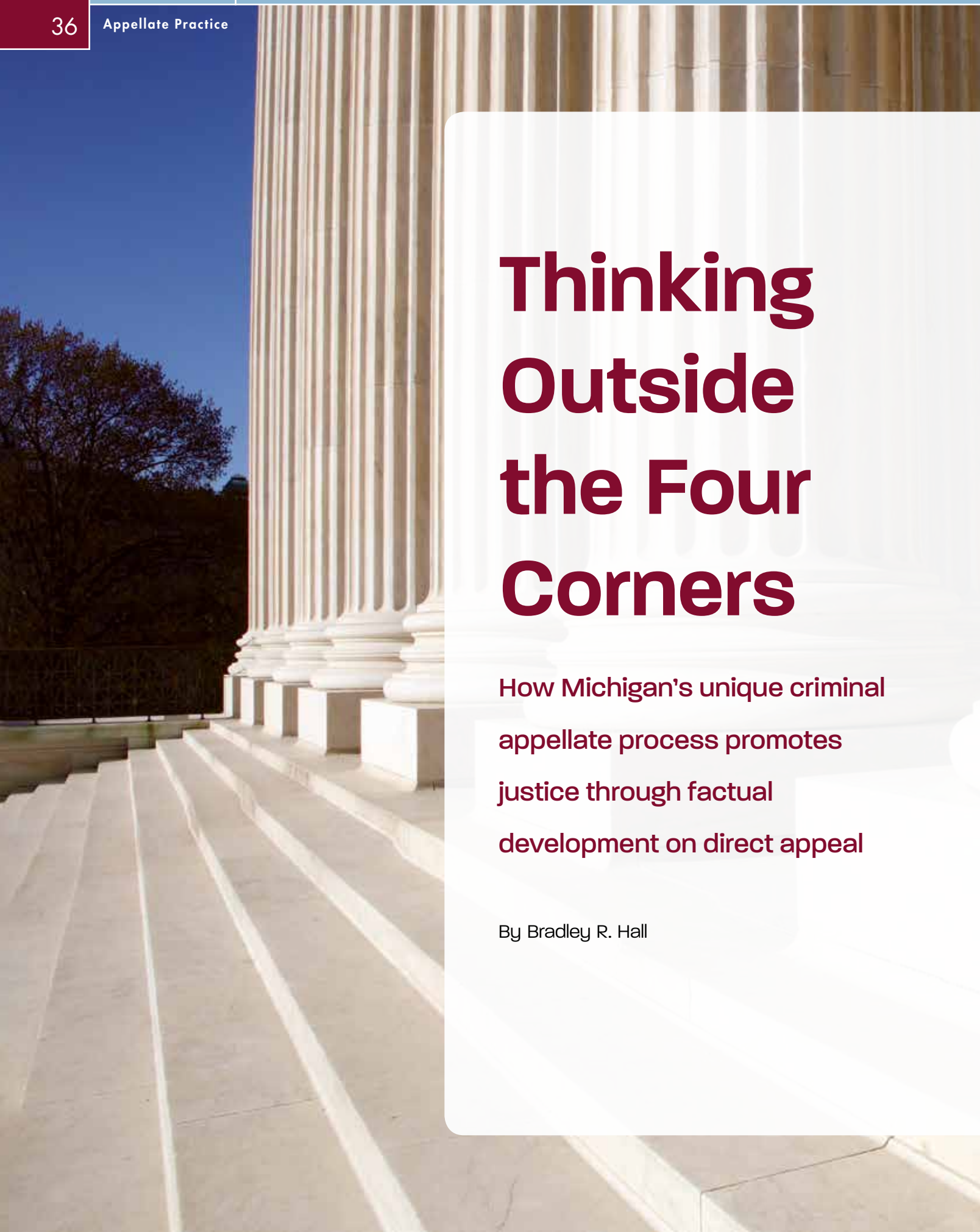

Thinking Outside the Four Corners

How Michigan's unique criminal appellate process promotes justice through factual development on direct appeal

By Bradley R. Hall

AT A GLANCE

In almost all jurisdictions, direct criminal appeals are limited to the "four corners" of the trial court record, meaning that many constitutional claims must wait until later collateral review, when defendants have a mechanism to develop the record but no right to appellate counsel to assist in doing so.

Michigan is a rare exception to this unfortunate rule. By permitting the development of a factual record during direct appeal, our unique criminal appellate procedure helps protect defendants' rights and identify wrongful convictions while fostering accurate and efficient fact-finding.

On a spring afternoon in 2015, Lawanda Jenkins got into an argument with her ex-boyfriend, Daniel Stewart, who was visiting her home. The argument ended with Stewart driving away as somebody smashed his car windows with a crowbar.

Jenkins claimed that Stewart "snatche[d] my purse and [ran] out the house." From her front porch, she "screamed to the neighborhood that 'he stole my purse.'" A man asked Stewart to return the purse; he refused. The man then struck the rear window and windshield of Stewart's car as Jenkins watched from her front porch.[1]

Stewart gave a different account. He agreed that a man broke his rear window, but claimed that Jenkins then picked up the crowbar, broke the windshield, and swung in his direction.[2] Based on this, Jenkins was charged with felonious assault with a dangerous weapon.[3]

At Jenkins's later bench trial, the prosecution presented Stewart's testimony, and Jenkins testified on her own behalf. No other witnesses testified, even though it was clear that neighbors had seen the events. After defense counsel delivered a six-word closing argument—"Question of fact, Judge, no argument"—Jenkins was convicted, with the trial court explaining simply that her testimony was not credible. The court sentenced her to probation.[4]

Despite red flags and unanswered questions, the "four corners" of the trial record revealed no glaring procedural errors. And although trial counsel appears to have done little to defend the case, it is not clear that additional evidence or argument would have made a difference. For this reason, and given the lenient sentence, an appeal in virtually any other American jurisdiction would have been futile. But as this article explains, Michigan is unlike other jurisdictions.

The predominant appellate and collateral model

In most states and the federal system, the direct appeal of a criminal conviction focuses on issues that are apparent from the trial court record, such as pretrial or evidentiary rulings. But because appellate courts lack the capacity to develop facts or make initial factual determinations, they do not generally consider claims relying on new evidence. Instead, they defer (or insist that defendants defer) such claims until later collateral review—where development of the record can begin anew in the trial court.[5]

Among the claims typically relegated to collateral review are those relying on new evidence to show actual innocence, unreliable forensics, improper jury influences, or police or prosecutor misconduct. But the most important and frequently litigated claim on collateral review may be ineffective assistance of counsel under *Strickland v Washington*.[6] Ineffectiveness claims typically depend on evidence about what trial counsel knew or should have known, and the reasons for counsel's decisions (strategic or otherwise)—none of which appears in the trial record. Because of this, the Supreme Court has cautioned against raising these claims on direct appeal, which "proceed[s] on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."[7]

This structure presents several problems for criminal defendants. Collateral review must await the conclusion of direct appeal, sometimes years after trial. Time can be a significant barrier in the search for truth as memories fade, witnesses disappear, and records are destroyed. Relatedly, many defendants serve their entire sentences before reaching collateral review, making them less likely to continue challenging their convictions.[8] Moreover, unlike trials[9] or appeals of right,[10] collateral review proceedings do not entail a constitutional right to court-appointed counsel[11] or other "basic tools of an

adequate defense," such as expert witnesses and investigators.[12] When it comes to raising constitutional claims on collateral review, indigent defendants often hold "a right without a remedy."[13]

There are systemic concerns as well. Given the difficulty in litigating ineffective assistance claims, "the performance of trial counsel in almost all misdemeanor and many felony cases is largely unchecked."[14] And the same applies to other actors as well, whose mistakes or misconduct can often be revealed only through the development of facts outside the trial record. The practical inability to investigate and litigate these issues jeopardizes the due process rights of all defendants and deprives us of an important tool to protect the integrity of our criminal justice system.

Further, if a primary goal of appellate and postconviction review is to protect the innocent from wrongful convictions, these barriers frustrate that goal. In 2018 alone, 151 people were exonerated after serving an average of 10.9 years in prison,[15] demonstrating that our courts largely fail to recognize "the kinds of false or erroneous evidence that led to these mistakes" as well as "the procedural errors that typically led to these miscarriages of justice."[16]

Finally, by promoting inefficiency and delay, piecemeal litigation frustrates the interests of prosecutors, courts, and crime victims. There is tremendous waste in relitigating and adjudicating multiple rounds of review—often years apart—from the same conviction and sentence, particularly after reassignment to new prosecutors or judges or different appellate panels. Moreover, just as time can impede a defendant's ability to prove his or her collateral claim, it can impede the prosecution's ability to prove its case after a successful collateral claim. And for crime victims, collateral litigation can reopen old wounds long after convictions were assumed final.

The Michigan model

Michigan's criminal appellate structure took root in the 1973 case of *People v Ginther*.[17] There, after the defendant pled guilty and was sentenced, he requested counsel and was appointed a new appellate attorney from the fledgling State Appellate Defender Office (SADO).[18] On appeal, he argued that trial counsel had provided bad advice before the plea, but he lacked any evidence because he had not filed the prerequisite motion for a new trial. And for good reason: new appellate counsel was not appointed until after the deadline for filing that motion.[19]

To this day, most courts would reject this argument and suggest that it be raised instead in collateral proceedings, where a record can be developed. But the Michigan Supreme Court had a more practical solution: if a defendant was without appellate counsel within the time for filing a postconviction motion—and thereby deprived of the opportunity to develop a record—the case may be remanded to the trial court for consideration of new evidence and adjudication of the claim.[20]

Widely known as a "*Ginther* hearing" when it involves an ineffective assistance claim, this procedure has since been expanded to other postconviction claims and codified in MCR 7.211(C)(1), under which a motion to remand may be filed "[w]ithin the time provided for filing the appellant's brief." And since 1989, MCR 7.208(B) has allowed a bypass of the remand procedure whereby defendants may file a postconviction motion directly in the trial court—without leave of the Court of Appeals—"[n]o later than 56 days after the commencement of the time for filing the defendant-appellant's brief."[21]

There is another feature of Michigan procedure that facilitates appellate review of extra-record claims. Since at least 1978, criminal appellate counsel has been appointed under the Appellate Defender Act, which mandates the appointment of SADO or private counsel from a roster approved by the Appellate Defender Commission.[22] As a result, appellate representation by trial counsel is virtually nonexistent, giving defendants a fresh set of eyes for appeal.[23]

This structure proved fortunate for Lawanda Jenkins. Rather than confining the appeal to the four corners of the trial record, a new, independent attorney and appellate investigator could dig deeper into questions of trial counsel's performance and the potential for additional evidence and develop that evidence in the trial court.[24] Relying on that evidence, the Michigan Court of Appeals ultimately found that trial counsel was unreasonable for failing to secure testimony from an "across-the-street neighbor who was known to have witnessed the event" and whom counsel had given up trying to contact after a single unsuccessful phone call. This "disinterested third-party witness" would have "corroborated defendant's version

Time can be a significant barrier in the search for truth as memories fade, witnesses disappear, and records are destroyed.

of the events and pointed to defendant's innocence" by confirming that she "remained on her porch" while the neighbor's "long-time friend shattered the complainant's car window after they heard defendant say that the complainant took her purse."[25] After the Court of Appeals reversed the conviction and remanded for a new trial, Jenkins was acquitted.

None of this would have happened in most other states or in federal court, where Jenkins would not have had a right to a new attorney and investigator or an opportunity to investigate and litigate these matters so soon after trial—when the neighbor could be located and appellate relief would still make a difference. The *Jenkins* case stands as a stark reminder of some of the most unique and remarkable features of Michigan criminal appellate procedure, which should serve as a model for other jurisdictions.[26]

Perfecting the Michigan model

Despite its many virtues, our system is not perfect. Jenkins had a proactive appellate attorney, ready access to a grant-funded investigator, and a relatively straightforward investigation that could be completed within 56 days after transcripts were filed. The absence of any one of these could have steered the case toward a different outcome.

Consider the case of Derrick Bunkley, whose attempted murder conviction was vacated after appellate counsel's analysis of Facebook and cellphone data proved his innocence. As appellate counsel would later explain, gathering and analyzing the information could not be completed within the 56-day window or even the motion-to-remand period. While continuing to investigate the "primary theory for appeal," counsel had to file a remand motion based on a "backup theory," which the Court of Appeals denied. Counsel then "scrambled and put together a motion for reconsideration as well as one [] styled a 'motion to add ground for remand.'" Only after the court granted these motions could the new evidence be presented to the prosecution, which agreed to vacate the conviction and dismiss charges.[27]

Or consider the case of Richard Armstrong, who was exonerated after his criminal sexual conduct conviction was vacated,[28] but only after a lengthy battle to have the case remanded. Despite trial counsel's affidavit admitting to mistakenly failing to present evidence of his client's innocence, the Court of Appeals refused to remand for a *Ginther* hearing.[29] After the Supreme Court denied interlocutory review,[30] the Court of Appeals rendered its opinion denying appellate relief, relying on the incorrect (yet frustratingly familiar) explanation that "[b]ecause defendant failed to…request…an evidentiary hearing, our review is limited to the existing record."[31] The Supreme Court then reversed and ordered an evidentiary hearing that confirmed trial counsel's mistakes, but the trial court and Court of Appeals still refused to vacate the conviction until the Supreme Court unanimously reversed.[32]

Many lessons emerge from these and other troubling examples. First, the jurisdictional 56-day window for filing trial court motions is not always sufficient, yet it cannot be extended. Although apparently intended to coincide with the deadline for filing an appellant's brief, the briefing deadline is frequently extended by motion for an additional 56 days.[33] This creates two separate deadlines for appellate counsel, constricting the ability to investigate the case and frustrating the efficiency that the rule was intended to foster. These deadlines should be harmonized so that a trial court motion may be filed within the deadline for filing the appellant's brief, eliminating the need for most remand motions.

Second, appointed appellate counsel need greater investigative and expert witness support. Counsel for Jenkins relied on an innovative grant-funded project to ensure a prompt and thorough investigation during the short 56-day window. And counsel for Bunkley had a highly trained team from SADO supporting the investigation, including a computer programmer with technical expertise. But these cases are exceptions to the rule; many trial courts are reluctant to provide adequate funding to reinvestigate cases after conviction, and efforts to secure this funding can significantly diminish counsel's limited time for investigation. State funding and a statewide structure with independence from trial courts and prosecutors should provide investigative and expert witness support immediately upon request.[34]

Finally, trial and appellate courts should be more receptive to claims of new evidence, as demonstrated by *Armstrong*. Courts should liberally grant evidentiary hearings upon any credible allegation of error, so that all relevant facts may be placed into the record as soon as possible after conviction. Not only will this foster a more accurate judicial process, it will save time and resources in the long term, as fewer constitutional claims will depend on evidentiary hearings in state or federal collateral proceedings many years later.[35]

With many reasons to be proud of Michigan's criminal appellate structure, these few reforms would cement our position as a national leader. ■

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ENDNOTES

1. *People v Jenkins*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2018 (Docket No. 329846) (Gleicher, J., concurring), p 1; (Cameron, P.J., dissenting), p 2.
2. *Id.*
3. MCL 750.82
4. *Jenkins* (Gleicher, J., concurring), unpub op at 2, n 1.
5. Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L Rev 679, 689–691 (2007), available at <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3062&context=clr> [https://perma.cc/S7TS-H2SW]. All websites cited in this article were accessed July 29, 2019.
6. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).
7. *Massaro v United States*, 538 US 500, 504–505; 123 S Ct 1690; 155 L Ed 2d 714 (2003).
8. *Structural Reform in Criminal Defense*, p 693, n 5.
9. *Gideon v Wainwright*, 372 US 335, 345; 83 S Ct 792; 9 L Ed 2d 799 (1963).
10. *Douglas v California*, 372 US 353, 357–358; 83 S Ct 814; 9 L Ed 2d 811 (1963).
11. *Pennsylvania v Finley*, 481 US 551, 555; 107 S Ct 1990; 95 L Ed 2d 539 (1987). The Supreme Court has not confronted the problem of collateral claims that cannot be raised earlier, such that collateral review effectively serves as the first appeal of right. See *Coleman v Thompson*, 501 US 722, 755; 111 S Ct 2546; 115 L Ed 2d 640 (1991).
12. *Britt v North Carolina*, 404 US 226, 227; 92 S Ct 431; 30 L Ed 2d 400 (1971).
13. *Structural Reform in Criminal Defense*, p 693, n 6.
14. *Id.* at 694
15. *Exonerations in 2018*, National Registry of Exonerations, Univ of Mich Law School <http://www.law.umich.edu/special/exoneration/Documents/2018_Exonerations_Report.pdf> [https://perma.cc/BAB9-3482].
16. Findley, *Innocence Protection in the Appellate Process*, 93 Marq L Rev 591, 601 (2009), available at <https://pdfs.semanticscholar.org/d1b5/b73ac4d90b7657497715cb55b7f4baadb11f.pdf> [https://perma.cc/V8ME-SDFW].
17. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).
18. *Id.* at 925. SADO opened its doors in 1969.
19. *Id.* at 925–926.
20. *Id.* at 926.
21. MCR 7.208(B)(1), staff comments to 1989 and 1996 amendments.
22. MCL 780.712(6).
23. MAACS Regulations, Section III(B)(4), SADO (amended March 13, 2019) <http://www.sado.org/content/pub/11101_Amended-MAACS-Regulations-.pdf> [https://perma.cc/5WMJ-SK2S].
24. Marcuz, *Innovative Appellate Investigation Project Leads to New Trial for Lawanda Jenkins*, 41 SADO Crim Defense Newsletter 7 (2018), pp 1–3.
25. *Jenkins*, p 3, n 1.
26. Professor Eve Brensike Primus urges widespread adoption of this model, albeit with a longer (six-month) period to investigate the case and file a new trial motion. *Structural Reform in Criminal Defense*, pp 706–707, n 5. Professor Keith Findley echoes this call for reform, pointing that a similar model has "been employed with tremendous success in Wisconsin for decades." *Innocence Protection in the Appellate Process*, p 610, n 16. It appears that Michigan and Wisconsin are the only states currently employing this structure.
27. Baker, *How Metadata from Facebook, Cell Phone Photos, and Cell Towers led to the Exoneration of Derrick Bunkley*, 39 SADO Crim Defense Newsletter 6–7 (2016), p 4.
28. *Richard Armstrong*, National Registry of Exonerations, Univ of Mich Law School <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3889> [https://perma.cc/8A3T-WQLC].
29. *People v Armstrong*, unpublished order of the Court of Appeals, issued January 25, 2007 (Docket No. 272104).
30. *People v Armstrong*, 478 Mich 872; 731 NW2d 740 (2007).
31. *People v Armstrong*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2007 (Docket No. 272104).
32. *People v Armstrong*, 490 Mich 281, 287–289; 806 NW2d 676 (2011).
33. Internal Operating Procedure 7.212(A)(1)-2, Michigan Court of Appeals. This and other internal procedures are currently available at <https://courts.michigan.gov/courts/coa/clerksoffice/pages/iop.aspx>.
34. *Appellate Investigation Project & Litigation Support Services*, MAACS, SADO (May 2019) <http://www.sado.org/content/pub/11130_AIPSUPPORT.pdf> [https://perma.cc/QCT5-T7H7].
35. Despite these benefits, there remains a need for collateral review through MCR 6.500, which is necessary to review the assistance of appellate counsel and where new evidence emerges after direct appeal.