# POSTCONVICTION**CLAIMS** of Innocence

BY MYRNA S. RAEDER

Today it is almost trite to observe that DNA has provided uncontestable proof that individuals can be convicted for crimes they did not commit. The DNA exonerations now stand at 240, with 17 released from death row. The prediction that they would slow as DNA testing became widely used before trial has yet to be realized. Since DNA evidence is estimated to be present in only a small fraction of cases, at best 10-20 percent, it is likely that the major systemic issues that are responsible for those wrongful convictions (mistaken eyewitness testimony, faulty forensic evidence, false confessions, lying informants, government misconduct, and ineffective defense counsel) also infect at least some of the cases for which proof of innocence is confined to more traditional sources such as confessions by actual perpetrators, recantation of witnesses, and newly discovered evidence. For example, one study found 196 non-DNA exonerations occurred from 1989 through 2003, (Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 524 (2006), and the Death Penalty Information Center's Web site indicates that since 1973 a total of 135 people sentenced to death have been exonerated, (*available at* http://www.deathpenaltyinfo.org/.) Wrongful convictions cast doubt on the reliability and fairness of the criminal justice system, and expose public safety failures because perpetrators, who include serial rapists and murderers, remain at large to pursue new victims. Thus, all of us, not just wrongfully convicted defendants, are harmed by these systemic breakdowns. Yet, because the criminal justice system depends on finality of judgment, it was exceedingly rare to obtain postconviction relief on the grounds of innocence prior to the advent of DNA testing.

While statutes now afford more opportunity to challenge convictions based on DNA testing, old attitudes die hard, and Chief Justice Roberts recently pointed out that the mere existence of new technology cannot mean that no case is final. (District Attorney's Office for the Third Judicial District v. Osborne, 129 S. Ct. 2308, 2316 (2009).) Moreover, for cases without biological evidence, the ability to obtain relief has changed little. This article will present an overview of postconviction remedies involving claims of innocence, analyze *Osborne*, which rejected a freestanding constitutional right to obtain postconviction access to prosecution evidence for DNA testing under the due process clause, and discuss ways to foster the ability of inmates to successfully bring postconviction innocence claims.

## Postconviction Requests for DNA Testing to Establish Innocence

Our appellate remedies are designed to ensure that defendants receive a fair trial, not to second-guess jury verdicts in the absence of insufficient evidence supporting a conviction. Finality concerns have long dictated very short time windows for new trial motions. Such statutes of limitations often expire less than one year from conviction, standing in stark contrast to 12 years, which is the average length of time served by DNA exonerees. With the advent of DNA came the recognition of the inequity of a criminal justice system that had no apparent remedy to free individuals who were clearly factually innocent. To remedy this problem, the Innocence Protection Act (IPA) was passed in 2004 (18 U.S.C. § 3600), to permit DNA testing for federal inmates who assert their innocence under penalty of perjury, and meet a number of detailed criteria, including:

- the evidence was not previously tested and the applicant did not knowingly or voluntarily waive the right to request testing;
- the evidence was tested, but current methods are substantially more probative;
- the evidence to be tested is in the possession of the government, has been subject to a chain of custody, and retained under conditions sufficient to ensure that it has not been substituted, contaminated, tampered with, replaced, or altered;
- the evidence supports a theory that is not inconsistent with any affirmative defense at trial;
- the proposed testing would provide new material evidence that would raise a reasonable probability that the applicant did not commit the offense;
- identity was an issue at trial;
- the applicant has provided a DNA sample for purposes of comparison with profiles in the FBI database; and
- the request is timely, with detailed criteria for determining rebuttal presumptions of timeliness and untimeliness.

The court can appoint counsel for the applicant, issue a preservation order to the government, and direct the gov-

ernment to pay the cost of testing for indigent applicants. Inculpatory results have a number of potentially negative consequences for the applicant who may be held in contempt, receive a sentence of three years consecutive to the current sentence if convicted of making false assertions in a proceeding, be required to pay for the testing, lose good time, be denied parole, and if relevant have the results sent to state officials. In contrast, exculpatory results excuse any time bar that would otherwise preclude a new trial or resentencing motion. The new trial motion is granted if the DNA test results, considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal. Oddly, the standard to obtain a new trial appears to render the need for a new trial unnecessary. The statute also indicates it is not an exclusive remedy, and does not count as a habeas corpus motion for purposes of evaluating the existence of successive motions. Beyond being a model for states, the IPA actively encouraged states to follow its dictates by providing DNA grants to law enforcement in states that adopt "comparable" postconviction DNA testing statutes. (118 Stat. 2285.)

To date, 47 states have adopted such statutes, with only Alaska, Oklahoma, and Massachusetts lacking any statutory support for DNA testing. (For specific statutes, *see* http://www.innocenceproject.org/fix/National-View2.php.) However, some states have enacted restrictions that hinder applicants from obtaining testing, such as prohibiting applications by individuals who plead guilty, admit guilt to obtain parole, or whose attorneys did not request testing; limiting the crimes for which relief can be sought; applying only to individuals sentenced to death; requiring applicants to establish a "likelihood" rather than a "possibility" the testing will be exculpatory, or clear and convincing evidence that the new results would be significantly more discriminating than the results of previous testing; and failing to provide adequate safeguards to preserve biological evidence. A few states even retain a statute of limitations in their DNA testing statutes. (*See generally* http://www.innocenceproject.org/Content/304.php.)

Even the federal statute is limited to cases in which identification was an issue at trial, and contains chain-of-custody requirements that if interpreted literally may be virtually impossible to meet. Indeed, Judge Higginbotham recently reversed a district court's denial of testing that was based on a claim of insufficient chain of custody, by noting "we cannot place upon the defendant the burden of proving history while it is held in government custody. To do so would create an entrance gate so difficult to enter as to frustrate the core objective of the statute."(United States v. Fasano, ___ F.3d ___, 2009 WL 2341990 (5th Cir. 2009).) In addition, Professor Garrett found that 20 percent of exonerees did not obtain DNA testing because of the failure of defense counsel to request it. (Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1633 (2008).) Ironically, although this failure could bar an applicant from obtaining testing, it may not meet the *Strickland* test for incompetent counsel if a strategic reason for the failure can be articulated. (Strickland v. Washington, 466 U.S. 668 (1984).)

The Innocence Project has created its own model legislation, that contain criteria that inmates are most likely to satisfy, but include restrictions to discourage abuse by prisoners who otherwise have nothing to lose by filing frivolous applications. (Innocence Project, *available at* http://www.innocenceproject.org/docs/09_model_legislation/Access_to_Post-Conviction_DNA_Testing_2009.pdf.) The Innocence Project is also currently renewing efforts to enact statutes that provide reasonable access to postconviction DNA testing in light of the Supreme Court's recent denial of a constitutional right to such testing in *Osborne*.

## *Osborne*'s Rejection of a Constitutional Right to DNA Testing

Osborne was convicted in Alaska of crimes resulting from a brutal sexual assault that occurred in 1993. After losing his appeal, his attempts to obtain state postconviction relief, including DNA testing, were also unsuccessful. As a result, he filed a suit under 42 U.S.C. § 1983, claiming he had a due process right to access the evidence used against him in order to subject it to DNA testing at his own expense. While a condom containing semen had been subjected to testing before trial, the DQ alpha test performed did not exclude 16 percent of the black population, including Osborne. He claimed he asked his lawyer to obtain more discriminating RFLP DNA testing, and his lawyer was ineffective for not doing so. In contrast, his lawyer claimed that she believed he was guilty and more precise DNA testing would defeat a mistaken identity defense. Alaska refused to permit the testing under its general postconviction statute because DNA testing had been available, Osborne had admitted guilt to some of the crimes in an application for parole, and no constitutional right to obtain DNA postconviction testing existed. The Supreme Court held in a 5-4 decision that there is no constitutional right to obtain postconviction DNA testing, and that Alaska's procedure for DNA testing did not violate due process. The Court also discussed several other issues important in innocence litigation. Chief Justice Roberts authored the majority opinion, which was joined by Justices Scalia, Kennedy, Thomas, and Alito.

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Although the holding is disappointing to those who litigate claims of innocence, some of the dicta concerning DNA is extremely positive, and will no doubt be widely quoted. *Osborne* recognizes that "DNA testing can provide powerful new evidence unlike anything known before." (129 S. Ct. at 2916.) Similarly, the majority noted the dual role of DNA: exonerating wrongly convicted people, while confirming the convictions of "many others." (*Id.*) However, the Court could not overcome its apprehension about the effect of DNA on finality, declaring that "the availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt." (*Id.*) In effect, *Osborne* concluded the floodgates would open to frivolous innocence claims if a right to testing was recognized. The Court was unwilling to shape the contours of a narrowly defined right, eschewing this path as leading down a slippery slope that would involve it in policy making that might even require monitoring how evidence is preserved. Ultimately, the *Osborne* majority ceded DNA postconviction relief to state and federal legislators, claiming for the most part they had already enacted statutes with varying requirements to provide relief. Moreover, Alaska, which did not have a specific DNA statute, was viewed as giving "prompt' consideration to accessibility issues, with judges interpreting the state constitution and general postconviction relief statutes to determine the availability of testing. Thus, *Osborne* found "no reason to constitutionalize the issue" by "turn[ing] it over to federal courts applying the broad parameters of the Due Process Clause." (*Id.* at 2312.) This approach is consistent with Justice Roberts's general view that the Court should remain above the fray and be wary of expanding constitutional rights that might prove controversial.

Procedurally, the Court began by assuming that 42 U.S.C. § 1983 was an appropriate way to raise the challenge to the denial of testing. (*Id.* at 2319.) The state argued that bringing a section 1983 action was an improper end-run around the timeliness and exhaustion requirements of habeas corpus petitions. While there is no dispute that an innocence claim must be brought in habeas, Osborne argued that an access claim did not challenge his conviction, since obtaining DNA testing, by itself, does not result in a direct challenge to the conviction. In other words, the testing may provide evidence of guilt, and even if exculpatory, a second step is needed to obtain relief, whether by a request for clemency or a motion for a new trial. The Court found it unnecessary to decide the issue, since it found no due process violation.

Generally, the Court imposed a high threshold that defeated Osborne's ability to claim the existence of a constitutional right to access. First, Osborne could not demonstrate a liberty interest in state clemency because he was a "noncapital" defendant. (*Id.* at 2319.) While he did have a liberty interest in demonstrating his innocence with new evidence under Alaska law, which required newly discovered evidence to establish innocence by clear and convincing evidence, it found that *Brady v. Maryland,* 373 U.S. 83 (1963), did not apply at the postconviction stage. (*Id.*) The majority indicated that because a convicted felon does not have the same liberty interests as a free man, a state "has 'more flexibility' in deciding what procedures are needed in the context of postconviction relief." (*Id.* at 2320.) Given a limited interest in postconviction relief, *Osborne* concluded that "*Brady* is the wrong framework." (*Id.*) Instead, *Osborne* applied a standard for overturning postconviction remedies that is virtually impossible to meet: A procedure is unconstitutional when it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." (*Id.*) As a result, "[f]ederal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." (*Id.*) Applying this standard, the Court found Alaska's developing procedures were facially constitutional. The majority also faulted Osborne for shortcutting Alaska's remedies by filing the section 1983 action, which it found defeated his ability to claim that they did not work in practice. (*Id.* at 2321.)

The *Osborne* majority continued to duck the issue of whether there is a federal constitutional right to be released upon proof of "actual innocence." As the Chief Justice admitted "[w]e have struggled with it over the years, in some cases assuming, arguendo, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet." (*Id.*) "In this case too we can assume without deciding that such a claim exists, because even if so there is no due process problem." (*Id.* at 2321-22.) The Court reached this conclusion because an innocence claim would have to be brought by habeas, which would permit discovery for good cause, thereby vitiating any due process challenge for lack of access. (*Id.* at 2322.)

*Osborne* also rejected an invitation to create an "untethered" substantive due process right to DNA evidence for purposes of testing. Both finality concerns and a "reluctan[ce] to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA" (*id.*), doomed Osborne's call for a specific right to obtain DNA testing. The Court cited the prompt response by states to the "challenge" to the criminal justice system posed by DNA technology as reason to reject the Court's preempting the field and forestalling public debate about appropriate remedies. While *Osborne* recognized that DNA has confirmed that the system "cannot be perfect" (*id.* at 2323),

it was not ready to craft a judicial remedy for the systemic flaws exposed by DNA.

Justice Alito wrote a concurrence joined by Justice Kennedy that argued that Osborne's claim had to be initiated by a petition for habeas corpus that exhausted state remedies, because it requested the discovery of evidence that had a material bearing on his conviction. (*Id.* at 2324-25.) Justice Thomas joined the concurrence limited to Part II, which recited various ways in which DNA can provide inconclusive results, be contaminated or manipulated, predicted that any judicial remedy would provide a fertile field for litigation, and was not cost-free. Part II of the concurrence also found the current case unworthy of judicial interference because a defendant who declines the opportunity to perform DNA testing at trial for tactical reasons has no constitutional right to perform such testing after conviction. (*Id.* at 2329.) In contrast, Justice Stevens's dissent, which was joined by Justices Ginsburg and Breyer, with Justice Souter joining as to Part I, questioned the majority's conclusion that Osborne did not avail himself of all of Alaska's procedures to obtain DNA testing, and while agreeing that Alaska's statute was not deficient on its face, found its application wanting. Part II of the dissent posits that Osborne "has established his entitlement to test the State's evidence." (*Id.* at 2334.) Justice Stevens rejected the majority's veneration of finality, arguing "finality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens." (*Id.* at 2337.) In other words, "[c]rime victims, the law enforcement profession, and society at large share a strong interest in identifying and apprehending the actual perpetrators of vicious crimes." (*Id.*) Justice Souter separately dissented, claiming that while Alaska's procedures were facially reasonable, in this case the state's continuing refusal to permit testing violated due process, and therefore it was unnecessary to determine if there is a freestanding right to obtain DNA testing. (*Id.* at 2342-43.)

## Does *Osborne* Matter?

*The New York Times* called the 5-4 decision "appalling," and stated that it was puzzled and disturbed by the Obama administration's support of Alaska's position, which continued the stance originally taken by the Bush administration. (Editorial, N.Y. Times, June 19, 2009.) Ironically, in response to *Osborne*, Eric Holder, the current U.S. attorney general stated:

> The Department's commitment to ensuring that justice is done is why, for example, I think defendants should have access to DNA evidence in a range of circumstances. DNA testing has an unparalleled ability to exonerate the wrongfully convicted as well as to identify the guilty. As you know, the Supreme Court held last week that there is no substantive due process right to access DNA evidence in post-conviction proceedings. But the Department distinguishes what is constitutional from what is good policy. And we have maintained that in a full and fair justice system, it is good policy to permit such access. Federal law already guarantees access to DNA evidence held by the federal government under specific conditions, and I hope that all states will follow the federal government's lead on this issue.

(Cato Institute, *available at* http://www.mainjustice.com/2009/06/24/holder-states-dojs-policy-on-dna-evidence/).

Peter Neufeld, cofounder of the Innocence Project, has downplayed the impact of the decision, indicating that most federal and state inmates will be able to obtain testing under existing DNA statutes. However, he admitted that it will deeply affect a small number of people who are denied testing in state courts, resulting in some innocent people languishing in prison. (The Defenders Online, *available at* http://www.thedefendersonline.com/2009/06/26/innocence-denied/).) In part, *Osborne*'s impact depends on the willingness of prosecutors to voluntarily provide inmates with DNA testing. When inmates or their attorneys informally request testing or resort to statutory remedies, prosecutors are the initial gatekeepers, who can either agree to or object to the testing.

In this regard, the executive director of the National District Attorney's Association reacted to *Osborne* by stressing that "'if there's any question at all' about a prisoner's innocence, 'and there's any way that a forensic test could be helpful, I think the vast majority of prosecutors, and Americans,' would agree that it should be done." (Nina Morrison, *A Misguided Decision and the Path Forward*, *at* http://www.acslaw.org/node/13638.) Yet Professor Brandon Garrett, who analyzed the DNA exonerations in *Judging Innocence*, (108 Colum. L. Rev. 55 (2008)) and *Claiming Innocence*, (92 Minn. L. Rev. 1629 (2008)), found that in the first 225 post-conviction DNA exonerations, prosecutors opposed testing in 18 percent of the cases for which data were available, and opposed motions to vacate the conviction in 12 percent of these cases. (University of Virginia Law School, *available at* http://www.law.virginia.edu/html/librarysite/garrett_exonereedata.htm.) Obviously, these statistics do not include detail about the cases, so we do not know whether the prosecutorial objections were justified or not, but particularly in cases with only one suspect and where the cost of testing will not be borne by the state, there is little reason to object. Clearly, some government officials agree, since Professor Garrett's data indicate that in 22 cases (12 percent) police or prosecutors or the FBI initiated the DNA testing, (*Judging Innocence*, 108 Colum. L. Rev. at 118), and obvi-

ously the majority of requests for testing by exonerees were not opposed. Indeed, from a public safety perspective, testing has resulted in identifying actual perpetrators in nearly 45 percent of DNA exonerations, more than half of which resulted from cold hits in a DNA database. (University of Virginia Law School, *available at* http://www.law.virginia.edu/html/librarysite/garrett_exonereedata.htm.)

Some prosecutors may be concerned about reactions of crime victims for whom such tests may have the potential of reopening closed cases and reviving painful memories. However, victims of crime are not benefited when innocent individuals are convicted, leaving victims to incorrectly believe themselves safe from actual perpetrators who remain free. Indeed, some victims who have misidentified individuals convicted of crime now speak publicly about problems with eyewitness testimony and the advantages of DNA evidence. (*See, e.g.*, http://innocenceinstitute.blogspot.com/2008/02/justice-opens-blind-eyes-kaffie-sledge.html.) Peter Neufeld has suggested that prosecutors resist in cases that involve multiple perpetrators or multiple pieces of evidence or when they believe the evidence of guilt is overwhelming. (The Defenders Online, *available at* http://www.thedefendersonline.com/2009/06/26/innocence-denied/.) Yet even when multiple suspects are involved or the evidence would not be conclusive but could identify other suspects, when the cost of the test is not paid by the state there is little reason for prosecutorial resistance unless the request appears to be frivolous, in bad faith, or unlikely to produce evidence that would have affected the outcome of the case. Of course, not all requests for testing are equal. Professor Garrett has divided them into substantial claims, outcome-determinative claims, and inconclusive claims based on the extent to which the new evidence would undermine the conviction. Substantial claims would "overwhelmingly" demonstrate innocence, while outcome determinative claims would simply make it more likely than not a new jury would fail to convict. In contrast, inconclusive claims have limited probative value in proving innocence. (Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1633 (2008).) Only inconclusive testing claims should be viewed as good candidates for denial.

*Osborne* provides no definitive answer about whether inmates can still resort to section 1983 rather than habeas in claims for testing. Because section 1983 can only be used to vindicate a constitutional right and the Court has now ruled that access to testing is not a constitutional right, is there any continuing role for section 1983 litigation? Counterintuitively, the answer is "yes." *Osborne* indicated that a due process claim might arise if the state's postconviction procedures "'offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress any recognized principle of fundamental fairness in operation.'" (*Id.* at 2320.) Indeed, Justice Souter would have granted Osborne's petition on this ground without reaching the question of whether a constitutional right to testing existed. (*Id.* at 2340.) Thus, there is still a small window for section 1983 claims that challenge whether the statute as applied violated an applicant's right to due process.

Thus, the dispute about the use of section 1983 is still alive, and given the circuit split on whether section 1983 is the appropriate procedure, is likely to persist. (*See generally* David A. Schumacher, *Post-Conviction Access to DNA Testing: The Federal Government Does Not Offer an Adequate Solution, Leaving the States to Remedy the Situation*, 57 Cath. U. L. Rev. 1245 (2008).) While federal prisoners can fall back on the IPA, state prisoners denied relief would have to meet the stringent requirements in place for filing habeas petitions. This is the group of inmates that *Osborne* fails, since their lack of DNA testing prevents them from demonstrating innocence to satisfy either a gateway or free-standing claim to relief, (*see infra*.) For example, Professor Garrett found that all of the DNA exonerees who raised innocence claims before obtaining testing were denied relief, and approximately half were refused access to testing by law enforcement. Indeed 12 exonerees were denied relief by courts after DNA testing excluded them as perpetrators. (*See, Judging Innocence*, at 111, 120.)

Other constitutional attacks citing *Osborne* may prove difficult. *State v. Salas*, 210 P.3d 635 (Kan. 2009), rejected an equal protection challenge to a postconviction DNA statute that restricted testing to premeditated first degree murder, finding intentional second degree murder was not substantially similar for purposes of meeting a threshold showing that the applicant is similarly situated to those who have a right to DNA testing.

Other than enacting new statutory remedies, the best way to avoid the barriers posed by *Osborne* lies with prosecutors, not the courts. In other innocence contexts, I have argued more self-policing by prosecutors should be the rule, rather the exception, in line with the role of prosecutors as ministers of justice. (Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts,* 76 Fordham L. Rev. 1413 (2007).) The view that the job of a prosecutor is to see "that justice shall be done" can be traced directly to *Berger v. United States*, 295 U.S. 78, 88 (1935). The ABA recently issued Formal Opinion 09-454, dated July 8, 2009, which discusses the prosecutor's duty to disclose evidence and information favorable to the defense under Rule 3.8(d). This rule imposes obligations that in fact are greater than required by *Brady*, since the ethical rule does not limit disclosure to exculpatory information that is "material." However, the opinion clearly limits its discussion to the pretrial and sentencing phases. Some commentators have argued for greater postconviction evaluation

of evidence implicating innocence, in part modeled on the Dallas D.A.'s Conviction Integrity Unit, which examined more than 400 cases in which DNA testing was denied by the courts. (*See* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence,* 6 Ohio St. J. Crim. L. 467, 494, 515-17 (2009); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35 (2009).) In addition, when the number of DNA exonerations began to skyrocket, several district attorney offices, including those led by CJS Chair Charles Hynes and former CJS Council member Susan Gaertner, voluntarily reviewed convictions to determine if any miscarriages of justice had taken place.

To ensure attention is given to innocence issues by prosecutors, the Criminal Justice Section initiated policy that resulted in a 2008 amendment to the ABA Model Rules of Professional Responsibility that guides prosecutorial responses concerning postconviction innocence requests. The new provisions give voice to the admonition in *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976), that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." Rule 3.8(g) now provides that in cases where there is "a reasonable probability that a convicted defendant did not commit the offense," prosecutors should (1) promptly disclose that evidence to an appropriate court or authority and, unless a court authorizes delay, promptly disclose that evidence to the defendant; and (2) undertake such further inquiry or investigation as may be necessary to determine whether the defendant was convicted of an offense that the defendant did not commit. Rule 3.8(h) applies when a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted of an offense that the defendant did not commit. In that case, the prosecutor shall seek to remedy the conviction. These rules may be key in cases where testing has taken place or other evidence establishing innocence is present, such as credible recantations and/or third-party confessions, even though *Osborne* has rejected any role for *Brady* in postconviction litigation. However, they leave open how prosecutors should react before testing. In this regard, Comment 1 added to 3.8(g) lends support for proactive action even in non-DNA cases by explicitly referencing the prosecutor's role as a minister of justice that carries obligations to see "that special precautions are taken to prevent and to rectify the conviction of innocent persons." At a minimum, this comment cautions against objection to testing requests without good cause.

The importance of prosecutorial self-regulation has become even more important after the recent decision in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), which extended absolute immunity beyond the core prosecutorial functions to administrative duties. *Goldstein* held that prosecutors were entitled to absolute prosecutorial immunity for their alleged failure to institute a system of information-sharing among deputy district attorneys regarding jailhouse informants, and failure to adequately train or supervise sharing of information concerning informants, which Goldstein claimed caused his wrongful conviction. In other words, individuals who are exonerated in postconviction litigation cannot successfully sue prosecutors, but must rely on compensation statutes, section 1983 suits for violations of constitutional rights, or private bills to obtain any monetary relief for their wrongful incarceration. (*See generally* Achieving Justice: Freeing the Innocent, Convicting the Guilty (ABA 2006), ch. 9 [hereinafter Achieving Justice]; Myrna S. Raeder, *Testimony, Concerning Remedies for Wrongful Convictions*, California Commission on the Fair Administration of Justice, Oct. 2007, at http://www.ccfaj.org/documents/reports/incompentence/expert/Raeder%20testimony.pdf; Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated,* 52 Drake L. Rev. 703 (2004).) As a result, other than in high-profile cases, there is little remedy against prosecutorial misconduct, particularly in light of the relatively few formal disciplinary proceedings against prosecutors (*see generally* Raeder, *See No Evil, supra*; Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. Rev. 1 (2009).)

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Yet, even assuming that every prosecutor adheres to the highest ethical standards, the practical difficulty with testing requests is determining whether evidence has been preserved that can lead to establishing innocence. While the existence of such evidence is particularly problematic in older cases, even new preservation statutes may be limited to evidence in only certain crimes, permit disposal of evidence prematurely, and do not have adequate penalties for unauthorized destruction of evidence. (*See* www.

innocenceproject.org/Content/253.php for fact sheet on preservation issues.) The ABA has endorsed draft legislation to generally ensure the preservation of material evidence for postconviction review (Resolution 111F, approved August 2004, reprinted in ACHIEVING JUSTICE, *supra*) and that would require the preservation of DNA evidence until the convicted defendant has completed the sentence. (ABA Standards on DNA Evidence, Standard 2.6(b).)

### Initial Barriers to Obtaining Habeas Release

Because collateral attacks on convictions typically depend on evidence not presented at trial, they often are raised in petitions for habeas corpus. While statutory remedies concerning DNA testing may eliminate some of the need for habeas, if testing is denied or produces inconclusive results, or more typically, if the biological evidence has been lost, destroyed, or does not exist, habeas will still be the likely remedy. In addition, new trial motions are not usually very helpful in non-DNA cases, because of their strict statutes of limitations, limited access to discovery, and high legal and evidentiary thresholds. (*See generally* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Court*, 47 ARIZ. L. REV. 655 (2005).) For example, a recent case decided by the Colorado Supreme Court held that a complaining witness's postconviction recantation of testimony that raises a reasonable doubt about the defendant's guilt is not enough to justify a new trial unless the court finds the recantation credible and would probably have led to an acquittal. As a result, a teenager's recantation of her uncorroborated accusations of sexual abuse by her stepfather was not enough to justify a new trial for the stepfather. (Farrar v. People, 208 P.3d 702 (Colo. 2009).)

The convoluted and confusing world of habeas corpus practice is beyond the scope of this article. However, timeliness and exhaustion questions often arise in the context of innocence claims. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) created a new limitations period for petitions for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 by state prisoners. "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. The limitation period shall run from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." (28 U.S.C. § 2244(d)(1)(A).) While the time during which a properly filed application for state postconviction or other collateral review is pending does not count toward any period of limitation (28 U.S.C. § 2244(d)(2),) AEDPA effectively blocks many claims.

Currently, the law concerning an innocence exception to the timeliness requirement of AEDPA is in complete disarray, with some federal circuits recognizing the exception, some rejecting it, and a few refusing to reach the issue because the petitioner had not met the high burden of proof needed to establish the innocence claim. (*See* Comment, Brandon Segal, *Habeas Corpus, Equitable Tolling, and AEDPA's Statute of Limitations: Why the* Schlup v. Delo *Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans,* 31 U. HAW. L. REV. 225, 243-44 (2008).) To the extent that courts permit equitable tolling of AEDPA's statute of limitations (*see* Lawrence v. Florida, 549 U.S. 327 (2007)), the petitioner must establish both due diligence and that extraordinary circumstances prevented timely filing. (*Id.* at 336.) Failure of an attorney to meet a postconviction deadline was rejected as a reason that satisfied this standard in *Melson v. Allen*, 548 F.3d 993, 1001 (11th Cir. 2008). Courts have also refused to determine if the clause that prohibits suspension of the writ of habeas corpus requires an exception for actual innocence. (*See* Wyzykowski v. Department of Corrections, 226 F.3d 1213, 1218 (11th Cir. 2000).) Commentators argue that courts should apply a "reasonable probability of innocence" standard to equitably toll time-barred habeas petitions, rather than requiring a petitioner to show "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," the standard required by *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

The Eleventh Circuit recently refused to apply the fundamental miscarriage of justice exception to AEDPA to excuse the filing of a second or successive habeas petition of a petitioner facing execution who claimed actual innocence. (In re Davis, 565 F.3d 810, 824-25 (11th Cir. 2009).) *Davis* left the door slightly ajar by indicating that even if it had the equitable power to ignore the procedural requirements, the petitioner had not made a compelling claim of innocence. (*Id.* at 825.) But this standard is virtually impossible to meet without DNA evidence.

***The existence of evidence for testing is problematic in older cases, but even newer preservation statutes may be limited.***

This refusal led Davis, a death row inmate, to file an original petition for habeas corpus in the Supreme Court. As a result, the Court recently took what Justice Scalia characterized as "the extraordinary step not taken in nearly 50 year "of instructing a district court to adjudicate a claim of innocence in *In re Davis*, ___S. Ct. ___, 2009 WL 2486475 (Aug. 17, 2009). The one paragraph decision is unsigned and orders the district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial *clearly* establishes petitioner's innocence," (emphasis added). The dissent of Justice Scalia, which is joined by Justice Thomas, which a *New York Times* editorial called "extraordinarily cold" (Aug. 18, 2009), would appear to allow an innocent petitioner to be put to death so long as that individual had received a fair trial. Moreover, in the view of the dissent, there is no basis to distinguish an actual innocence claim from other claims barred by AEDPA. In contrast, the concurrence of Justice Stevens, joined by Justices Ginsburg and Breyer, raises a bevy of unanswered questions concerning the constitutionality of AEDPA and other bars to establishing actual innocence that justify a hearing.

Davis's request for a pardon has already been denied. He was convicted of the 1989 murder of an off-duty Savannah police officer, but claims he was not the shooter. Seven key witnesses have since recanted, and several people have identified the main prosecution witness as the shooter. While the Court's grant of a hearing sends a positive signal about the seriousness of innocence claims, so far this case does not appear to have the type of conclusive evidence of actual innocence thus far demanded by the Court in *Herrera*. Like *House v. Bell*, 547 U.S. 518, 536-37 (2006), which found enough evidence of innocence to excuse the habeas petitioner's procedural default in state court, the evidence in *Davis* sounds sufficient for a gateway claim (*see infra*). However, Davis did not make a procedural challenge to his conviction in his writ. Therefore, Justice Scalia may ultimately prove correct, that the hearing will be fruitless, resulting in Davis's execution. Indeed, the district court has already requested briefing as to whether a "free-standing actual innocence claim" is recognized by the U.S. Constitution, and, if so, the burden of proof necessary to establish the claim. Undoubtedly, the case should provide a vehicle to argue that the Court should find actual innocence based on either the clear and convincing evidence standard that is suggested by the Court's direction for the hearing, or the evidentiary burden currently required for a gateway claim, rather than on the higher standard mentioned in *Herrera.* At a minimum, it is arguable that such findings should bar execution even if no procedural constitutional right has been alleged or is found. *Davis* also makes it likely that the Court will finally be forced to determine these issues when the case eventually winds up before it again after the conclusion of the hearing and subsequent appeal to the Eleventh Circuit.

## Gateway Claims

Generally, a procedural default may be excused in habeas if the petitioner can show that failure to address the claim on the merits would lead to a fundamental miscarriage of justice, often referred to as the "actual innocence" exception. (Wainwright v. Sykes, 433 U.S. 72, 90 (1977).) In *Schlup v. Delo*, 513 U.S. 298, 314-17 (1995), the Court discussed gateway claims of innocence, which simply permit the federal court to hear a constitutional claim brought by a federal habeas petition that was procedurally defaulted in state court. *Schlup* held that to state a claim of actual innocence sufficient to excuse procedural default, a defendant must show that, in light of all the evidence, "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." (*Id.* at 314; *see also* Bousley v. United States, 523 U.S. 614, 623 (1998).) The petitioner must establish factual innocence rather than mere legal insufficiency. (*Id.* at 330.) *Schlup* explicitly limited the miscarriage of justice test to "extraordinary" cases. (*Id.* at 324.):

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

(*Id.*)

Pro se litigants can hardly be expected to meet this criterion, but even inmates who find lawyers willing to champion their innocence are hard-pressed to find this quality of evidence. For example, in *House*, which found enough evidence of innocence to excuse the habeas petitioner's procedural default in state court, the petitioner was benefited by DNA evidence that eviscerated his alleged motive. In the absence of DNA, most evidence comes from accomplices or witnesses who recant, who are viewed skeptically by judges. *Willis v. Jones*, 2009 WL 1391429 (6th Cir. 2009), exemplifies the difficulty of excusing a procedural barrier. *Willis* rejected the argument that actual innocence warrants equitable tolling, because the evidence he presented was merely consistent with innocence, and is not evidence that would demonstrate that no reasonable juror could have voted to convict. Willis's evidence was explained away as follows:

> For instance, a picture of Willis with short hair ten days before the crime does not prove that Willis did not wear a wig and/or false facial hair during the

commission of the crime. Jurors may convict based solely on eyewitness identifications even when some evidence suggests a lack of reliability. Likewise, a doctor's opinion that Willis would have been limping at the time of the crime does not prove that observers would have seen him limp, nor would jurors necessarily credit the doctor's opinion. And evidence that Willis had some money at the time of the robbery hardly proves that jurors would not believe he would not have stolen a smaller amount, putting aside the difficulty of how a robber is supposed to know in advance how much money he will successfully steal. Equitable tolling based on "actual innocence" requires more compelling evidence than that which Willis presents.

In the 10 years after *Schlup* was decided, less than 10 percent of decisions citing that case resulted in consideration of otherwise barred claims, and of those 31 cases only 20 were resolved in favor of the petitioner. (*See* Brief for Former Prosecutors and Professors of Criminal Justice as Amici Curiae Supporting Petitioner in House v. Bell, at 2005 WL 2367033, at *10, discussed in Segal, *Habeas Corpus, supra* at 31 U. Haw L. Rev. at 247-48.) Thus, 10 individuals with enough evidence to suggest their probable innocence were denied relief. In evaluating constitutional claims, Professor Garrett suggests that our current *Brady* framework ignores the probity of DNA, and that some courts will not grant a new trial for concealment of DNA evidence even though the DNA would have dramatically altered the trial dynamics. (*Claiming Innocence*, 92 Minn. L. Rev. at 1663.) He also argues that courts should generally be more sensitive to the impact of DNA results when evaluating harmless error. (*Id*. at 1695.) For example, DNA evidence may buttress a claim of misidentification or unreliability of a confession, even when it does not conclusively establish innocence. While some courts are evaluating DNA as relevant to the prejudice prong of *Strickland*, *id.* at 1696, Professor Garrett notes that few inmates exonerated by DNA had much other evidence. (*Id*. at 1697.)

*House v. Bell*, 547 U.S. 518, 536-37 (2006), was the first Supreme Court case to satisfy the *Schlup* standard, which it stated as follows: "Prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House* also reaffirmed that the reviewing court must make a "holistic judgment" about all the evidence, and its likely effect on reasonable jurors applying the reasonable-doubt standard. (*Id*. at 539, citing *Schlup*, 513 U.S. at 328.) The difference between the 5-3 decision favoring *House* and the 5-4 decision in *Osborne* rejecting a right to DNA testing was Justice Kennedy's swing vote in both cases, which may have been influenced by the strong facts favoring innocence in *House* and the much weaker factual showing in *Osborne*. Justice Alito took no part in deciding *House*. The exculpatory evidence in *House* included DNA, which confirmed the semen on the victim's underwear belonged to her husband and not to House. This undermined the state's argument at trial that House's motive to kill the victim was to mask that he had sexually assaulted her. Expert evidence also indicated that incriminatory bloodstains actually resulted from a spill from House's reference sample. Finally, new evidence indicated that the victim's husband had confessed to the crime.

Even with this evidence, three justices did not believe that House met the innocence threshold necessary to establish a gateway claim. Chief Justice Roberts's dissent faulted the majority for disregarding the district court's role in evaluating the reliability of House's new evidence. (547 U.S. at 560.) He also opined that it was more likely than not that at least one juror acting reasonably would vote to convict, *id*. at 572, pointing out the standard required not simply reasonable doubt, but compelling evidence of innocence that it was more likely than not that no single juror acting reasonably would vote to convict him. (*Id*. at 571.) *House*'s significance is undercut because it is so dependent on the factual context of the litigation, which again implies that other than DNA exclusions that conclusively prove innocence, the best remedy is for stronger procedures at the front end of the criminal process, such as those suggested by ABA policies that are designed to minimize systemic weaknesses. (*See* Achieving Justice, *supra; see also* Myrna S. Raeder, *Introduction to Wrongful Convictions Symposium*, 37 Sw. L. Rev. 745 (2008); Myrna S. Raeder, Andrew E. Taslitz, and Paul C. Giannelli, *Convicting the Guilty, Acquitting the Innocent: Recently Adopted ABA Policies*, 20 Crim. Just. 14 (Winter 2006); Myrna S. Raeder, *What Does Innocence Have to Do with It? A Commentary on Wrongful Convictions and Rationality*, 2003 Mich. St. L. Rev. 1315.)

Because *House* did not find actual innocence, but only permitted litigation of an otherwise barred procedural claim of ineffective assistance of counsel, the case was remanded. In other words, being more likely than not that no reasonable jury would convict him would not have saved House from execution unless his claim of constitutional procedural error was granted. Without that finding, he could not be freed, let alone granted a new trial. As difficult as House's journey to freedom proved, his petition did not raise any thorny AEDPA issues because it was his first federal filing, so not barred as a successive claim. In fact, *Schlup* was decided a year before the enactment of AEDPA, and therefore, its relationship to AEDPA is not clear, meaning that many habeas litigants will have to surmount AEDPA barriers previously mentioned, as well as satisfying innocence criteria. Ultimately, House was granted

a conditional writ of habeas corpus that did not prohibit the state from retrying him. Although the local district attorney had vowed he would retry House, charges were dropped shortly before the new trial date in 2009. House's ordeal began in 1985. It took three years from the Supreme Court's ruling in June 2006 for the case to be dropped, although House was released from prison in July 2008, after additional DNA testing and investigation further bolstered his claim of innocence (and even that decision generated a dissent). While his long road to freedom proved the system can rectify its errors, it reinforces how difficult the process is.

## Defining "New" Evidence

What constitutes "new" evidence for new trial motions and gateway claims is currently in dispute, with some circuits allowing evidence not previously presented, even if it technically would have been available, while others consider only evidence that could not have been discovered prior to trial through the exercise of due diligence. (*See generally* Jay Nelson, *Facing Up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway*, 59 Hastings L.J. 711 (2008).) The broader rule is necessary to encompass evidence that is often relevant in cases alleging innocence, i.e., 1) evidence excluded because of actions of the defense counsel, whether or not they reach the level of incompetent counsel, or 2) the defendant's own testimony, which may have been absent because the defendant failed to take the stand or plead guilty. Similarly, in federal court, a majority of circuits exclude a codefendant's posttrial offer of exculpatory testimony from the definition of "newly discovered evidence." (*See generally* Mary Ellen Brennan, *Interpreting the Phrase "Newly Discovered Evidence": May Previously Unavailable Exculpatory Testimony Serve as the Basis for a Motion for a New Trial Under Rule 33?* 77 Fordham L. Rev. 1095 (2008).)

Another problem with the definition of newly discovered evidence is demonstrated by the developing scientific consensus about fire investigation, which suggests that there may be as many as 200 people convicted of setting fires that were actually accidents, based in part on expert testimony that would currently be subject to exclusion. (Marc Price Wolf, *Habeas Relief from Bad Science: Does Federal Habeas Corpus Provide Relief for Prisoners Possibly Convicted on Misunderstood Fire Science?* 10 Minn. J. L. Sci. & Tech. 213, 228 (2009).) Is this newly discovered evidence? And would it reach the level of a freestanding innocence claim? It may not be helpful in a gateway claim, since it is difficult to claim incompetence of counsel, or prosecutorial misconduct when the field would not have excluded the evidence at the time it was offered. These questions are not academic, since a recent lengthy article argues that Cameron Todd Willingham, who was executed in Texas in 2004 after spending 12 years on death row for killing his three children by arson, was innocent. (David Grann, *Trial by Fire, Did Texas Execute an Innocent Man*? The New Yorker (Sept. 7, 2009).) Grann always proclaimed his innocence and refused a deal that would have given him a life sentence. Expert reports that challenged the finding of arson did not prevent Willingham's execution. However, a recent report of an independent expert contracted by the Texas Forensic Science Commission that rejected the conclusion the fire was arson may result in the first time that a state confirms that it has executed someone who was factually innocent. The only other evidence of guilt was by a jailhouse informant whose evidence was even viewed skeptically by the prosecution.

Finality problems are more significant when DNA is not available, because innocence cannot typically be demonstrated by a neutral source, there may be circumstantial evidence of guilt, and second-guessing juries could result in retrials with stale evidence and upset victims without a guarantee that justice will be done. In some states like California, the bias against newly discovered evidence is pronounced, and in the habeas context does not warrant relief unless it points unerringly to innocence. (*See generally* Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. Davis L. Rev. 1437 (2007).) Yet, since the early days of our republic when "dead" people reappeared after defendants were sentenced to death for murder, there have been several hundred exonerations without DNA. (*See, e.g.,* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 524 (2004); Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/innocence-and-death-penalty.) Statutory changes to facilitate non-DNA innocence claims are long overdue. Professor Medwed makes a number of suggestions for specific reforms such as extending the time frame for bringing new trial motions, only demanding evidence that "would have probably changed the outcome at trial," allowing direct appeal of a superior court's denial of habeas claims, not apply-

***What constitutes "new" evidence for new trial motions and gateway claims is currently in dispute.***

ing the abuse of discretion standard to summary denials of newly discovered evidence, and not sending newly discovered evidence claims to the original judge. (*Id*. at 1475-76.) Most dramatically, Medwed proposes developing a single remedy for newly discovered non-DNA evidence claims, resembling New York's approach, which combines attributes of new trial, habeas corpus, and coram nobis. (*Id*. at 1477.)

## Freestanding Constitutional Right to Innocence

Innocence claims brought in habeas petitions typically allege violations of due process under the Fifth or Fourteenth Amendments, and claim cruel and unusual punishment under the Eighth Amendment. In *Herrera v. Collins*, 506 U.S. 390 (1993), the U.S. Supreme Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to pursue such a claim." (*Id*. at 417.) *Herrera* refrained from announcing a standard for evaluating a freestanding innocence claim, but cautioned that due to the disruptive effect on finality and the "enormous" burden on the state in having to retry cases on stale evidence, the threshold of such a claim would be "extraordinarily high." (*Id*.) The Court characterized *Herrera*'s showing as "falling far short" of satisfying this standard. (*Id.*) His affidavits were submitted shortly before the scheduled execution, which was more than 10 years after the conviction, and asserted the defendant's brother who died six years earlier had committed the murder.

Justice O'Connor's concurrence, which was joined by Justice Kennedy, observed "executing the innocent is inconsistent with the Constitution," and would be "a constitutionally intolerable event." (*Id.* at 418.) The dissent of Justice Blackmun, joined by Justices Stevens and Souter, agreed with Justice O'Connor, declaring "the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence." (*Id*. at 431.) Thus, five justices agreed that the execution of an actually innocent person would violate the Constitution.

In *House,* the Court once again left open whether a truly persuasive freestanding innocence claim in a capital case would warrant federal habeas relief if no state avenues of relief remain available. In dicta, *Osborne* again assumed without deciding that an actual innocence claim could be brought in habeas, but noted "the high standard any claimant would have to meet" to succeed with such a claim. Given such language, it is not surprising that *Herrera* relief was denied to five people whom DNA later proved innocent, including one who had actually presented initial DNA results that excluded him as the perpetrator. (Garrett, *Claiming Innocence,* 92 Minn. L. Rev. at 1692.) Even today, some circuits do not even recognize freestanding claims of actual innocence on federal habeas review. (S*ee, e.g.,* In re Swearingen, 556 F.3d 344, 348 (5th Cir. 2009).) The concurring decision of Justices Scalia and Thomas in *Herrera* suggested "[w]ith any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon." (*Id*. at 428.) In fact, 59 of the DNA exonerees received a pardon. (University of Virginia Law School, *available at* http://www.law.virginia.edu/html/librarysite/garrett_exonereedata.htm.) However, as previously discussed, because Troy Davis has been denied a pardon, the Court will ultimately be faced with yet another claim of actual innocence. Professor Garrett suggests that judicial reliance on finality in this debate is misplaced since state DNA testing statutes have abandoned this rationale. (*Claiming Innocence*, 92 Minn. L. Rev. at 1702.) Even where a circuit permits a freestanding innocence claim, some categories of non-DNA cases appear never able to meet the test. For example, *Mills v. Hill*, 2009 WL 1426787 (9th Cir. 2009), noted that "[w]e have rejected freestanding claims of innocence based on the affidavit of a mental health expert hired by the defense, reasoning that '[b]ecause psychiatrists disagree widely and frequently on what constitutes mental illness, a defendant could always provide a showing of factual innocence by hiring psychiatric experts who would reach a favorable conclusion.'"

## Final Thoughts

In the absence of DNA exclusions, postconviction claims of innocence tend to be discounted because of our inability to readily identify individuals who were wrongfully convicted. *Arizona v. Youngblood*, 488 U.S. 51, 58-59 (1988), poses the most telling example of this dilemma. *Youngblood* denied relief where the state had not preserved evidence that the defendant claimed could exonerate him, and also rejected any constitutional remedy in the absence of bad faith destruction of such evidence by the government. The decision did not even require any showing of good cause for the destruction. Yet some 12 years later, evidence was found that when submitted to newer DNA analysis exonerated Youngblood. How ironic that the Supreme Court downplayed the possibility of Youngblood's innocence in setting a high threshold in a case where the defendant actually was innocent. That *Youngblood* is not an isolated example of our failure to accurately determine after conviction who is innocent is demonstrated by Professor Garrett's study of exonerees, which revealed that the reason for denial of relief in one-third of the cases with written decisions on direct appeal was harmless error. (*Judging Innocence*, 108 Colum. L. Rev. at 108.) Indeed, in half of the written decisions, courts referred to the likely guilt of the defendant, and 10 percent referred to the evidence of guilt as overwhelming. (*Id* at 109.) In other words, appellate review not only failed to rectify the wrong-

ful conviction, but judges also incorrectly identified innocent defendant as guilty, and thereby disregarded the strength of the procedural errors during trial.

Given the lack of a viable constitutional theory to raise claims of innocence on direct appeal, it is not surprising that of the 16 exonerees who sought a new trial based on newly discovered evidence of their innocence, none received relief prior to obtaining DNA testing. (*Id.* at 111.) Similarly, the five who raised *Herrera* claims had them denied. (*Id.* at 112.) Interestingly, 45 percent challenged the sufficiency of evidence supporting their conviction, often highlighting unreliable evidence, but only one out of 60 ultimately prevailed on this theory. (*Id.*, discussing standard in Jackson v. Virginia, 443 U.S. 307, 324 (1979), requiring showing that no rational trier of fact "could have found proof of guilt beyond a reasonable doubt" based on evidence presented at trial.)

To respond to this disconnect, North Carolina has set up a commission that inquires into individual cases and actually reviews evidence not submitted at trial. (*See* North Carolina Ctr. on Actual Innocence, Guidelines for Counsel Appointed by Indigent Defense Services for Claims Investigated by the North Carolina Innocence Inquiry Commission (2007), *available at* http://www.ncids.org/OtherManuals/InnocenceInquiry/guidelinesforiicappointedcounsel.pdf.) This type of commission resembles the model used in the United Kingdom and Canada. (*See, e.g.*, ABA Report, *supra*; Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 Am. U. Int'l L. Rev. 1241 (2001); Barry C. Scheck and Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 Judicature 98 (2002).) While such an approach may be considered too bold at present for most jurisdictions to adopt, commission review is no guarantee that innocence will be established, as can be seen by the rejection of the first case sent by the North Carolina Innocence Inquiry Commission for judicial review. (Press Release, North Carolina Innocence Inquiry Commission, *Man's Conviction Upheld in Innocence Hearing*, (Sept. 3, 2008).)

Thus, until technology or forensic science is able to provide the equivalent of DNA exclusions in cases not involving biological evidence, such postconviction claims of innocence will understandably continue to be treated skeptically. Dedicated prosecutors and defense counsel are the best protectors of innocence, but we also need to be more open to reviewing policies, practices, and legal doctrines across the criminal justice system to ensure that procedures that appear to create high risk of error are changed to reduce the risk of wrongful convictions. ■