 percent of cases filed in the year ending September 30, 2012, sought noncapital postconviction relief. At the Supreme Court, habeas also consumes a surprisingly large share of judicial bandwidth. In October Term (O.T.) 2012, 8 percent of the Court's merits docket concerned habeas. In O.T. 2011, it was 20 percent; in O.T. 2010, 10 percent." Huq, *supra* note 13, at 520–21. For a comprehensive analysis of the tremendous effect that habeas corpus petitions have on federal dockets, see Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009).

right to counsel. Part III surveys existing methods of providing legal advice without counsel and addresses the problems with these methods in providing advice for post-conviction petitioners. Part IV explains why a computer program is the best option for pro se inmates seeking collateral review, using Illinois law as an example. Although the details of post-conviction processes vary by state, specific requirements for filing a post-conviction petition in Illinois will be addressed to show how a computer program could be designed to aid pro se petitioners as they interact with the rules in their jurisdiction.

I. THE GREAT WRIT CONFINED BY STATE COURT PROCEEDINGS

The right to petition for a writ of habeas corpus has existed since the time of the Magna Carta.²⁰ The writ was included in the Constitution's Bill of Rights to provide a procedure for "securing to the petitioners their constitutional rights."²¹ The Supreme Court "has steadfastly insisted that 'there is no higher duty than to maintain [the writ] unimpaired.'"²² The core purpose of the writ is to ensure "freedom from unlawful restraint," which is a "fundamental precept of liberty."²³

The writ does not exist to determine whether the petitioner is factually guilty or innocent of the crime committed.²⁴ Instead, the writ calls for a reviewing court to determine if the petitioner was provided due process.²⁵ It is especially important for state convictions to receive a second look because of the pervasive budget cuts affecting state justice systems.²⁶ Judges, prosecutors and public defenders must grapple with an increasing number of cases with fewer resources to adequately investigate, litigate and decide those claims—leading to a greater propensity for unconstitutional convictions.²⁷

Despite the tremendous constitutional importance of the writ, an overwhelming majority—ninety three percent—of federal habeas petitioners file

²⁰ Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 3 (2009).

²¹ *Id.* (quoting *Moore v. Dempsey*, 261 U.S. 86, 91 (1923)).

²² *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)).

²³ Adelman, *supra* note 20 at 4 (quoting *Boumediene v. Bush*, 553 U.S. 723, 739 (2008)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1222–23 (2011).

²⁷ *Id.*

their petitions pro se.²⁸ These petitioners lack even basic legal advice.²⁹ Their claims, as a result, are frequently haphazard, handwritten complaints that have a very small chance of success.³⁰ Petitioners with counsel are fifteen times more likely to receive post-conviction relief.³¹ This is partially due to the fact that a pro se petitioner must rely on the inadequate research and informational materials available in prison to file a petition.³² Additionally, pro se petitioners are further disadvantaged because of the extremely high rates of illiteracy amongst prisoners and financial restrictions that exist for the incarcerated.³³

Lack of access to legal advice is particularly troublesome, not just because of the constitutional importance of the writ but also because the process of filing habeas petitions is notoriously riddled with procedural requirements.³⁴ Even in litigation less burdened with procedure than habeas,

²⁸ Bureau of Justice Statistics, U.S. Dep't of Justice Off. of Justice Programs, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 13–14 (1995), available at <http://bjs.gov/content/pub/pdf/FHCRSCC.PDF>.

²⁹ See Julie B. Nobel, Note, *Ensuring Meaningful Jailhouse Legal Assistance: The Need for A Jailhouse Lawyer-Inmate Privilege*, 18 CARDOZO L. REV. 1569, 1576–77 (1997) (finding that for pro se habeas petitioners “the resources available to ensure that their habeas corpus or civil rights claims are heard in court are very limited”).

³⁰ “[Although] inmates regularly make use of their right to petition for habeas corpus relief, less than two-fifths of one percent of those petitions receive any type of relief, and that relief often is a new trial or sentence that results in the inmate’s return to prison.” Martin, *supra* note 26, at 1222.

³¹ Alice McGill, *Murray v. Giarratano: Right to Counsel in Postconviction Proceedings in Death Penalty Cases*, 18 HASTINGS CONST. L.Q. 211, 234 (1990).

³² See, e.g., Ken Strutin, *Litigating From The Prison Of The Mind: A Cognitive Right To Post-Conviction Counsel*, 14 Cardozo Pub. L. Pol’y & Ethics J. 343, 353. “Imagine first being convicted of a serious felony and sentenced to decades behind bars. Then, envision being represented by someone who never went to law school, never learned how to do legal research, is unable to perform any factual investigation or consult with an expert, possesses no telephone, computer or Internet, and spends her time fending off violent attacks from every direction while suffering from untreated psychological and medical illnesses. That someone is the everyman and everywoman behind bars. They prepare their cases while locked in a noisy, cramped room with poor lighting, without Westlaw, Lexis, or the Internet, using an undernourished library of outdated dilapidated books and without the guidance of legal counsel.” *Id.*

³³ See Jessica Feerman, “*The Power of the Pen*”: *Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 367–70 (2006).

³⁴ See Jennifer Gwynne Case, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 675–76 (2008); see also Jude Obasi Nkama, *The Great Writ Encumbered by Great Limitations: Is the Third Circuit’s Notice Requirement for Habeas Relief A Structural Bias Against “Persons in Custody?”*, 26 SETON HALL LEGIS. J. 181, 183–85 (2001).

“pro se litigants often lose on procedural technicalities, not on the merits of their cases.”³⁵

One reason for the intricate procedural requirements is the deference federal courts give to state court proceedings.³⁶ Barring an incredible exception,³⁷ a federal habeas petitioner must meet two major procedural requirements. First, for a federal court to review a habeas claim from a state prisoner, the petitioner must exhaust all of her state court remedies.³⁸ Second, in order for a federal court to reach a claim on the merits, the petitioner must have raised the issue in one complete round of direct or post-conviction review at the state level.³⁹ These requirements mean the substance of a federal habeas petition is determined by what is pleaded in state post-conviction proceedings. The lack of legal advice available to prisoners at the state post-conviction stage has a tremendous influence on the quality of habeas petitions filed each year.

Beyond the right to a direct appeal, state prisoners have the option of pursuing a post-conviction appeal. Post-conviction review gives prisoners the chance to have the facts of their cases reviewed—facts that are not reviewed by a court on direct appeal.⁴⁰ The Supreme Court has explained that

³⁵ Candice K. Lee, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1264 (2003).

³⁶ See 28 U.S.C. § 2254(d) (2014) (Relief is not appropriate “unless the [state court’s] adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”).

³⁷ See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To overcome a procedural default, the petitioner must show: (1) “cause for the default and actual prejudice as a result of the alleged violation of federal law” or (2) that the default “will result in a fundamental miscarriage of justice.” *Id.* “To exhaust, the petitioner must present the substance of his federal claim to the state courts. Mere similarity between claims is not sufficient to exhaust. Thus, for example, a habeas petitioner cannot raise a claim alleging error under state law in state court, but then seek to frame the issue in federal court as a violation of due process under the Fourteenth Amendment. Similarly, a petitioner does not exhaust state remedies by appealing generally to a broad constitutional provision. Rather, he must reference the specific constitutional provision at issue and the facts that entitle him to relief. In so doing, a petitioner may provide additional facts to support a claim under §2254 as long as those facts do not fundamentally alter the legal claim presented to the state courts.” Uhrig, *supra* note 5, at 576–77.

³⁸ See 28 U.S.C. § 2254(b)(1)(A) (“[A]n application for writ of habeas corpus . . . pursuant to the judgment of a state court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the state.”).

³⁹ *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (holding that a federal district court may not overturn a “state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance”); see also 28 U.S.C. § 2254.

⁴⁰ James Liebman et al., *A Broken System: Error Rates In Capital Cases* (unpublished

states are not constitutionally required to have post-conviction appeals.⁴¹ Congress, however, has incentivized states to offer post-conviction review: federal habeas law says that federal courts will review claims from a state prisoner with greater deference to the state court decisions if, by the time the claims reach a federal court, a state court had reviewed the claims in a post-conviction appeal.⁴²

The intricate relationship between state post-convictions and federal habeas review is further complicated by the Antiterrorism and Effective Death Penalty Act (AEDPA).⁴³ Scholars have noted that the AEDPA made it more difficult for federal courts to grant habeas relief.⁴⁴ With the AEDPA Congress intended “to reduce the abuse of habeas corpus that results from delayed and repetitive filings.”⁴⁵ To curtail the use of federal habeas claims, the AEDPA instituted a one-year statute of limitations, with tolling exceptions.⁴⁶ The tolling process of the AEDPA, however, is exceedingly complicated.⁴⁷

To give an example of how some of the AEDPA tolling provisions work: the AEDPA’s yearlong statute of limitations will toll while “a proper-

study) (on file at Columbia Law School).

⁴¹ *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (“State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.”).

⁴² See *Liebman et al.*, *supra* note 40, at n.108 (explaining that 28 U.S.C. §§ 2254(d) & 2254(e)(1) “provid[e] a laxer standard of review for certain kinds of claims that were ‘adjudicated on the merits’ in state court proceeding”). Accordingly, all states now provide post-conviction petitions. *Id.*

⁴³ See *McCullough*, *supra* note 6 at 376–80 (explaining the difficulties posed by the AEDPA’s one-year statute of limitation for habeas petitions); see also *Adelman*, *supra* note 20, at 15–20 (pointing out numerous difficulties defendants face under the AEDPA). See generally JAMES S. LIEBMAN & RANDY HERTZ, 1 FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE 343 (6th ed. 2011).

⁴⁴ See *Adelman*, *supra* note 20, at 20; Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473, 475 (2013); see also *Feierman*, *supra* note 33, at 379.

⁴⁵ *McCullough*, *supra* note 6, at 375 n.62 (quoting H.R. REP. NO. 104-23, at 9 (1995)) (“[T]he bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings.”). See also Anthony Roby, *Taking A Heavy Toll: The Constitutional Implications of Prohibiting Equitable Tolling in Cases of Actual Innocence*, 89 U. DET. MERCY L. REV. 81, 83 (2011) (citing H.R. REP. NO. 104-518, at 111 (1996)).

⁴⁶ 28 U.S.C. § 2244(d)(1) (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”). “In *McQuiggin v. Perkins*, the Supreme Court created an exception to a statutory barrier — a statute of limitations — for the actually innocent.” *Leading Cases, Antiterrorism and Effective Death Penalty Act of 1996 — Actual Innocence Gateway — McQuiggin v. Perkins*, 127 HARV. L. REV. 318, 318 (2013).

⁴⁷ See *McCullough*, *supra* note 6, at 377–78 (explaining the tolling process).

ly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending” before a state court.⁴⁸ Pursuant to the AEDPA tolling provisions, a post-conviction petitioner whose complaint was properly filed will have around a year⁴⁹ after exhausting his state court collateral remedies to file a habeas petition.⁵⁰ If, however, the state court reviewing a post-conviction application determines that the application was deficient during the time the application was awaiting review, the AEDPA statute of limitations will run at the time the application was initially filed with the state court.⁵¹

Thus, the AEDPA tolling provisions could prevent a petitioner’s federal habeas petition from ever being reviewed by a federal court if the petitioner fails to properly file an application for post-conviction review with a state court.⁵² State post-conviction procedures are “[b]ewildering” and often contain “unclear filing requirements [which] often lead to defendants filing improper state applications.”⁵³ The AEDPA’s statute of limitations frequently expires “as defendants await resolution of their improper state claims before attempting to file federal petitions.”⁵⁴ Similar to federal habeas petitions, there is no constitutional right to counsel for state post-conviction petitioners,⁵⁵ and the majority of state post-conviction petitions are filed *pro se*.⁵⁶ And like federal habeas petitions, state post-conviction petitioners who are represented by counsel are more likely to be successful than those filing *pro se*.⁵⁷

⁴⁸ 28 U.S.C. § 2244(d)(2). There is ambiguity in what “properly filed” or “collateral review” means, and whether it can include a federal habeas petition. *See Uhrig, supra* note 1, at 1236–38 (analyzing the possible meanings of “properly filed” and “collateral review”).

⁴⁹ The actual triggering event for when the AEDPA statute of limitations begins to run again is complicated and jurisdiction dependent. *See Uhrig, supra* note 1, at 1230–32 (pointing out the ambiguities of determining when tolling begins).

⁵⁰ *Id.* at 1235.

⁵¹ *Id.* at 1236–37.

⁵² *Id.* at 1237–38.

⁵³ *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 184 n.2 (2001) (Stevens, J., concurring) (“The question whether a claim has been exhausted can often be a difficult one, not just for prisoners unschooled in the immense complexities of federal habeas corpus law.”)).

⁵⁴ *See McCollough, supra* note 6, at 378.

⁵⁵ *Pennsylvania v. Finley*, 481 U.S. 551, 554–55 (1987) (noting precedent “establish[es] that the right to appointed counsel extends to the first appeal of right, and no further”).

⁵⁶ Barbara E. Bergman, *Great Writ Endangered*, THE CHAMPION, September/October 2005, at 4; *see also* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 35–36 n.22 (2003).

⁵⁷ Ronald F. Wright & Marc Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 670 (1986).

The effect that state procedural requirements have on federal dockets is further compounded by the tremendous number of habeas claims filed each year—nearly 20,000 non-capital habeas petitions and 400 capital habeas petitions filed in U.S. district courts.⁵⁸ These petitions make up a large percentage of the cases on federal district court dockets, nearly seven percent.⁵⁹ Yet procedural defaults do not stop federal courts from having to expend resources on claims.⁶⁰ The courts simply cannot reach those claims on the merits. In fact, a study conducted in 2009 found one out of every fourteen civil cases filed in federal district court was a habeas challenge from a state prisoner.⁶¹ Moreover, each federal habeas case “average[s] eighteen docket entries per case.”⁶² Thus it is not just the volume of federal habeas claims that are impacting federal dockets but the duration of each individual habeas case.

The extra procedures do not mean that courts and government attorneys can quickly dismiss deficient petitions. Resources and time are spent litigating the outcome of various procedural rules and the applicability of exceptions to those rules without ever reaching the merits of a claim. This process wastes government resources.⁶³ Furthermore, the right to petition for habeas corpus is a valuable protection of the legal system because it is the final safeguard against wrongful imprisonment. However, the purpose of the writ seems far removed when petitioners are not able to access justice because their claims are procedurally deficient and federal courts are not

⁵⁸ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, Mar. 31, 2004, Table C-2, available at <http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf>; see also Scott J. Shackelford, *Habeas Corpus Writ of Liberty*, Boumediene and Beyond, 57 CLEV. ST. L. REV. 671 (2009), available at <http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1121&context=clevstlrev> (last visited Nov. 23, 2014). “Given that many state prisoners must proceed *pro se* because they do not have attorneys to assist them with their postconviction petitions, it is not surprising that the technical requirements of *habeas* practice already often preclude a meaningful review of many state claims.” Bergman, *supra* note 56, at 4.

⁵⁹ Huq, *supra* note 13, at 520–21 (“In the district courts, 6.77 percent of cases filed in the year ending September 30, 2012, sought noncapital post-conviction relief.[] At the Supreme Court, habeas also consumes a surprisingly large share of judicial bandwidth. In October Term (O.T.) 2012, 8 percent of the Court’s merits docket concerned habeas.[] In O.T. 2011, it was 20 percent; in O.T. 2010, 10 percent.”) For a comprehensive analysis of the tremendous effect that habeas corpus petitions have on federal dockets, see Hoffmann & King, *supra* note 19.

⁶⁰ Hoffmann & King, *supra* note 19, at 816.

⁶¹ *Id.* at 815.

⁶² *Id.*

⁶³ See *id.* At 816 (“Addressing the procedural and substantive questions raised in these petitions takes not only the time of the district and circuit judges and their clerks but in many districts the time of magistrate judges, their clerks, and *pro se* attorney staff as well.”).

able to address the deprivation of due process.

II. THE LIMITS OF “MEANINGFUL ACCESS”

Not only are there complicated procedural hurdles for a petitioner to jump through, there are very little legal resources available to a prisoner. The minimal amount of legal advice available to prisoners filing post-conviction petitions greatly adds to the impact procedural hurdles have on the post-conviction process. The Supreme Court has consistently maintained that the Constitution does not provide the right to counsel for collateral review proceedings.⁶⁴ Part of the justification for this rule is because post-conviction appeals, including federal habeas corpus petitions, are considered civil claims.⁶⁵ As Chief Justice Rehnquist explained, “[p]ost-conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature.”⁶⁶ Thus, prisoners clearly are not entitled to receive legal advice on their appeals from appointed counsel.

But what about legal advice that does not involve the appointment of counsel? There is a line of Supreme Court precedent that addresses the rights of prisoners to have the resources available to litigate their claims—termed “meaningful access” to the courts.⁶⁷ The Supreme Court first interpreted the right of access in 1941 with its decision in *Ex Parte Hull* when the Court held that “the state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus.”⁶⁸ Almost thirty years later the Court again addressed the issue of an inmate’s right to the court system in *Johnson v. Avery*.⁶⁹ In *Johnson*, the Court

⁶⁴ See *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (finding “[t]here is no constitutional right to an attorney in state post-conviction proceedings.”); see also Sarah L. Thomas, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1140 (2005) (explaining “[t]he U.S. Supreme Court and most state supreme courts do not require that counsel be provided as a matter of constitutional right to indigent petitioners in habeas corpus cases.”).

⁶⁵ Thomas, *supra* note 2, at 1140.

⁶⁶ *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987). In capital cases, however, where a petitioner is filing for federal habeas, the petitioner is entitled to counsel. See 28 U.S.C. §§ 2261–2266.

⁶⁷ See e.g., *Bounds v. Smith*, 430 U.S. 817, 820 (1977); *Lewis v. Casey*, 518 U.S. 343 (1996).

⁶⁸ 312 U.S. 546, 549 (1941); see also Josephine R. Potuto, “*The Right of Prisoner Access: Does Bounds Have Bounds?*,” 53 IND. L.J. (1977) (explaining *Hull* as the beginning of the “right of access by prisoners to the federal courts.”)

⁶⁹ *Johnson v. Avery*, 393 U.S. 483 (1969).

struck down a state regulation preventing inmates from relying on jailhouse lawyers.⁷⁰ In its decision, the Court said “because the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.”

Since *Johnson*, there have been two major cases in the *Hull* progeny that define what is required for meaningful access. In *Bounds v. Smith*, the Court concluded that “meaningful access” meant prisoners needed access to legal resources in order to have access to courts.⁷¹ But nineteen years later, in *Lewis v. Casey*,⁷² the Court significantly narrowed and, essentially removed an “affirmative duty” to provide legal resources to prisoners.⁷³

First, in *Bounds* the Court determined that “meaningful access” included a right to legal texts.⁷⁴ The Court held that the right to access the courts must not just allow for inmates’ to file papers with the courts but must also provide for “meaningful access.”⁷⁵ In order for states to meet this obligation, “States must protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge.”⁷⁶ With this decision, the *Bounds* Court upheld the district court’s determination that the North Carolina state prison system violated an inmate’s constitutional right to access the court by having only one law library and providing no other legal assistance to inmates.⁷⁷

Justice Marshall, writing the opinion for the Court, pointed to the Court’s decision in *Ex parte Hull*,⁷⁸ and *Johnson v. Avery*.⁷⁹ Relying on this precedent, the Court dismissed the State’s argument that the state only needs to make sure that the lines of communication between the inmate and the courts are open.⁸⁰ The Court then mentioned the necessary parts of filing a potentially successful claim, including understanding procedural rules, and conducting legal research so that an inmate can successfully allege le-

⁷⁰ *Bounds*, 430 U.S. at 823 (citing *Johnson*, 393 U.S. at 489).

⁷¹ *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

⁷² *Lewis v. Casey*, 518 U.S. 343, 350 (1996).

⁷³ Joseph A. Schouten, *Not So Meaningful Anymore: Why A Law Library Is Required to Make A Prisoner’s Access to the Courts Meaningful*, 45 WM. & MARY L. REV. 1195, 1203 (2004).

⁷⁴ *Bounds*, 430 U.S. at 828.

⁷⁵ *Id.* at 828.

⁷⁶ *Bounds*, 430 U.S. at 817.

⁷⁷ *Id.* at 826–28.

⁷⁸ *Ex parte Hull*, 312 U.S. 546 (1941).

⁷⁹ *Johnson v. Avery*, 393 U.S. 483 (1969).

⁸⁰ *Id.* at 823.

gal injuries.”⁸¹ These steps to filing a meaningful claim require “prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”⁸²

After *Bounds*, the extent of the affirmative duty to provide inmates “meaningful access” to the courts was unclear.⁸³ The lower courts grappled with discerning the quantity of resources states needed to devote to inmate legal aid and what constituted a person in custody such that the state needed to provide aid.⁸⁴ Furthermore, it was unclear if law libraries actually provided inmates with the information necessary to file developed claims.⁸⁵ A district court made an emphatic comparison, explaining that providing inmates with access to legal libraries was like “furnishing medical services through books like: ‘Brain Surgery Self-Taught,’ or ‘How to Remove Your Own Appendix’”; even “the fullest law library . . . [is] a useless and meaningless gesture . . . worthy of Lewis Carroll.”⁸⁶ Another court said, in reference to *Bounds*, that “[g]iving an illiterate the run of the stacks is like giving an anorexic a free meal at a three-star restaurant.”⁸⁷ The meaningful access standard needed clarification.

So, nineteen years after *Bounds*, the Court granted certiorari to *Lewis v. Casey*.⁸⁸ The concerns voiced over *Bounds*’ opacity resonated with the Supreme Court. In oral arguments, several justices made clear their dissatisfaction with the right to legal text resources that *Bounds* recognized. Justice Souter said “[w]e’re placing books in front of someone who cannot read them, and we’re placing legal helpers in front of someone who cannot communicate with them. That seems utterly senseless.”⁸⁹ Justice Kennedy also pointed out that instead of law libraries “there might be much better, more efficient ways in which to provide prisoners some [legal] assistance.”⁹⁰ Justice Kennedy further explained that only one percent of in-

⁸¹ *Id.* at 825.

⁸² *Id.* at 828.

⁸³ Karen Westwood, “*Meaningful Access to the Courts*” and Law Libraries: *Where Are We Now?*, 90 LAW LIBR. J. 193, 194–95 (1998).

⁸⁴ *Id.*

⁸⁵ Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1175 (2013) (discussing how legal resources are not an adequate substitute for legal services).

⁸⁶ *Id.* at 1176 (quoting *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982)).

⁸⁷ *DeMallory v. Cullen*, 855 F.2d 442, 451 (7th Cir. 1988) (Easterbrook, J., dissenting).

⁸⁸ See Westwood, *supra* note 83.

⁸⁹ Transcript of Oral Argument at *4, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), 1995 U.S. Trans. LEXIS 130.

⁹⁰ *Id.* at *8.

mates' law suits succeed, implying that the *Bounds* regime supported a deficient system.⁹¹ This uneasiness with the effects of *Bounds* led the Court to limit its understanding of "meaningful access to the courts."

Justice Scalia writing for the *Lewis* Court, with an eight-to-one decision, significantly restricted its holding in *Bounds* in several ways.⁹² First, an inmate has to show an actual injury as a result of being denied access to legal advice.⁹³ It is not sufficient, the Court said, just to show that his access to legal texts was somehow substandard, which could have been a sufficient *Bounds* violation.⁹⁴ Justice Scalia explained *Bounds* "did not create an abstract, free standing right to a law library or legal assistance; rather, the right that *Bounds* acknowledged was the right of access to the courts."⁹⁵ A petitioner can only meet the standing requirement if he shows his claim was dismissed from court because he was unaware of some technical requirement that he could have been aware of or could have satisfied had the prison supplied him with legal resources.⁹⁶

Second, because there is not a freestanding right to a law library, an inmate does not have an actual injury by claiming that the "prison's law library or legal assistance program is subpar in some theoretical sense."⁹⁷ This holding has effectively destroyed the law library requirement.⁹⁸

The Court further limited the "meaningful access" standard by discharging the legal precedent *Bounds* relied on. The Court mentioned there were statements in *Bounds* that "suggest[ed] that the State must enable the prisoner to discover grievances, and to litigate effectively once in court."⁹⁹ The Court said that these statements stretched the meaning of "access to the courts" beyond the precedent and thus they must be disregarded.¹⁰⁰ Meeting the "meaningful access to courts" standard does not require state prisons to assist inmates beyond the pleading stage. According to the Court, the "mostly uneducated and . . . largely illiterate prison population" does not

⁹¹ *Id.*

⁹² *Lewis v. Casey*, 518 U.S. 343 (1996); *see also* Westwood, *supra* note 83, at 195; Abel, *supra* note 85, at 1177.

⁹³ *Lewis*, 518 U.S. at 343.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Benjamin R. Dryden, Note, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PA. J. CONST. L. 819, 830 (2008) (citing *Lewis*, 518 U.S. at 351).

⁹⁷ *Lewis*, 518 U.S. at 351.

⁹⁸ Abel, *supra* note 85, at 1173; *see also* *Lewis*, 518 U.S. at 351, 353 n.4 (holding that "there is no freestanding right to a law library").

⁹⁹ *Lewis*, 518 U.S. at 354 (emphasis omitted).

¹⁰⁰ *Id.*

have a Constitutional right to “sophisticated legal capabilities.”¹⁰¹ To do otherwise would “effectively demand permanent provision of counsel,” which is not constitutionally required.¹⁰²

Finally, the Court in *Lewis* made clear that *Bounds* was restricted by the right of prisons to promulgate a regulation that encroaches on an inmate’s constitutional rights, as long as that right “is reasonably related to legitimate penological interests.”¹⁰³ Thus, even if a prisoner demonstrates an actual injury from her lack of access to the court, the prison’s actions may be justified if the state has a reasonable interest in the regulation.

The result of *Lewis* is a “strict, if not insurmountable, standard for the level of injury necessary to maintain a suit against a prison for lack of law materials.”¹⁰⁴ The states capitalized on this change in jurisprudence, and many jurisdictions quickly dismantled their law libraries.¹⁰⁵ Arizona, for example, shut down thirty of its thirty-one prison libraries, cutting the \$650,000 budget that had supported the libraries.¹⁰⁶ Many other states followed a similar path, and by and large, inmates’ claims for *Bounds* violations have been dismissed for a lack of standing.¹⁰⁷

The lack of legal knowledge—knowledge that was formally supplemented by legal libraries—is especially troublesome in the post-conviction process. Pro se petitioners are disadvantaged because of the heavy procedural requirement of post-conviction appeals. For these reasons, a solution targeted to the post-conviction process is needed. This solution could take the form of a computer program that informs inmates of the post-conviction process and provides administrative assistance and legal advice from the time indigent state prisoners lose access to counsel.

¹⁰¹ *Id.* (citing *Ex parte Hull*, 312 U.S. 546, 547–48 (1941); *Griffin v. Illinois*, 351 U.S. 12, 13–16 (1956); *Johnson v. Avery*, 393 U.S. 483, 489 (1969)).

¹⁰² *Id.*

¹⁰³ *Id.* at 361 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

¹⁰⁴ Evan R. Seamone, *Fahrenheit 451 on Cell Block D: A Bar Examination to Safeguard America’s Jailhouse Lawyers from the Post-Lewis Blaze Consuming Their Law Libraries*, 24 *YALE L. & POL’Y REV.* 91, 93 (2006); see also Margo Schlanger, *Inmate Litigation*, 116 *HARV. L. REV.* 1555, 1633 (2003) (“The result has been a marked contraction in the availability of law libraries and other legal services to prison inmates.”).

¹⁰⁵ Seamone, *supra* note 104, at 91.

¹⁰⁶ Dryden, *supra* note 96, at 829.

¹⁰⁷ *Id.* The Arizona example is particularly emblematic of the changes brought by *Lewis* from the holding in *Bounds*. Recall that the Court in *Bounds* specifically found that the one library supplied by North Carolina was constitutionally insufficient.

III. EXISTING METHODS OF LEGAL ADVICE AVAILABLE TO PRO SE POST-CONVICTION PETITIONERS

Besides direct representation by counsel, there are other existing forms of legal resources that individuals who cannot afford counsel rely on to pursue their claims.¹⁰⁸ Several programs concerning civil pro se litigation have been developed to assist indigent litigants pursue their claims in courts. One such mechanism used in civil litigation and post-conviction appeal is the form packet, a fill-in-the-blank type claim provided to litigants by various organizations to help them file claims.¹⁰⁹ Additionally, there is the jail-house attorney, a fellow inmate who commonly provides legal assistance to other inmates as they work through the post-conviction process.¹¹⁰

Each of these mechanisms provides support to the post-conviction petitioner. But modern technology offers a more effective solution. Not only is the technology available to provide a computer program, but it will be reasonably low cost to develop and distribute thanks to developments in memory storage. Due to emerging technology and significant budget deficits, a computer program that guides inmates in state prisons through the post-conviction process could provide the most economical and effective means of giving post-conviction legal advice. To better explain why a computer program should be made available, a brief survey of other methods of legal advice available and their associated limitations is provided.

A. LEGAL AID CLINICS

One option that could help inmates in the post-conviction process, often used to assist non-inmate pro se litigants, is a court-funded, bar-funded, or law school clinic.¹¹¹ Certainly, law schools provide some assistance through innocence project clinics.¹¹² While the number of these clinics is

¹⁰⁸ See, e.g., Dryden, *supra* note 96, at 829.

¹⁰⁹ See Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 119 (2002); *A Jailhouse Lawyer's Manual, Chapter 21: State Habeas Corpus: Florida, New York, and Michigan*, COLUM. HUM. RTS. L. REV. (8th ed. 2011) available at <http://www3.law.columbia.edu/hrlr/jlm/chapter-21.pdf> (visited Feb. 7, 2015).

¹¹⁰ See generally Seamone, *supra* note 104, at 94; see also *Johnson v. Avery*, 393 U.S. 483, 487 (1969).

¹¹¹ See generally Meehan Rasch, *A New Public-Interest Appellate Model: Public Counsel's Court-Based Self-Help Clinic and Pro Bono "Triage" for Indigent Pro Se Civil Litigants on Appeal*, 11 J. APP. PRAC. & PROCESS 461, 475 (2010).

¹¹² In 2013, there were sixty-three law school clinics around the county that provided assistance in the post-conviction process for inmates claiming actual innocence. Stephanie Roberts Hartung, *Legal Education in the Age of Innocence: Integrating Wrongful Conviction Advocacy into the Legal Writing Curriculum*, 22 B.U. PUB. INT. L.J. 129, 138 (2013). Hartung provides a complete list of these clinics at footnote 47 of her article.

rapidly growing,¹¹³ the number of claims they can address is naturally limited.¹¹⁴ Furthermore, the vast majority of clinics are concerned with the innocence of the petitioner, not necessarily the mere fact that the petitioner's constitutional rights have been implicated by a lack of due process.¹¹⁵ Law school innocence clinics, therefore, are not a tenable solution to providing legal assistance to pro se petitioners seeking post-conviction relief, because the clinics often look past claims alleging due process violations.¹¹⁶

Alternatively, there is also the option of a court-funded or bar-funded clinic available through the court or prison system. A number of jurisdictions use these types of clinics to provide legal assistance to civil pro se litigants.¹¹⁷ The clinics can either provide direct representation to litigants or supply them with basic counseling on how to file their claims and information on the procedural process.¹¹⁸ The clinics are run by pro bono attorneys, paralegals, law students, and court staff.¹¹⁹ They often assist pro se litigants by offering informational sessions on certain issues.¹²⁰

While this approach seems fairly tailored to the needs of post-conviction petitioners because clinics offer expert legal advice on a specific topic, this advice comes at a significant financial cost.¹²¹ Many jurisdictions have a difficult time funding the clinics,¹²² let alone providing traveling legal assistance and resources to inmates in prison.¹²³ Likewise, public interest lawyers rarely pursue prisoners' civil rights claims.¹²⁴ There is also the issue of continued legal assistance. Pro se petitioners do not just need help at the initial filing stage but need guidance throughout collateral re-

¹¹³ *Id.* at 139.

¹¹⁴ *See id.* ("Of these sixty-three clinics, fifty of them focus exclusively on actual innocence claims in the post-conviction context, while the remaining thirteen clinics handle criminal appeals and post-conviction relief more broadly, and may handle cases regardless of factual innocence.").

¹¹⁵ *Id.*

¹¹⁶ *See id.*

¹¹⁷ Rasch, *supra* note 111, at 462.

¹¹⁸ Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 21 (1998).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Buxton, *supra* note 109, at 117.

¹²² *Id.*

¹²³ *See* John Matosky, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295, 308 (1998) (finding that "[i]ncarceration effectively prevents an inmate from accessing legal aid services that would be available to him if he was not in prison").

¹²⁴ *Id.*

view—if they are not immediately successful—from their first post-conviction appeal to their petition for federal habeas corpus. Additionally, because they are in custody, inmates are physically isolated from counsel—which further limits their ability to rely on help from attorneys.

B. THE JAILHOUSE LAWYER

Because of these tremendous obstacles for obtaining legal counsel, many inmates receive legal advice from other inmates.¹²⁵ The inmates who provide advice are often dubbed “jailhouse lawyers.”¹²⁶ Definitions for jailhouse lawyers range from inmates that other inmates contact for informal advice to relationships that more resemble an attorney-client relationship—where the jailhouse lawyer assists the inmate-litigant at each step in his case.¹²⁷ Jailhouse lawyers, in all capacities, provide legal advice for fellow inmates’ civil claims but also frequently provide advice in the post-conviction context.¹²⁸ Jailhouse lawyers are frequently dubbed “writ-writers” because of the important role they play in the post-conviction processes of other inmates.¹²⁹

In *Johnson v. Avery*, the Supreme Court recognized the important role jailhouse lawyers play in litigating an inmate’s claims.¹³⁰ The Court explained, “[f]or all practical purposes, if such prisoners cannot have the assistance of a ‘jailhouse lawyer,’ their possibly valid constitutional claims will never be heard in any court.”¹³¹ The *Avery* Court rested this determination on the fact that many inmates are illiterate or uneducated, and the jailhouse lawyer can assist those inmates achieve their broader constitutional right to access to the courts.¹³²

A jailhouse attorney could certainly provide some procedural and basic legal information for post-conviction petitioners seeking review of their

¹²⁵ Feierman, *supra* note 33, at 371.

¹²⁶ *Id.*

¹²⁷ *Id.* (citing Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 192 (2004); Nobel, *supra* note 29, at 1573 n.28 (A jailhouse lawyer is a “convict who possessed or claimed to possess some knowledge of law and procedure in fields of interest to convicts and who held himself out as being ready, willing and able to write writs to the courts on behalf of other inmates of the institution” (quoting *Watts v. Brewer*, 588 F.2d 646, 647–48 (8th Cir. 1978))).

¹²⁸ *Id.*

¹²⁹ See, e.g., R. Jason Richards, *Stop! . . . Go Directly to Jail, Do Not Pass Go, and Do Not Ask for A Notary*, 31 J. MARSHALL L. REV. 879, 894 n.87 (1998).

¹³⁰ *Johnson v. Avery*, 393 U.S. 483, 487 (1969).

¹³¹ *Id.* (quoting *Johnson v. Avery*, 252 F. Supp. 783, 784 (M.D. Tenn. 1966), rev’d, 382 F.2d 353 (6th Cir. 1967), rev’d, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969)).

¹³² *Avery*, 393 U.S. at 487–88.

conviction by a higher court. However, the role of the jailhouse lawyer is limited. Jailhouse lawyers are unregulated and are often without formal training and legal resources.¹³³ Furthermore, jailhouse lawyers are often criticized as encouraging frivolous claims, promoting an antagonistic relationship between the inmates and prison staff, and preying on newly convicted inmates without clout in the prison system.¹³⁴

High costs and limited access are particularly troublesome in the post-conviction process. There are things unique to post-conviction appeals that make the jailhouse lawyer an unsuitable solution to a petitioner's lack of legal counsel. First, post-conviction litigation is an extremely burdensome procedural process.¹³⁵ Without access to formal training, jailhouse lawyers have very limited legal skills.¹³⁶ There are also likely too few jailhouse lawyers to assist all inmates who need help filing claims.¹³⁷ Additionally, due to the Court's holding in *Lewis*, jailhouse lawyers are also unlikely to have access to legal resources and are thereby unable to conduct adequate legal research.¹³⁸ This can contribute to the procedurally deficient petitions already burdening dockets.¹³⁹

Due to the nature of custody, jailhouse lawyers also have difficulty adhering to time sensitive filing deadlines, limiting their ability to assist pro se petitioners. As already described in this Comment, state post-conviction petitions and federal habeas review are intimately intertwined because of the procedural requirements of habeas.¹⁴⁰ Although they may be better than no legal advice for assisting inmates, a jailhouse lawyer may not be that helpful for an inmate asking a federal court to review his conviction.

C. FORM PACKETS

Besides jailhouse lawyers, pro se petitioners have access to form packets. These packets, providing information on filing for federal habeas corpus, can be pulled from the Internet by completing a simple Google search.¹⁴¹ A search renders packets from multiple district courts and law

¹³³ See Nobel, *supra* note 29, at 1573 (1997).

¹³⁴ *Id.*; see also Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 CLINICAL L. REV. 779, 795 (2007).

¹³⁵ Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM. & MARY L. REV. 2071, 2075 (2014).

¹³⁶ Matosky, *supra* note 123, at 309.

¹³⁷ *Id.*

¹³⁸ See generally Dryden, *supra* note 96.

¹³⁹ Matosky, *supra* note 123, at 309.

¹⁴⁰ See *supra* Part I.

¹⁴¹ A petitioner could not, more than likely, pull a form packet from the Internet; the ma-

school clinics.¹⁴² These packets provide fill-in-the-blank approaches to filing a petition for federal habeas corpus.

For example, a packet provided by the Columbia Human Rights Law Review is eighty-four pages long and provides a variety of information on filing federal habeas petitions.¹⁴³ The packet includes basic procedural information such as where to file, when to file, and potential procedurally defaulted claims.¹⁴⁴ The packet also discusses a federal court's standard of review for state court decisions.¹⁴⁵ Additionally, the packet lists what a petitioner may not complain about explaining that federal habeas corpus is limited to the implication of certain constitutional rights.¹⁴⁶ The packet is full of case citations to various precedents that a petitioner might use in her or his petition.¹⁴⁷

In tackling the problem of federal dockets burdened by procedurally defaulted claims, the packets provide little help for multiple reasons. First, filing deadlines continue to pose major barriers to pro se petitioners, notwithstanding the forms. Second, some inmates may not have access to the packets. Inmate petitioners are unlikely to have access to the Internet and cannot access a packet from a reliable source, such as the Columbia Law School website. The packets that circulate in prisons often do not come from established organizations like law schools or courts, and may have been compiled by jailhouse lawyers selling their own legal advice.¹⁴⁸ Accordingly, outdated or poorly researched packets can create unfounded claims and waste court resources, thus adding to the burden of courts reviewing habeas claims.

Thus, the existing opportunities for providing legal advice to pro se petitioners are flawed and their inadequacy could be contributing to the encumbered federal habeas system.¹⁴⁹ One solution is to make a post-conviction, appeals-specific computer program available to petitioners. This program should be available at the critical moment in the collateral re-

jority of prisons do not provide Internet access to inmates. See Dryden, *supra* note 96, at 894.

¹⁴² GOOGLE SEARCH, <http://www.google.com> (search term "habeas corpus packet").

¹⁴³ *A Jailhouse Lawyer's Manual, Ch. 13: Federal Habeas Corpus*, COL. HUM. RTS. L. REV. (8th ed. 2011), http://www3.law.columbia.edu/hrlr/JLM/Chapter_13.pdf.

¹⁴⁴ *Chapter 13: Federal Habeas Corpus*, *supra* note 143.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 40–45.

¹⁴⁷ See generally *id.*

¹⁴⁸ Discussion with Alan Mills, Legal Director, Uptown People's Law Center, in Chicago, Ill. (Oct. 22, 2013) [hereinafter Mills Discussion].

¹⁴⁹ See discussion *supra* Section III.

view process, when post-conviction petitioners lose access to legal counsel, and it becomes important to assist petitioners filing claims.

IV. A COMPUTER PROGRAM COULD PROVIDE INMATE LITIGANTS BETTER ACCESS TO THE COURT SYSTEM

A computer program designed and made available for inmates after they lose their direct appeal could provide the legal advice necessary for filing a meaningful post-conviction appeal. The program could also help prepare petitioners' claims for a potential federal review and reduce the number of procedurally defaulted claims. Due to the nature of computer technology, the program could avoid many of the pitfalls of the previous options discussed.

As a model, Illinois Legal Aid Online (ILAO) has created a computer program for civil pro se litigants. The program offers form complaints, instructional videos and information through a website.¹⁵⁰ The website offers free guidance for a variety of civil actions—such as family law, property, employment suits and so on.¹⁵¹ ILAO provides an interactive user interface that asks users questions and then compiles their answers to those questions into a complaint ready to submit to a specific court.¹⁵² In addition to the website, the organization sets up “self-help” centers in local courts for pro se litigants to use as they develop their claims.¹⁵³ The goal of the program “is to increase access to justice by streamlining the delivery of free and pro bono legal services to the poor, and providing easy to understand legal information and assistance to the public.”¹⁵⁴ A similar program could be designed for pro se inmates looking to file state post-conviction petitions or for federal habeas review by guiding petitioners through the task of drafting petitions at each stage of their collateral review process.

A. DESIGN BENEFITS OF THE COMPUTER PROGRAM

After the initial costs of designing the computer program, the costs of maintaining the program could be relatively small.¹⁵⁵ It is difficult to predict the costs of the computer program, and there would need to be substan-

¹⁵⁰ ILLINOIS LEGAL AIDE ONLINE, <http://www.illinoislegalaidonline.org/index.php?ourhistory> (visited Nov. 23, 2014).

¹⁵¹ *Id.*

¹⁵² See *Research and Development*, ILLINOIS LEGAL AIDE ONLINE, <http://www.illinoislegalaidonline.org/index.php?ourhistory> (visited Nov. 23, 2014).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Mills Discussion, *supra* note 148 (discussing the potential benefits for using a computer program).

tial coordination with institutions like the state, private benefactors to fund the development and maintenance of the program, and public interest groups. Prisons' Internet policies would not need many changes because the program could simply be installed on a computer in the prison.¹⁵⁶ Inexpensive computers could be provided by pro bono organizations and installed in the prison.¹⁵⁷ The result would be a fairly cheap option for prisons to provide legal advice.

Additionally, prisoners could get personalized information related to their claim. An inmate could log in to the computer program and have a specific account with a username and password. Their personalized account could inform them about the status of their filings. The program could alert them of upcoming deadlines and give them notice if there has been a ruling on their case. The computer program could also provide them with key information about the long-term options of post-conviction review, including a federal habeas petition. If a state court dismisses the applications, the program could alert petitioners so that they may promptly file a revised application. The program could help petitioners better organize and present their claims to courts.

Additionally, a recorded video of an attorney explaining related legal issues would provide audio and visual information about the process of filing. A video interface would also allow the communication of proper legal advice to illiterate, uneducated inmate petitioners.¹⁵⁸ Translations could also be made available to non-English speaking inmates.

Information currently supplied by form packets regarding procedural requirements, potential claims, and court precedents could be delivered more accurately and completely if attorneys familiar in the law were updating the computer program. Instead of outdated packets and information made available by jailhouse attorneys, the program could provide organized and up-to-date legal information to the pro se petitioner. The program could also help jailhouse lawyers become more informed about the process of filing pro se petitions. By interacting with the information on the program and becoming familiar with the legal precedent explained in the program, the jailhouse lawyer could receive training and could better help other petitioners compile properly crafted complaints. Furthermore, petitioners could better interact with jailhouse lawyers if they had some basic under-

¹⁵⁶ For an argument that “the unenumerated constitutional right of access to courts entails that prisons provide *pro se* prisoner litigants with Internet access to help them with legal research,” see Dryden, *supra* note 96, at 819.

¹⁵⁷ Mills Discussion, *supra* note 148.

¹⁵⁸ See Matosky, *supra* note 123, at 313.

standing, provided by the computer program, of the legal issues of their claim.

B. SUBSTANTIVE INFORMATION SUPPLIED BY THE PROGRAM

Substantively, the program could explain the difference between the state post-conviction process and federal habeas review. Basic information could be crucial to an inmate's eventual habeas corpus petition, such as awareness that (1) claims not brought in state post-convictions proceedings will not be reviewed by a federal court,¹⁵⁹ (2) that the AEDPA generally has a one-year statute of limitations,¹⁶⁰ and (3) if the state post-conviction petition is dismissed the statute will run.¹⁶¹

Beyond supplying this basic information about steps necessary to pursue a habeas claim, the program could better help the petitioner file at the state post-conviction stage than existing options for legal advice. Information contained in an information packet released by the Illinois State Public Defender's Office illustrates how a computer program could enrich petitioners' access to information.¹⁶² The packet is 250 pages of legalese, filled with terms of art, and provides only cursory review of the complicated procedures for filing a post-conviction application.¹⁶³ The packet is filled with overly inclusive information of various Illinois statutes and rules, without explanatory language that might help an inmate understand the application of those laws to the process of drafting a petition for collateral relief.¹⁶⁴

The law in post-conviction proceedings is not intuitive and the information in the packet is dense. The packet explains the options available for collateral review and corresponding legal precedent. These options are guided by the Illinois Post-Conviction Hearing Act,¹⁶⁵ which has three stages of review.¹⁶⁶ If a claim is deemed frivolous, it will be dismissed.¹⁶⁷ A

¹⁵⁹ *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (holding that a federal district court may not overturn a "state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance"); *see also* 28 U.S.C. § 2254.

¹⁶⁰ *McCullough*, *supra* note 6, at 378–79; 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.")

¹⁶¹ *Id.*

¹⁶² *See Illinois State Appellate Defender, Criminal Law Digest: Ch. 9 Collateral Remedies*, ILLINOIS.GOV, updated December 23, 2014, at *3, available at [https://www.illinois.gov/osad/Publications/DigestbyChapter/CH %2009%20Collateral%20Remedies.pdf](https://www.illinois.gov/osad/Publications/DigestbyChapter/CH%2009%20Collateral%20Remedies.pdf).

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ 725 ILCS 5/122—1 et seq. (West 2014).

¹⁶⁶ *Illinois State Appellate Defender*, *supra* note 162.

complaint that is not dismissed advances to the second stage where the trial court decides whether there is a “substantial showing of a constitutional violation.”¹⁶⁸ If there is a substantial showing, the complaint can progress to an initial hearing.¹⁶⁹ In order to get past a motion to dismiss, “a pro se defendant need allege only the ‘gist’ of a constitutional claim.”¹⁷⁰ The packet then provides summaries of Illinois cases analyzing the “gist” standard.¹⁷¹ These rules are merely an example of the complicated procedures associated with filing for post-conviction review, which the packet attempts to explain.

This information provided by the packet could be made more accessible to petitioners if presented by the suggested computer program. Likewise, the program could be updated from time to time with relevant case law giving inmates the best information on how courts are reviewing this critical and confusing “gist” standard.¹⁷² The program could provide legal advice to petitioners that is necessary to file a state post-conviction petition and a claim for federal habeas review.

C. POTENTIAL PROBLEMS IN IMPLEMENTING THE COMPUTER PROGRAM

The process to develop, fund, implement and maintain this computer program will depend on many variables for each jurisdiction and facility. Variables include: cost considerations associated with hiring computer programmers and lawyers who could formulate the information necessary to meaningfully aid inmates; developing processes to maintain the programs and update them with more information; training inmates on the program;

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (citing *People v. Hodges*, 234 Ill. 2d 1 (2009)); *see also* *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998) (“In cases of pro se petitioners under sentence of imprisonment for a term of years, this court has acknowledged that only the ‘gist’ of a constitutional claim need be asserted in order to survive dismissal under section 122–2.1 and to require the appointment of counsel under the Act.”).

¹⁷¹ *Id.* at 75.

¹⁷² “Only a few states offer any electronic legal research at all, but do so using DVD-based software rather than an Internet connection.” Dryden, *supra* note 96, at 831. Professor Mills explained that a prison staff member, not the inmates, usually conducts legal research in Illinois prisons. Professor Mills said that an inmate will typically submit a request for relevant cases (which he may have learned about from form packets or jailhouse attorneys) and a prison librarian will go on a legal research cite and print out the cases and then given them to the inmate who sent the request. If an inmate gets an idea from the printed out case and would like to see additional research he must begin the process again. The result is time consuming and ineffective. Mills Discussion, *supra* note 148.

inmates' privacy concerns; the additional prison staff necessary to monitor inmates' use of the program; and getting computers to the facilities. These concerns would need to be addressed before this suggestion could be considered. This Comment seeks only to point out, at a very high level, that technology can be used to tackle the dearth of legal information given to individuals seeking federal habeas review.

Beyond the operational hurdles, implementing the computer program would require community organizing, lobbying and legislative action to convince state governments to dedicate the resources. The program, which could potentially shorten an inmate's sentence, could come with a lot of fiscal and political costs. This program, however, would also result in benefits for states beyond the direct benefit to inmates. Research has shown that the presence of educational and community building programs in prisons reduces violent inmate behavior and recidivism.¹⁷³ If educational classes offer this benefit, it seems easy to imagine that providing inmates with the tools to meaningfully pursue their legal claims, especially those claims related to the constitutionality of their imprisonment, would have similar constructive externalities to states—reducing crime. Furthermore, if inmates are able to have a court review the merits of their claims of innocence, as opposed to having their claims dismissed for procedural reasons, an innocent inmate may be exonerated in a shorter period of time, reducing the civil damages the state pays for wrongful prosecution and imprisonment.¹⁷⁴ These advantages are in addition to the general benefit of reducing the inefficiencies currently facing courts in adjudicating post-conviction and federal habeas petitions¹⁷⁵ and could be used to convince state governments to implement such a program.

D. THE COMPUTER PROGRAM IS AN IMPROVEMENT OVER EXISTING OPTIONS, AND HELPS ENSURE MEANINGFUL ACCESS TO THE COURTS

Due to the nature of computer technology, the program could improve on the existing options for legal advice beyond direct representation. A

¹⁷³ See John H. Esperian, *Effect of Prison Education Programs on Recidivism*, 61 J. OF CORRECTIONAL EDUC. 4 (2010); see also Karen F. Lahm, *Inmate-On-Inmate Assault: A Multilevel Examination of Prison Violence*, 34 Criminal Justice and Behavior 120 (2008).

¹⁷⁴ See e.g., Gabrielle Emmanuel, *When Innocent People Go To Prison, States Pay*, (June 2014), available at <http://www.npr.org/sections/money/2014/06/16/320356084/when-innocent-people-go-to-prison-states-pay> (noting that several states and the federal government often pay \$50,000 a year for wrongful imprisonment and damages can go to \$1 million a year.)

¹⁷⁵ See discussion, *supra*.

computer program could be made available to inmates in prisons via software designed specially to assist them in filling collateral review at both the state and federal level. Because of the limited access that inmates have to the Internet,¹⁷⁶ this program should be installed on computers and not operate as a web-based application. The software program could mitigate the shortfalls of the options of legal advice available to inmates. For instance, the danger that inmates receive inaccurate information from jailhouse lawyers and form packets will be mitigated, if the program is designed by attorneys.

Additionally, the computer program, unlike jailhouse lawyers, packets, and legal clinics could be more regularly available. An inmate could request access to the computer lab at any facility, which would mitigate the risk that a petitioner loses access to his source of legal knowledge and advice when he—or his jailhouse attorney—is transferred between facilities. This is a more reliable solution than the jailhouse lawyer that moves around from facility to facility or the packet, which could contain inadequate information, or the legal clinic, which is difficult for an inmate to access. The result would be better-informed inmates seeking collateral review.

CONCLUSION

The above suggestions for a computer program are certainly not exhaustive. There are numerous ways a computer program could address the complicated legal and procedural requirements of seeking collateral review. The suggestions provided in this Comment are illustrative only and are intended to offer some ways that emerging technology could provide a different medium for educating pro se defendants about relevant legal issues.¹⁷⁷

The overarching goals of the program would be to better provide inmates with information about pursuing collateral review. If defendants are more aware of the type of legal claims that are valid, and if they are informed of the procedural requirements necessary to present those claims, that awareness will lead to better-pled petitions, which in turn will lead to an easier time for courts. Then both federal and state courts will be better able to review the merits of a petition as opposed to analyzing applicable procedural bars and determining whether exceptions apply. In turn, this will mean that frivolous and procedurally deficient claims will be less likely to reach a federal docket—freeing up burdened district courts.

Additionally, the computer program could be a solution for the

¹⁷⁶ See Dryden, *supra* note 96.

¹⁷⁷ For additional analysis on the ways the Internet could assist inmates, see Dryden, *supra* note 96.

Bounds-Lewis tension as it relates to collateral review. If the Court wants to ensure meaningful access but does not want to meddle in the day-to-day requirements of what that right-to-access means, then the computer program could be an alternate resource besides law libraries that could fulfill inmates' constitutional right to bring their grievances to the courts.

Also, providing legal advice in the form of a computer program specifically for post-conviction petitioners would likely result in more substantively correct complaints. Complaints that are easier to read, based on relevant legal precedent, and free of procedural barriers, could mean more effective habeas review for federal courts. The program could make for less burdened dockets and better protection for our most treasured constitutional values.