Drowned Out Without Discovery: Post-Conviction Procedural Inadequacy in an Era of Habeas Deference

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DROWNED OUT WITHOUT DISCOVERY: POST-CONVICTION PROCEDURAL INADEQUACY IN AN ERA OF HABEAS DEFERENCE

by Rachel G. Cohen & Krista A. Dolan

State post-conviction proceedings are becoming the central stage upon which the battle for freedom from imprisonment, for life versus death, and for the protection of substantial constitutional rights must be litigated. An ever-narrowing lens through which federal review may be conducted, it has rendered the state court the sole opportunity to adduce evidence in support of a prisoner’s claims that he is being held in violation of the Constitution. The United States Supreme Court has recognized the initial-review collateral proceeding in state court as the critical forum for the vindication of claims of ineffective assistance of counsel.

Such claims “often depend on evidence outside of the trial record.” The Court has recognized that in federal post-conviction litigation, it is far better to permit litigants to raise certain claims in collateral proceedings where there “has been an opportunity to fully develop the factual predicate for the claim.” In emphasizing the importance of collateral post-conviction review, presentation of evidence on the record, in state court, takes on a pivotal role.

By contrast, the Commonwealth of Kentucky has effectively eviscerated the post-conviction litigant’s access to a full evaluation of the evidence necessary to vindicate his rights. This paper will begin by discussing discovery mechanisms in Kentucky and the existing inadequacies of those mechanisms. Part II discusses the need, in light of recent Supreme Court decisions and federal statute, to expand access to discovery in the post-conviction context. Part III discusses the “fast-track” provision of the Anti-Terrorism and Effective Death Penalty Act and its failure to address a post-conviction litigant’s access to discovery. Part IV discusses the need for adequate post-conviction discovery procedures, as well as an overview of existing state law. Part V discusses Kentucky’s Open Records Act and associated issues with obtaining records via open records procedures. Finally, Part VI discusses potential options for implementing a mechanism providing post-conviction litigants with meaningful access to discovery.

1. “Discovery” in Kentucky

Kentucky’s rules regarding discovery in criminal cases are set forth by Kentucky’s Rules of Criminal Procedure. Discovery is not automatic; rather, it must be requested by the defense. Among items that defendants are entitled to, once requested, are: oral inculminating statements by the defendant, written or recorded statements or confessions by the defendant, results or reports of physical or mental examinations, and scientific tests made in connection with the case. Once requested, however, Kentucky recognizes that the trial judge must have broad discretion to determine the extent

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2 Id. at 1318.
4 KY. R. CRIM. P. 7.24.
5 Id. at (1).
6 Id. at (1)(a).
7 Id. at (1)(b).
of appropriate disclosure by the parties. The Kentucky Supreme Court has noted that such discretion is necessary to protect the spirit underlying discovery rules — the adversary system must not become “a poker game in which players enjoy an absolute right always to conceal their cards until played.”

As it stands, there is no mechanism for receiving any type of discovery when litigating post-conviction matters in the Commonwealth of Kentucky. While the trial court has discretion to order access to some files in a limited context, there is no uniformity throughout the state. Various permutations outside of statutory authority exist for providing litigants access to the materials they require for the post-conviction process. Kentucky contemplates whether a litigant should have access to the entirety of the material that was provided to his counsel in advance of trial or the entry of a guilty plea. Indeed, Kentucky has determined that counsel’s file is the sole property of the defendant not trial counsel. As the Kentucky Supreme Court noted in \textit{Hiatt v. Kentucky}, a litigant seeking the file of his trial counsel is only seeking “that which is his in the first place — his file.” Thus, Kentucky precedent establishes that a litigant should have, and is entitled to, everything his counsel had. But what happens if counsel’s file is lost? What if a litigant had initial and successor counsel, each of whom was provided portions of the discovery by the prosecution at different phases prior to trial? There is no guarantee that a post-conviction litigant will have access to “his file” as kept by trial counsel.

Further, though the requested records would presumably be part of the trial attorney’s file, if claims of ineffective assistance of counsel are brought, it is nonsensical to expect a litigant to rely on the records collected by the very attorney against whom he claims ineffectiveness, including claims that counsel failed to conduct adequate investigation. In fact, the system often pushes clients to plead deals long before adequate investigation can be conducted.

The underfunding and understaffing of indigent defense systems, for example, places substantial pressure on counsel for indigent defendants to do what they can with what they have available . . . Both prosecutors and defense counsel are frequently pushed toward resolving a case at the

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  \item \textbf{8} See \textit{Kentucky v. Peters}, 353 S.W.3d 592, 596 (Ky. 2011) (noting that the court may make discovery orders as appropriate).
  \item \textbf{10} See \textit{Bowling v. Kentucky}, 357 S.W.3d 462, 466 (Ky. 2010) (noting that “a person already convicted in a fair trial,” does not have the same liberty interest as someone standing trial, and thus is not entitled to pre-conviction trial rights).
  \item Hawkins alleged that trial counsel was ineffective for encouraging him to plead guilty without having received discovery in the case. The Court of Appeals noted, “the parties’ Agreed Discovery Order required the parties to submit discovery only to each other, and not to the court.” \textit{Id.} at *2. The Court was thus unaware of what specifically had been provided to defense counsel at the time of the plea or what material was still outstanding; the Court determined that because some discovery had been provided, counsel had not been ineffective. Absent Hawkins having access to the actual discovery in the case, however, there was no way for Hawkins to substantiate his claim that the discovery would have led him to reject the guilty plea or that counsel failed to adequately follow up on potential lines of investigation unearthed by the discovery.
\end{itemize}
earliest opportunity. While efficiency in resolving pending cases has benefits for both the accused and the State, the process frequently ignores whether the disposition of a case accurately reflects the accused's degree of culpability or the deservedness of the penalty... Insufficient discovery contributes to both wrongful convictions and unfair sentencing.\(^{16}\)

The irony of this arrangement is that Kentucky provides the prosecutor with access to the bulk of the materials he will require to defend his conviction. Kentucky has implied that the attorney-client privilege is waived by the filing of a post-conviction motion\(^{17}\) and has affirmed the trial court's decision to provide the prosecution with a copy of the post-conviction litigant's trial attorney file, in order that he may respond to the litigant's claims.\(^{18}\) This inequality exists despite the fact that the defendant bears the burden of proof in post-conviction litigation.\(^{19}\) Similarly, a wealth of cases require the petitioner to provide affidavits of proffered witnesses in the filing of the post-conviction motion,\(^{20}\) rather than merely pleading a claim with specificity as the rule would appear to require.\(^{21}\) Along these same lines, motions requesting funds for expert assistance in post-conviction are required to be filed in open court,\(^{22}\) eliminating the ex parte strategic and privacy protections usually granted to indigent litigants seeking such funds.

II. The Adequacy of State Procedures: *Pinholster*

The ability to adduce information in the record in state post-conviction proceedings has never been more critical. In 1996, with the passage of the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), the United States codified a series of laws designed to limit a state post-conviction litigant's access to federal habeas review. Federal habeas relief was only accessible to a state petitioner where a violation of the United States Constitution was proven, and where the state court's determination on the matter was either “contrary to... or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of

17 While a line of Kentucky cases indicate that attorney-client privilege is waived with the litigation of a post-conviction motion, the American Bar Association’s more recent ethical opinions have created some doubt as to when in the post-conviction process such a waiver occurs. Compare Gall v. Kentucky, 702 S.W.2d 37, 44-5 (Ky. 1985) (articulating that when the attorney's competence is questioned the attorney-client privilege is waived), with ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (describing how the attorney-client privilege is not completely waived but there are some limitations).
18 Sanborn v. Kentucky, 975 S.W.2d 905, 910 (Ky. 1998).
19 See Dorton v. Kentucky, 433 S.W.2d 117, 118 (Ky. 1968) (stating the movant has the “burden... to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings”).
21 See Ky. R. CRIM. P. 11.42(2) (requiring only that a motion for post-conviction relief “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds”).
22 Compare Stopher v. Conliffe, 170 S.W.3d 307, 310 (Ky. 2005) (deeming KRS 31.185, which provides for expert funding and ex parte filing, to be inapplicable to post-conviction proceedings), with Hodge v. Coleman, 244 S.W.3d 102, 105-08 (Ky. 2008) (finding that at least some portions of the KRS 31.185 funding provisions are applicable in the post-conviction context). Thus, Stopher and Hodge leave unsettled the question of whether post-conviction litigants may request funds ex parte, subjecting a litigant to the Hobson’s choice of determining whether to one, file the motion ex parte with the risk that a judge may unseal such a motion finding it was improperly filed; or two disclose the personalized need for expert assistance on a particular issue to the opposing party.
the United States,”23 or where the state’s ruling was based on an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”24 This statute placed a burden on the petitioner to rebut the presumption of correctness of factual determinations by the state court based on “clear and convincing evidence.”25 Similarly, AEDPA severely curtailed a habeas petitioner’s right to an evidentiary hearing in federal court.26 The statute required litigants to fully exhaust their claims in state court before proceeding to federal habeas review,27 and generally limited state petitioners to one federal habeas proceeding, absent some limited exceptions.28 Overall the message of AEDPA was clear: expedite the federal habeas corpus review process by deferring to state court determinations the validity of a conviction. However, in enacting AEDPA, President Clinton cautioned against criticisms that the bill “would undercut meaningful Federal habeas corpus review,” instead entrusting federal courts to “interpret [AEDPA] to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.”29

The overall message of AEDPA was for federal courts to defer to the state court’s determination of a petitioner’s rights. In 2011, the United States Supreme Court further defined the extent to which deference would operate in a landmark habeas case that originated in California.30 In Cullen v. Pinholster,31 the Court examined a federal habeas petition where the Ninth Circuit Court of Appeals had granted relief based upon evidence adduced during an evidentiary hearing in the federal district court. The Court reversed the Ninth Circuit’s decision finding that it could only consider the evidence adduced in the state court, and that habeas review under 28 U.S.C. §2254(d) was “limited to the record that was before the state court that adjudicated the claim on the merits.”32 The Court reached this conclusion by noting the AEDPA’s overall purpose: to channel prisoners’ claims first to the state courts . . . It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo.33

Thus, following Pinholster, a state petitioner bears the burden of adducing every piece of evidence on the state court record to protect his rights in federal court.

However, Pinholster left a gateway through which state petitioners could continue to adduce new evidence in federal court. In citing to Williams v. Taylor,34 the Pinholster Court noted that this was not a case in the same procedural posture confronted by the Williams case, where the petitioner was prevented from presenting evidence in state court and was therefore entitled to an evidentiary hearing under 28 U.S.C. §2254(e)(2).35 Remaining open is the

24 Id. § 2254(d)(2).
25 Id. § 2254(e)(1).
26 See id. §2254(e)(2) (permitting evidentiary hearings in federal court for state litigants where the facts were not developed in state court, only where claims rely on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or a factual predicate that could not have been previously discovered through the exercise of due diligence.”). In seeking an evidentiary hearing, the state litigant in federal court must also demonstrate that “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense”).
27 Id. § 2254(b)(1)(A).
28 See id. § 2244(b) (discussing the circumstances when additional habeas petitions can be filed).
30 Just three months earlier, the Supreme Court decided Harrington v. Richter, which similarly echoed the notion of uncanny deference to the state court adjudication, determining that where a state post-conviction petition appeared to have been adjudicated on the merits, the federal court would presume that the ruling was reasonable, absent a demonstration to the contrary. 131 S. Ct. 770, 784-85 (2011).
32 Id. at 1398.
33 Id. at 1398-99.
34 529 U.S. 420 (2000).
35 Pinholster, 131 S. Ct. at 1399-1400 (citing Williams, 529 U.S. at 429) (stating “only one claim at issue in
question as to whether a litigant can present new evidence where the state court prevented him from litigating his claims. This loophole has been applied in federal habeas review to permit the adducing of evidence in federal court that was not presented to the state court. In *Smith v. Cain*, the Federal Court of Appeals for the Fifth Circuit examined a claim for habeas relief based on a violation under *Batson v. Kentucky*, where the prosecutor’s race-neutral reasons for the exercise of his peremptory challenges did not appear on the state court record. The court recognized that the state’s failure to consider evidence amounted to a due process violation such that the petitioner met the burden required for relief under §2254(d)(1), in that the state’s adjudication on the merits was “an unreasonable application of, clearly established Federal Law.” The Ninth Circuit has also found that the bar to consideration of new evidence under *Pinholster* may be lifted where the state court has failed to consider the “side-by-side comparisons of [the] black venire panelists and the white panelists who were allowed to serve,” as required under *Batson*. The Fifth Circuit has applied the same exception to the *Pinholster* ban on new evidence when a petitioner was denied a hearing in state court on his claim that he was exempted from the death penalty under *Atkins v. Virginia*. Thus, consideration of evidence by a federal court that was not adduced in the state court may be permitted wherever the petitioner “diligently tried to develop the facts . . . in state court,” such that, “[t]here was nothing else [the petitioner] could have done to develop the factual record.” A

“state court’s refusal to allow [the petitioner] to develop the record, combined with the material nature of the evidence that would have been produced in state court were appropriate procedures followed, render[s] its decision unbecitting of classification as an adjudication on the merits.”

Indeed, in post-*Pinholster* litigation, federal courts have found that the Supreme Court’s ruling was silent on the inherent conflict between federal discovery provisions made applicable in habeas proceedings, and the limitations on the consideration of new evidence outlined by the *Pinholster* decision. As the United States District Court for the District of Nevada noted, “the Supreme Court made no holding in *Pinholster* as to whether a district court may grant leave for discovery before it determines whether § 2254(d)(1) has been satisfied on the merits.”

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“Discretion is better exercised in not foreclosing at this stage the possibility of discovery. Were the Court to permit discovery only after it appears that *Pinholster* would not bar consideration of new evidence, the Court would be adding months of delay to the proceedings, a result that could be avoided by simply permitting discovery that otherwise appears to be warranted under Rule 6. The Court recognizes the downside of its position namely the possibility that time and money will be expended in the discovery of evidence that this Court might never consider. That is a risk the Court is willing to take. In a death penalty habeas corpus case,”

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36 708 F.3d 628, 631 (5th Cir. 2013).
38 *Smith*, 708 F.3d at 634 (quoting 28 U.S.C. §2254(d)(1)).
39 *Jamerson v. Runnels*, 713 F.3d 1218, 1226 (9th Cir. 2013) (quoting Miller-El v. Dretke, 545 U.S. 231, 241 (2005)).
40 *Blue v. Thaler*, 665 F.3d 647 (5th Cir. 2011).
42 *Toliver v. Pollard*, 688 F.3d 853, 860 (7th Cir. 2012).
43 *Winston v. Pearson*, 683 F.3d 489, 502 (4th Cir. 2012); *see Richardson v. Branker*, 668 F.3d 128, 152 n. 26 (4th Cir. 2012) (internal quotation marks omitted) (citing with approval the holding in *Winston* that the state court did not adjudicate the petitioner’s claims on the merits because “Virginia state courts did not afford Winston an evidentiary hearing and thus passed on the opportunity to adjudicate [his] claim on a complete record”).
the Court prefers to err on the side of gathering too much information rather than too little.\footnote{45} Once a petitioner arrives in federal court, assuming he has diligently sought discovery in a state post-conviction proceeding and has had the wherewithal to raise claims and exhaust them in state court based on what discovery might show were he able to receive it, a petitioner may have access to discovery under the federal rules. The federal rules permit discovery where the litigant can demonstrate “good cause” for conducting such discovery. Good cause requires a demonstration that if the facts are fully developed, the petitioner may be able to demonstrate his entitlement to relief.\footnote{46}

Finality has had its limits, however. Prior to the enactment of AEDPA, the United States Supreme Court recognized the importance of excusing a state court’s exercise of procedural default in order to permit a litigant to proceed in federal habeas review.\footnote{47} A petitioner whose claims have been rejected on adequate and independent procedural grounds may bring his claims in federal court where he can demonstrate both cause for the default and prejudice resulting from the denial of his ability to litigate.\footnote{48} However, the Court rejected the notion that post-conviction counsel’s failure to file a timely appeal could constitute cause for a procedural default, ruling instead that ineffective assistance of counsel could amount to cause only if it was akin to a constitutional violation.\footnote{49}

As the noose of AEDPA tightened, however, the Supreme Court became more concerned with the increased likelihood that petitioners would be wholly unable to vindicate their rights. Just two months apart, the United States Supreme Court decided two cases that appeared to breathe life back into federal habeas law. Cory Maples, an inmate on Alabama’s death row, was represented in his state post-conviction proceedings by two pro bono attorneys from a law firm in New York, with an attorney in Alabama serving solely to assist private counsel in their pro hac vice admission to the Alabama court system.\footnote{50} By the time the state court denied Mr. Maples’ petition, his pro bono counsel had left their firm, and the mailed denial was returned to the court.\footnote{51} The clerk of court did nothing, nor did Mr. Maples’ local counsel.\footnote{52} When the prosecutor finally notified Mr. Maples that his claims had been denied, he was out of time to file an appeal in state court.\footnote{53} The habeas court thereafter denied Mr. Maples’ claims, stating that they were procedurally defaulted for his failure to exhaust the claims in state court.\footnote{54} In finding that Maples had shown sufficient cause to excuse his default under \textit{Coleman v. Thompson},\footnote{55} the Court moved away from the holding in \textit{Holland v. Florida},\footnote{56} which did not excuse the procedural default on the basis of equitable tolling where the failure to timely file a pleading was the result of attorney negligence.\footnote{57} Instead, the \textit{Maples} decision aligned itself with the concurring opinion in \textit{Holland}, written by Justice Alito, in which he found that the procedural default should be excused because the petitioner had been utterly

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\item \footnoteref{46} Harris v. Nelson, 394 U.S. 286, 300 (1969).
\item \textit{See id.} at 750 (reiterating that it must be shown that justice will be diverted if the claims are not considered in federal court).
\item \textit{Id.} at 755.
\item \footnoteref{49} Maples v. Thomas, 132 S. Ct. 912, 916 (2012).
\item \textit{Id.} at 916-17.
\item \textit{Id.} at 917.
\item \textit{Id.} at 920.
\item \textit{Id.} at 921 (noting that Maples forfeited his ineffective assistance claim by failing to file the claim in state court within the requisite time period).
\item 50 501 U.S. 722 (1991) (barring prisoners who defaulted on their federal claims in state court from federal habeas review unless they can show adequate cause for the default and prejudice as a result of the claimed federal law violation).
\item 56 See 130 S. Ct. 2549 (2010).
\item 57 \textit{See id.} at 2562-64 (suggesting that while ordinary attorney negligence does not warrant equitable tolling, the circumstances of cases which do qualify are not limited to the Eleventh Circuit’s rigid ruling that gross negligence without proof of “bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part” is insufficient for equitable tolling).
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abandoned by his counsel.\textsuperscript{58} When Alito had authored his concurrence just two years earlier, however, not a single other member of the Supreme Court joined in the opinion.\textsuperscript{59}

Finally, in 2012, the Supreme Court redefined the holding of Coleman, determining that ineffective assistance of counsel in the first post-conviction state proceeding could excuse the procedural default of a petitioner’s claims of ineffective assistance of trial counsel.\textsuperscript{60} In reaching this decision, the Court was chiefly concerned with the idea that deference to the state adjudication would result in a complete loss of a petitioner’s ability to vindicate his rights.\textsuperscript{61} This holding was similarly expanded to states where ineffective assistance of counsel claims are not required by statute to be brought in a collateral review process, but where, for procedural reasons, it is virtually impossible to raise such claims on direct appeal.\textsuperscript{62} In expanding its holding to include post-conviction matters originating from such states, the Court noted that the overall importance of the holding of Martinez was the underlying inquiry of whether the state “affords meaningful review of a claim of ineffective assistance of trial counsel” during direct appeal.\textsuperscript{63}

\section*{III. And Along Comes Chapter 154}

As a provision of AEDPA in 1996, the statute included a “fast track” provision\textsuperscript{64} whereby habeas petitions in federal court would be resolved in an expedited fashion upon a showing that the state court procedure was adequate.\textsuperscript{65} The statute required an inquiry into the state statutory scheme:

\begin{quote}
This chapter is applicable if a State establishes . . . a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.\textsuperscript{66}
\end{quote}

State attorney generals, representing the wardens, have petitioned federal courts to apply the expedited procedures of Chapter 154 in particular habeas proceedings, alleging that counsel, as provided, met the competency and compensation requirements outlined in §2261.\textsuperscript{67} In both Spears v. Stewart\textsuperscript{68} and Ashmus v. Woodford,\textsuperscript{69} the federal courts declined to apply the expedited provisions of Chapter 154 upon a finding that counsel was not promptly

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\item \textsuperscript{58} See Maples, 132 S. Ct. at 923-24 (Alito, J., concurring in part and concurring in judgment) (referencing Holland, 130 S. Ct. at 2567-68).
\item \textsuperscript{59} See Holland, 130 S. Ct. at 2566 (arguing that while he agrees with the majority’s decision, it does not do enough to set forth what “extraordinary circumstances” in cases involving attorney misconduct qualify for equitable tolling).
\item \textsuperscript{60} See Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012) (acknowledging that without adequate counsel, state proceedings may have been insufficient in ensuring that a substantial claim was given sufficient weight).
\item \textsuperscript{61} Id. at 1316 (noting that “[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim”).
\item \textsuperscript{62} See, e.g., Trevino v. Thaler, 133 S. Ct. 1911, 1920-21 (2013) (discussing the Texas courts’ inability to provide the majority of defendants with an opportunity to bring forth claims regarding ineffective counsel on direct appeal).
\item \textsuperscript{63} Id. at 1919 (emphasis added).
\item \textsuperscript{64} The “fast track” provisions would require that a capital post-conviction litigant file his federal habeas petition within 180 days of the denial of his state petition for relief, and eliminates any tolling of this statute of limitations by the filing of a petition for a writ of certiorari with the United States Supreme Court. 28 U.S.C. § 2263 (1996). Furthermore, these provisions require the district court to complete review of such a petition within the lesser of 450 days of filing, or 60 days after the matter’s submission for a decision. 28 U.S.C. § 2266(b)(1)(A) (2006).
\item \textsuperscript{65} See 28 U.S.C.A. § 2261(b) (2006).
\item \textsuperscript{66} Id.
\item \textsuperscript{67} No federal court has ever found a state post-conviction litigant to have adequate state representation such that his case could be litigated under the “fast track” provision. E.g. Editorial, “Congress must rewrite the law governing lawyers for poor death-row inmates,” Washington Post, June 21, 2010.
\item \textsuperscript{68} 283 F.3d 992 (9th Cir. 2002).
\item \textsuperscript{69} 202 F.3d 1160 (9th Cir. 2000).
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appointed as required by the opt-in provision. In Ashmus, the Ninth Circuit rejected California’s appointment mechanism as complying with the competency requirement of Chapter 154 because the state statutory scheme did not have mandatory guidelines for the appointment and qualifications of counsel. On the other hand, in Spears, the Ninth Circuit found that Arizona’s system provided sufficient guidelines to ensure adequate representation in that both statutes and procedural rules monitored attorney competence and compensation, as well as reasonable litigation expenses; however, the Ninth Circuit noted that in the petitioner’s case, counsel had not been timely appointed as required by §2261.

In 2006, with the enactment of the USA Patriot Improvement and Reauthorization Act, Chapter 154 was amended to allow for the precertification of particular state capital post-conviction mechanisms. Under this scheme, the Attorney General was required to promulgate regulations to implement a certification procedure for establishing whether a state “has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death.” The statute provides a “quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants.” However, Chapter 154, both following its initial enactment in 1996, and its amendment in 2006, contains provisions only governing the competency and compensation of counsel and the payment of litigation expenses. The rule does not contain provisions (nor does it permit regulation) governing a litigant’s access to any type of discovery in the state post-conviction process. But should it? Once a post-conviction litigant arrives in federal court, discovery is available where he can demonstrate “good cause” before a magistrate judge. Similarly, a federal court of appeals may review the granting or denial of discovery under an abuse of discretion standard. Where the district court orders the expansion of the record through discovery, it may then consider whether to grant an evidentiary hearing in light of the newly added evidence. However, under the expedited procedures, a habeas petition must be filed within 180 days of the affirmance of the conviction by the state court.

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70 See Spears, 283 F.3d at 992 (9th Cir. 2002) (ruling because the State of Arizona failed to meet with the timeliness requirement of Chapter 154 of the AEDPA with regards to the counsel it appointed for the petitioner, it was not entitled to any expedited procedures with regards to his case); Ashmus, 202 F.3d at 1160 (9th Cir. 2000) (holding the State of California failed to meet the criteria necessary to qualify for Chapter 154 of the AEDPA with regards to capital prisoner’s habeas petition).
71 See Ashmus, 202 F.3d at 1165-67 (rejecting California’s claim that State mechanisms in place from 1989 to 1998 for the appointment of collateral counsel met Chapter 154 requirements).
72 See Spears, 283 F.3d at 1010-11, 1013, 1015, 1019 (noting Arizona’s statutes which require that counsel have five years litigation experience including criminal litigation experience, post-conviction and appellate litigation experience; and provide for counsel’s compensation at $100 an hour and the provision of “reasonable fees and costs” complied with the requirements of §2261, but finding that because counsel was not appointed until 18 months after certiorari was denied, Arizona could not apply Chapter 154).
75 Chapter 154 does not permit the Attorney General to outline regulations governing any other aspect of a state’s post-conviction mechanism beyond the competency and compensation of counsel and the payment of litigation expenses. 28 U.S.C. § 2265(a)(3) (2006) (“There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.”).
76 See, e.g., Hayes v. Woodford, 301 F.3d 1054, 1065 n.6 (9th Cir. 2002); Holley v. Smith, 792 F.2d 1046, 1049 (11th Cir. 1986) (explaining that upon arriving in federal court, the burden is on the petitioner to establish that an evidentiary hearing is necessary).
77 See Bittaker v. Woodford, 331 F.3d 715, 728 (9th Cir. 2003) (reiterating that in habeas proceedings there is no federal right to discovery, its dispensation and scope are left entirely to the judge’s discretion).
78 See Valverde v. Stinson, 224 F.3d 129, 135 (2d Cir. 2000) (discussing some of the discretionary powers available to the district court with regards to evidentiary hearings).
79 See 28 U.S.C. § 2263(a), (b)(3) (2006) (the statute of limitations will be tolled for any time that the petition is properly filed seeking a grant of certiorari from the United States.
window of time renders the possibility of adequate discovery prior to filing a habeas petition a de facto nullity, granting litigants only seven months to request, litigate, receive, review, and plead claims related to post-conviction discovery. Nor does the fact that a petitioner could attempt to seek discovery and amend his petition after filing adequately protect federal habeas rights. The Court must decide a habeas petition under the expedited procedures on the earlier of 450 days from the filing of the initial petition, or sixty days after the submission of the matter. Assuming the petitioner could be granted discovery and subsequently amend his petition in light of heretofore unknown information, the 450 days would have to be sufficient time to request, litigate, receive, review, and amend in light of discovery, while also allowing time for the prosecution to respond, all without hobbling the district court’s ability to hold a hearing, if necessary, and finally adjudicate the matter.

Deference under AEDPA, Pinholster, and its progeny strikes a balance that states are capable of being relied upon to adequately adjudicate their own matters and protect a litigant’s constitutional rights. Similarly, the entire premise upon which Chapter 154 is based is that states can provide an adequate post-conviction mechanism. The woeful inadequacy of post-conviction discovery hamstrings the litigant’s ability to vindicate the critical rights at stake.

But does due process entitle a state habeas petitioner to discovery? While the due process clause of the Fourteenth Amendment affords post-conviction litigants minimal protections, it does require that the state provide adequate, effective and meaningful procedures that allow a litigant to “vindicate the substantive rights provided.” In determining what Supreme Court or state post-conviction relief; the district court may grant one thirty (30 day continuance for “good cause”).

IV. Full Post-Conviction Discovery Mechanism

Some scholars have noted the importance of post-conviction review at detecting system errors. While some may argue that full access to discovery in post-conviction may seem duplicative and disruptive of finality, “[t]he high rates of error found at each stage [of review] . . . confirm the need for multiple judicial inspections.”

Full access to discovery in the post-conviction process would provide petitioners with a far more complete process. This situation would allow litigants to seek materials that had not been sought by trial counsel, and were only available to the prosecution, including criminal backgrounds of witnesses, photographs of physical evidence, and the entire line of police reports underlying the state’s investigation. A majority of states provide some access to discovery in their post-conviction proceedings.

California permits a litigant in capital post-conviction litigation to request discovery in the state court prior to the filing of a state habeas petition. Their statutory scheme permits state habeas litigants access to discovery materials where the petitioner is serving a life sentence or awaiting execution. The state

statute right).
82 See Herrera v. Collins, 506 U.S. 390, 410-11 (1993) (assessing what procedures were provided in a majority of states to determine whether a particular state’s post-conviction process violated the Fourteenth Amendment).
83 See James S. Liebman, et. al., Capital Attrition: Error Rates in Capital Cases 1973-1995, 78 Tex. L. Rev. 1839, 1848 (2000) (noting that error, in at least some states, is often caught in post-conviction review; in Maryland, state post-conviction led to at least 52% of the capital judgments that were reviewed being overturned “due to serious error”).
84 Id. at 1855-56.
85 CAL. PENAL CODE § 1054.9 (West 2003).
permits such discovery upon a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful,” and limits the defendant’s access to materials that are solely “in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at the time of trial.” In interpreting its statute, California has noted that the rationale behind the rule is to enable defendants to have full access to discovery “as an aid in preparing the petition.” Furthermore, California does not limit the application of the rule to materials that were actually requested by the defense and turned over by the prosecution; instead, a defendant is entitled to materials the defense “should have possessed.”

California’s policy provides a state habeas petitioner “specific discovery that the prosecutor did provide but has become lost to petitioner, that the prosecution should have provided but failed to do so, and to which the defense would have been entitled had it requested it.”

Additionally, New Mexico has determined that as state habeas proceedings are part and parcel of a defendant’s criminal conviction, those rules governing criminal pre-trial discovery are similarly applicable. Nebraska also makes the pre-trial discovery rules applicable in the post-conviction process, but contemplates that such motions for discovery are only permissible after a state habeas petition has been filed. Wyoming and South Dakota permit discovery in accordance with their civil rules of procedure.

In an attempt to balance the finality of a conviction and fairness to the post-conviction litigant, a majority of states permit limited post-conviction discovery. In those contexts, the courts may consider the need for the discovery in a particular case, as well as the burden that the granting of such discovery would place upon the prosecution. In considering whether to grant post-conviction discovery, Florida expressly outlines that the trial court must evaluate “the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts.”

Similarly, West Virginia, Idaho, and Colorado permit a post-conviction litigant access to discovery where such a request is feasible and practicable. West Virginia outlines this standard as permitting discovery where, “a court in the exercise of its discretion determines that such process would assist in resolving a factual dispute that, if resolved in the petitioner’s favor, would entitle him or her to relief.” Idaho’s slightly more restrictive rule indicates that discovery is not required in the post-conviction process and that the trial court has sole discretion to determine to what extent discovery should be granted. However, the judge abuses his discretion where the post-conviction litigant can demonstrate that the denial of access to discovery was erroneous, as such discovery was “necessary to protect an applicant’s sub-

County, 696 P.2d 54, 72 (Wyo. 1985).
94 Florida v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994); see also id. (noting that “[i]n most cases any grounds for post-conviction relief will appear on the face of the record. On a motion which sets forth good reason, however, the court may allow limited discovery into matters which are relevant and material and where the discovery is permitted the court may place limitations on the sources and scope. On review of an order denying or limiting discovery it will be the [moving party’s] burden to show that the discretion has been abused”).
96 See Merrifield v. Arave, 912 P.2d 674, 678 (Idaho 1996) (finding room to determine “on a case-by-case basis, whether and to what extent the discovery rules should be followed in pursuing habeas corpus actions”).

86 Id. § 1054.9(a).
87 Id. §1054.9(b).
88 In re Steele, 85 P.3d 444, 449 (Cal. 2004).
89 Id. at 450 (emphasis in original).
90 Id. at 449.
91 See Allen v. LeMaster, 267 P.3d 806, 811 (N.M. 2011) (examining whether the defendant can be compelled to produce a statement in post-conviction proceedings based on pre-trial discovery principles).
92 See State v. El-Tabech, 610 N.W.2d 737, 744 (Neb. 2000) (commenting that there must be a proceeding pending to make a discovery request as discovery relates to specific proceedings).
93 See Jenner v. Dooley, 590 N.W.2d 463, 469 (S.D. 1999); Wyoming ex rel. Hopkinson v. Dist. Court, Teton
stantial rights.”97 Colorado’s rights are similarly limited, but permit a post-conviction petitioner to access discovery materials where “it is clearly shown that the matters sought to be discovered will be relevant to the very narrow issue of a habeas corpus hearing.”98 Oklahoma’s post-conviction statutes limit discovery to matters that could not have been raised on direct appeal and would support a showing of either the reasonable probability of a different outcome at trial, or that the petitioner is factually innocent; the petitioner bears the burden of demonstrating that his discovery requests are so limited.99 Similarly, Wisconsin confronts post-conviction litigants with the burden of establishing that the sought material would create a reasonable probability of a different outcome had it been utilized at trial, in order to obtain discovery.100

Connecticut similarly curtails the rights of a post-conviction litigant to access discovery, but the state firmly vests the trial court with discretion to make such a determination.101 However, the Superior Court of Connecticut has cautioned trial courts that in the exercise of their discretion, they must consider; “the gravity of the rights at stake,” such that a “habeas petitioner should be entitled to obtain evidence sufficient to explore his claims and present his case, but there is no carte blanche right for a petitioner to fish through a state’s file in search of fodder for unspecific and unsupported claims.”102 In Smith v. Warden, the Connecticut Superior Court noted that the petitioner had “zealously and diligently pursued” his claims and had made good-faith efforts to obtain evidence from the prosecution and other public agencies. While denying the petitioner’s discovery requests, the Connecticut Court noted that the task of successful post-conviction litigation is rendered all the more difficult, “without access to necessary or relevant evidence,”103 thereafter engaging in a detailed analysis of whether the petitioner had shown a likelihood that the undisclosed discovery would substantiate his claims. The Smith court’s analysis indicated that where the petitioner can meet the showing that such discovery is necessary, the trial court has discretion to order the disclosure of such materials and the superior court will analyze whether the trial court has abused its discretion where it denies discovery.

While allowing for all other post-conviction discovery requests to be subject to the sound discretion of the trial court,104 Virginia requires that a trial court scrutinize discovery requests in cases where the post-conviction litigant is alleging the withholding of exculpatory evidence in violation of Brady v. Maryland.105 Virginia courts have recognized that “unless trial judges scrutinize discovery requests in those instances where a plausible claim is made that material exculpatory evidence exists, protection of an accused’s due process/Brady rights is left solely in the hands of the prosecutor.”106 The trial judge may thus elect to conduct an in camera review to search for material and exculpatory evidence allegedly contained in the prosecutor’s file, or he may order disclosure of the previously withheld document, should the prosecution acknowledge its existence, while disputing its materiality.107 The Virginia Court of Appeals noted that there is no procedure, other than “a mandatory ‘open file’ rule, that can ensure defense access to all material exculpatory information possessed by the Commonwealth. In order to extend the discovery requirement to that point would require action by the legislature or an amendment to the discovery rules by the Supreme Court.”108

A majority of states permit discovery where the petitioner makes a showing of good

97 Id.
103 Id. at *2.
107 See id.
108 Id. at *2 n. 1.
cause.\textsuperscript{109} Louisiana gives the trial judge wide discretion to order post-conviction discovery once a post-conviction litigant has demonstrated “good cause.”

Recognizing the need in some cases to go beyond the record of the proceedings, the Code of Criminal Procedure now empowers the district court to authorize oral depositions, requests for admissions of fact, and requests for admission of genuineness of documents. Such discovery techniques may be used upon a showing of “good cause” and are to be regulated by the court. The court should be guided by the Louisiana Code of Civil Procedure in specifying the conditions under which the discovery techniques are to be used.

Discovery devices may be employed effectively to eliminate possible factual disputes by fully developing the petitioner’s allegations. What appears to be a factually meritorious claim (when alleged in the petition) may collapse after the petitioner’s deposition has been taken and, under oath, he recants some of his allegations.

After the methods of expanding the record have been employed, the court may find that no evidentiary hearing is needed.

Due to the obvious importance of the discovery procedures in determining the appropriateness of summary dismissal, the petitioner is entitled to the assistance of counsel if such methods are utilized.\textsuperscript{110}

Nevada supplants this “good cause” standard with civil procedure rules for discovery in post-conviction proceedings.\textsuperscript{111} Georgia and Ohio give trial court judges discretion to grant discovery in post-conviction proceedings.\textsuperscript{112} Texas authorizes the trial judge to “utilize affidavits, depositions, interrogatories, personal recollections, and evidentiary hearings,” to resolve contested issues in a petition for post-conviction relief.\textsuperscript{113} Under such an analysis, the Due Process Clause of the Fourteenth Amendment would require Kentucky to provide some access to discovery mechanisms in the post-conviction process.

\section*{V. Not-So Open Records}

The limited mechanism Kentucky purports to provide to the general public (and thereby post-conviction litigants) has been hobbled by the language and nonsensical interpretation of the statute itself. In Kentucky, it is well established that all public records must be disclosed, except those falling into one of the narrowly construed exceptions to the Open Records Act.\textsuperscript{114}

\textsuperscript{109} See Pennsylvania v. Collins, 957 A.2d 237, 272 (Pa. 2008) (finding post-conviction discovery permitted only where “good cause” shown); see also Canion v. Cole, 115 P.3d 1261, 1262 (Ariz. 2005) (examining whether lower court abused discretion in finding that petitioner had shown good cause for granting post-conviction discovery); Kemp v. Mississippi, 904 So. 2d 1137, 1139 (Miss. 2004) (Mississippi Uniform Post-conviction Collateral Relief Act provides for discovery where “good cause is shown and in the discretion of the trial judge”); Ex parte Land, 775 So. 2d 847, 852 (Ala. 2000) (finding that “good cause” is the appropriate standard by which to judge post-conviction discovery motions); Dawson v. Delaware, 673 A.2d 1186, 1198 (Del. 1996) (affirming trial court’s denial of post-conviction discovery where “good cause” was not shown); Jensen v. North Dakota, 373 N.W.2d 894, 901 (N.D. 1985) (finding litigant not entitled to post-conviction discovery where he has not met initial burden of showing “good cause”).


\textsuperscript{111} See Nev. Rev. Stat. Ann. § 34.780(2) (2013) (permitting post-conviction counsel to “invoke any method of discovery under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so”).

\textsuperscript{112} See Turpin v. Bennett, 513 S.E.2d 478, 483 (Ga. 1999) (deciding that a trial court’s decision regarding discovery will only be reversed when it is clear the trial court abused its discretion); Ohio v. Wiles, 709 N.E.2d 898, 903 (Ohio Ct. App. 1998) (reiterating that the trial court decides discovery issues on post-conviction claims).

\textsuperscript{113} Ex Parte Patrick, 977 S.W.2d 588, 589 (Tex. Crim. App. 1998) (Baird, J., concurring).

The Open Records Act provides for several exemptions, among them, records of law enforcement agencies:

Records of law enforcement agencies . . . that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions . . . public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth’s attorneys pertaining to criminal investigations or criminal litigation shall be exempted.116

In Skaggs v. Redford,117 a request was made for the Commonwealth Attorney’s file while the defendant was preparing to file his federal habeas petition.118 While the Skaggs court stated that a federal habeas action was considered a prospective law enforcement action, it was in the context of access to the Commonwealth Attorney’s file, not police records.119 “[T]he state’s interest in prosecuting the appellant is not terminated until his sentence has been carried out. The Office of Commonwealth of [sic] Attorney . . . represent[s] the state’s prosecutorial function in this case.”119 There is no mention of records from a lab in that case, yet the case has been used repeatedly to apply the exemption to police investigative files. Further, Skaggs dealt with the secondary exemption in KRS 61.878(h): the records of Commonwealth’s attorneys are always exempt. KRS 61.871 provides that exemptions shall be strictly construed. The exemption only exists for law enforcement agencies if they can prove harm. Until recently, the Attorney General’s Office, which is responsible for issuing decisions in Open Records disputes, has continuously extended Skaggs to apply to police agencies.120 This results in uneven application of the Open Records Act, as sometimes police agencies will grant requests for open records in a post-conviction action, while other times they will not. The continued denial of access to police records and lab reports based on existing case law violates defendants’ due process rights and should be clarified to note that the exemptions apply only to the Commonwealth Attorney’s files and not to police investigative files.

By contrast in Courier-Journal, Inc. v. Lawson,121 the Courier-Journal sought disclosure under the Open Records Act of a proffer given by Lawson during the entry of a guilty plea, which was used by the Attorney General to conduct a criminal investigation. When the Courier-Journal sought disclosure, Lawson moved to enjoin the Attorney General from providing the information. On appeal, the Kentucky Supreme Court noted that Hiatt was inapplicable to the case because the proffer was not contained in the file of Lawson’s trial counsel, which would have belonged to Lawson. Because the information was in the possession of the Attorney General, Lawson had no authority to determine what would happen to the proffer.122 While outside of the criminal litigation context, the Lawson case draws a significant distinction between material physically contained in trial counsel’s file and material in the prosecution’s file, even if such information references the same document.

116 844 S.W.2d 389 (Ky. 1992).
117 id. at 389.
118 id. at 390.
119 id.
120 See City of Ft. Thomas v. Cincinnati Enquirer, 406 S.W.3d 842 (Ky. 2013) (holding that in order to invoke the law enforcement exemption of the Open Records Act, the agency must articulate a factual basis for a showing of harm).
121 307 S.W.3d 617 (Ky. 2010).
122 See id. at 624.
In addition to denial of police investigative files, police investigative agencies in Kentucky have also used the Open Records Act to deny access to lab results from DNA analysis that have previously been completed because of another exemption in the Open Records Act that has been misinterpreted. KRS 17.175(4) provides that “DNA identification records produced from the samples are not public records but shall be confidential and used only for law enforcement purposes. DNA identification records shall be exempt from the provisions of KRS 61.870 to 61.884.” Reliance on this exemption to deny access to already-existing reports is clearly overbroad. The plain language indicates that the exemption applies only to DNA from a person, and not to DNA from a crime scene. KRS 17.169(1) sets forth definitions for KRS 17.175(4); sample means “a blood or swab specimen from a person.” Further, KRS 17.170 identifies those required to submit samples for inclusion in the database. So, while KRS 17.175(4) exempts “DNA identification records produced from samples,” by definition, only those identification records produced from samples from a person are exempt. Further, the intent of the statute is expressly stated within the statute:

The purpose of the centralized DNA database is to assist federal, state, and local criminal justice and law enforcement agencies within and outside the Commonwealth in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of sex-related crimes, violent crimes, or other crimes and the identification and location of missing and unidentified persons.

The purpose is not to prevent a criminal defendant from accessing lab reports produced in connection with his case. Despite this, the exemption has been used to deny access to records.

Ironically, at the same time, Kentucky has noted the overall importance of DNA testing to potential exoneration in the post-conviction process. Just as Kentucky’s statutes contain no right to discovery in post-conviction, until recently, Kentucky’s statutes contained no provision granting post-conviction litigants access to DNA testing in non-capital cases even in cases where the litigant had the funding to conduct such testing and was only seeking access to the physical evidence. The Kentucky Supreme Court noted that the restriction of access to such evidence, which could be “substantial, if not pivotal” to the litigants’ motion for a new trial, amounted to an abuse of discretion on the part of the trial court. In reversing the trial court’s denial of the litigants’ DNA testing motion, the court further noted “that evidence admitted into criminal trials in this state belongs to the Commonwealth of Kentucky. It does not belong to the Commonwealth’s Attorney. The latter is charged with the duty to preserve and protect the integrity of the evidence, not to hoard it.” Thus, in the narrow realm of DNA testing, Kentucky has recognized that it is grossly unfair to allow the prosecution to be the architect of a proceeding seeking to maintain a conviction.

VI. Efficacious Solutions

Creating statutory authority for the provision of open file discovery would guarantee that a post-conviction litigant has access to all


125 Hardin v. Kentucky, 396 S.W.3d 909, 914 (Ky. 2013) (quoting Bedingfield v. Kentucky, 260 S.W.3d 805, 815 (Ky. 2008)).

126 Hardin, 396 S.W.3d at 915.

127 See Brady v. Maryland, 373 U.S. 83, 88 (1963) (holding that due process is violated where the prosecution withholds material exculpatory evidence, as such suppression “casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice”).


of the materials provided to trial counsel in litigating his post-conviction claims. Under such a procedure, the prosecution would simply make their file (minus privileged thoughts and impressions work-product) available to a litigant. By comparing the file of trial counsel, to which the post-conviction litigant is entitled under *Hiatt*, a defendant would have access to the full panoply of materials to determine what claims he may have. Open file discovery is routinely provided in advance of trial by prosecutors in certain counties throughout the Commonwealth of Kentucky, and has been lauded by reformers of the criminal justice system for its ability to “level the playing field” and prevent wrongful convictions. Applying open-file discovery to Kentucky’s post-conviction process would ensure that defendants could access all of the materials to which their trial counsel had access, while not requiring the prosecution to undertake the financial burden of replicating their entire file.

Kentucky’s post-conviction access to counsel limits the effectiveness of open-file discovery, which grants carte blanche access to examine the prosecution’s file, but does not physically provide copies of the file to a defendant. Kentucky’s statute for collateral attack, Rule 11.42, requires an inmate to file a post-conviction petition before being appointed counsel. The petition must state the grounds for relief specifically and must allege “the facts on which the movant relies in support of such grounds.” The rule further provides that counsel be appointed only in those cases where the court grants a hearing. A hearing is required only in those cases where the defendant has raised facts that, if true, would support the finding of a violation of the petitioner’s constitutional rights. Thus, a pro se litigant must have access to the entire file, including those materials in possession of the prosecution, in order to adequately plead his claims. He must be able to outline for the court specific facts that supports those claims in order to prove that he is entitled to a hearing and thereby entitled to counsel. An incarcerated inmate, who is typically the post-conviction litigant, would not be physically able to examine the file in the prosecution’s possession, nor would he have access to facilities to make copies of the necessary portions of that file. While subsequently appointed counsel may amend a litigant’s petition to include additional meritorious claims, reliance upon an open-file discovery proceeding would be inadequate to enable a pro se litigant to adequately plead a claim sufficient to meet the requirements for appointment of counsel outlined by Rule 11.42.

File recreation would require the prosecution to provide a post-conviction litigant with every item of discovery that it turned over during trial. The Kentucky Supreme Court in *Kentucky v. Bussell* implicitly upheld such access. The trial court in Bussell required the prosecution to recreate trial counsel’s file for Bussell by providing his post-conviction counsel the discovery that had been turned over prior to trial. When these materials were provided, post-conviction counsel discovered a wealth of police reports that indicated the existence of

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128 194 S.W.3d 324 (Ky. 2006).
129 See, e.g., Porter v. Kentucky, 394 S.W.3d 382, 387 (Ky. 2011) (holding that “parties may agree amongst themselves to provide ‘open file’ discovery”); see also Hicks v. Kentucky, 805 S.W.2d 144, 148 (Ky. App. 1990) (noting that the open file discovery policy adopted by the Commonwealth in the case “allowed the appellant and his counsel to have full access to all of the state’s evidence relevant to the case”)
an alternate suspect, which cumulatively suggested “a reasonable probability that had the information been disclosed, the outcome of Bussell’s trial would have been different.”

After Bussell’s conviction was vacated, the Commonwealth appealed, alleging that the trial court erred in ordering file recreation where such actions were purportedly prohibited by the Open Records Act. The Bussell Court declined to address the Commonwealth’s claim that the defense was not entitled to have access to the exculpatory information for litigating the post-conviction matter where the Commonwealth had failed to turn over the exculpatory information prior to trial in violation of Brady. Implicitly, the Kentucky Supreme Court found that a trial judge has authority to order such file recreation subject to the discretion of the court. Bussell, however, was a results-oriented decision wherein the Kentucky Supreme Court examined whether a post-conviction litigant should have access to the prosecution’s file after already knowing that the prosecution had withheld exculpatory information. The Bussell Court’s silence on the issue of file recreation severely undermines that there is a requirement that other post-conviction litigants have access to the same procedure.

The Bussell decision itself serves as a cautionary tale demonstrating the need for adequate post-conviction discovery. The material upon which Mr. Bussell ultimately received a new trial had not been turned over by the prosecution prior to, during, or post-trial. Instead, an unwitting prosecutor, under the auspices of file recreation, inadvertently turned it over to post-conviction counsel. Following vacation of the conviction, the prosecution attempted to un-ring the bell: to resuppress the evidence that had been long-hidden in violation of Brady. Such violations are one of the most common errors found at the capital post-conviction phase, second only to ineffective assistance of counsel. While defendants are entitled to exculpatory evidence, they are entitled only to evidence that “is material either to guilt or punishment.” This most often leaves prosecutors with the discretion in determining what is considered “material,” as “[d]efense lawyers, for all their incentives to find exculpatory information, usually lack the time, resources, or expertise, to conduct the type of massive pretrial investigation needed to ferret out this evidence.” Prosecutors’ obligations under Brady are ongoing. Despite this obligation, which has been in place since 1963, violations of Brady take place regularly.

“Studies have pinpointed the suppression of exculpatory evidence as a factor in many documented wrongful convictions later overturned by post-conviction DNA testing.”

A trial judge’s determination whether to provide file recreation is subject to abuse of discretion review on appeal. Thus, an appellate court may overturn a trial court’s refusal to provide file recreation where such refusal is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” Given the lack of authority requiring the provision of any materials to a post-conviction litigant, the denial of file recreation by the trial court is unreviewable. While this would not resolve all problems underlying the ability to bring meritorious claims in post-conviction, creating authority for file recreation would be an excellent start in allowing a pro se post-conviction litigant to plead his claims before the state court.

138 Brady, 373 U.S. at 87.
139 Medwed, supra note 130, at 1541.
140 Id. at 1537.
141 Id. at 1539.
142 Id. at 1540.
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