

ESTABLISHING THE RELEVANCE OF EXPERT TESTIMONY REGARDING EYEWITNESS IDENTIFICATION: COMPARING FORTY RECENT CASES WITH THE PSYCHOLOGICAL STUDIES

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I. INTRODUCTION

There is a long history of researchers, mostly academic psychologists, staging crimes in front of students to demonstrate the problems involved with human memory and eyewitness identification.¹ It has been reported that one of the first such demonstrations was approximately one hundred years ago by a German professor in Berlin.² Since that time, thousands of studies have been conducted and reported in academic journals, as well as in the popular press.³ These researchers have consistently and repeatedly shown that many factors can affect the accuracy of acquisition, storage and retrieval of memories, as it relates to eyewitness identification.⁴

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¹ See generally ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1996) (explaining how researchers have studied and identified many factors comprising witnessing an event, including individual perceptions, the way people store memories, how memories are retrieved, and external elements that can subtly alter memory).

² *Id.* at 20-21. According to history, Professor von Liszt, a famous criminologist of the time, was teaching a class when two students engaged in a heated argument that ended in gunfire. *Id.* No one was hurt, but the professor insisted that each student in the class provide a detailed description of the incident. *Id.* Afterward, Professor von Liszt admitted that the episode had been staged in order to conduct an experiment. *Id.* After reading the students' accounts, the professor determined that many witnesses omitted significant, essential parts of the encounter, while other students invented actions and dialogue that never happened. *Id.*

³ Steven D. Penrod, Solomon M. Fulero & Brian L. Cutler, *Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The State of the Law and the Science*, 13 *BEHAV. SCI. & L.* 229, 245-46 (1995) (noting that one of the article's authors maintained a bibliographical eyewitness research that contained over 2000 references, and many new books were being published on psychological studies of eyewitness identification).

⁴ See generally BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995) (discussing factors that affect eyewitness memory and how expert testimony is needed at trials to explain these factors); ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (3d ed. 1997) (providing both summaries of research into eyewitness identification and helpful ideas for defense attorneys to challenge eyewitnesses); DAVID F. ROSS, J. DON READ & MICHAEL P. TOGLIA, *ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS* (1994) (compiling research articles based on information presented at a symposium of the American Psychological Society in 1991); DANIEL L. SCHACTER, *SEARCHING FOR MEMORY: THE BRAIN, THE MIND, AND THE PAST* (1996) (describing firsthand accounts of treating persons with memory disorders due to psychological trauma or physical brain injuries); CHARLES P. THOMPSON ET AL., *EYEWITNESS MEMORY: THEORETICAL AND APPLIED PERSPECTIVES* (Charles P. Thompson et al. eds., 1998) (presenting research articles on

This is not just an insignificant issue for professors to pontificate upon in front of undergraduate students. Alvin Goldstein, June Chance, and Gregory Schneller of the University of Missouri surveyed prosecutors and estimated that over 77,000 people each year in the United States end up as defendants as a result of eyewitness identification.⁵ In England in 1974, a special committee was formed to review the identification procedures after convictions in several notorious cases were reversed.⁶ The committee, chaired by Lord Devlin, identified 2,116 lineups from the year 1973.⁷ The suspect was picked out in 45 percent of the lineups.⁸ Of that number, 850 were prosecuted and 697 were convicted.⁹ Of particular concern is that 347 people were prosecuted where the only evidence against them was one or more eyewitness identifications.¹⁰ Of these cases, 257 (74 percent) were convicted solely on the basis of the eyewitness' memory.¹¹

In the courtroom, a confident-appearing eyewitness and accompanying testimony represents to the jury an almost irresistible justification that the defendant should be convicted of the charges brought against him.¹² One study of mock trials found that positive eyewitness identification was more likely to lead to a conviction than positive testimony by experts in fingerprint, polygraph, or handwriting analysis.¹³ A tactic defense attorneys have employed to illuminate the complexities and unreliability of eyewitness testimony is to bring in an expert, who can educate the jury on the considerable problems with human

memory and eyewitness identification from a symposium presented by the Society for Applied Research in Memory and Cognition in July 1995).

⁵ Alvin G. Goldstein, June E. Chance & Gregory R. Schneller, *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 73 (1989). The researchers arrived at the 77,000 estimate for arrests based on eyewitness identification by making the following calculation: based on answers to questionnaires returned by prosecutors across the United States, the researchers calculated the median percentage of felony cases with crucial eyewitness evidence at 3 percent. *Id.* The Federal Bureau of Investigation's National Crime Information Service reported 2,577,100 arrests for the felony crimes in the researchers' index. *Id.* Multiplying the number of arrestees by the percentage of eyewitness-critical evidence, the researchers estimated that roughly 77,313 people were arrested solely on the basis of eyewitness identification. *Id.*

⁶ LOFTUS, *supra* note 1, at 8 (explaining that after two men were proved to be wrongly convicted based on eyewitness identification, the British government formed a committee to investigate the possibility that more people were in prison unjustly based on mistaken eyewitness testimony).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 9.

¹² See LOFTUS & DOYLE, *supra* note 4, at 5-8 (noting that confident eyewitnesses may be more compelling than scientific experts because eyewitnesses can provide a detailed account of the entire crime, while the expert focuses on one small, isolated piece of evidence).

¹³ *Id.* at 5 (explaining that in mock trials, 78 percent of defendants were convicted based on eyewitness testimony, while fingerprint evidence convicted 70 percent, polygraph evidence convicted 53 percent, and handwriting evidence convicted only 34 percent of mock defendants).

memory.¹⁴ Unfortunately, it is not uncommon for the trial judge to exclude expert testimony of this nature.¹⁵

Expert testimony in federal courts is governed by Federal Rule of Evidence 702¹⁶ as interpreted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁷ The Supreme Court explicitly stated “the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”¹⁸

The authors maintain that there should not be any controversy regarding the reliability of the research on eyewitness identification. The scientific validity of the psychological research on eyewitness identification has been established through thousands of scientific publications.¹⁹ The authors have personal experience on prosecutors’ proclivity at trial to question the relevance of the psychological studies, simply because most studies are conducted with college students. It seems natural to be skeptical about extrapolating from studies using volunteers in staged settings to the traumatic events that victims experience in a crime.²⁰ The focus of this article is to establish such skepticism as unwarranted and to show that the psychological studies, conducted with healthy volunteers in non-violent situations, reflect the same principles seen in real crimes with genuine victims.²¹ Therefore, courts should allow expert testimony relating to the inherent problems with eyewitness identification.

¹⁴ See CUTLER & PENROD, *supra* note 4, at 213-24 (pointing out that in experiments with mock trials, jurors who heard testimony regarding eyewitness identification limitations were far more skeptical of eyewitness identification than jurors who did not hear expert testimony).

¹⁵ *McMullen v. State*, 714 So. 2d 368, 370, 373 (Fla. 1998) (noting that the trial court had discretionary authority to allow such expert testimony into evidence, but the court did not abuse its discretion in excluding this testimony because the substance of the expert’s testimony was not such that required “special knowledge or experience to assist jurors in reaching their conclusions”).

¹⁶ FED. R. EVID. 702. This rule provides, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” *Id.*

¹⁷ *Daubert Inc. v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The Supreme Court interpreted Federal Rule of Evidence 702 as requiring trial judges to evaluate the admissibility of expert scientific testimony by determining (1) whether the expert is proposing to testify to scientific knowledge (2) and whether it will assist the trier of fact to understand or determine a fact in issue. *Id.* at 592. The Supreme Court determined that the following four factors are relevant in assessing whether these two criteria are met: (1) whether the theory has been tested; (2) whether it has been subjected to peer review and publication; (3) the standard used in controlling the technique’s operation and its potential rate of error; and (4) how widely the theory has been accepted. *Id.* at 593-94.

¹⁸ *Id.* at 597.

¹⁹ See Penrod, Fulero & Cutler, *supra* note 3, at 245 (listing, not only, recent books on the subject of eyewitness identification, but also sources for journal articles detailing similar research).

²⁰ See CUTLER & PENROD, *supra* note 4, at 103-04 (noting that ethical constraints prohibit researchers from truly traumatizing subjects in order to test their theories on how stressful or violent situations affect the memories of eyewitnesses).

²¹ See generally LOFTUS & DOYLE, *supra* note 4, at 9-45 (explaining several studies using healthy volunteers and showing similar memory impairment in the structured experiments as in interviews with people after national tragedies, such as the explosion of the space shuttle *Challenger*).

The authors believe that juries should hear such expert testimony because of numerous wrongful convictions of innocent persons. It has been shown repeatedly, in large collections of cases, that the most common error in a wrongful conviction is erroneous eyewitness identification.²² Edwin Borchard was the first to gather a collection of wrongful convictions, and, in 1932, he published a book outlining 65 criminal convictions that were completely unfounded.²³ He stated, “[p]erhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically responsible for 29 of these convictions.”²⁴ This amounts to 45 percent of the 65 cases.²⁵ In 1987, Bedau and Radelet reported their findings on 350 cases that they called *Miscarriages of Justice in Potentially Capital Cases*.²⁶ They determined that 193 (55 percent) were witness errors.²⁷ Edward Connors, Thomas Lundregan, Neal Miller, and Tom McEwan, staff members from the Institute of Law and Justice, reviewed the first 28 cases exonerated with DNA evidence, and in the majority of cases found that eyewitness testimony was the most compelling erroneous evidence presented at trial.²⁸ More recently, Scheck, Neufeld and Dwyer expanded the research by Connor and his team to a total of 62 cases exonerated with DNA evidence and found mistaken identifications to be the most frequent factor leading to the wrongful conviction in 52 (84 percent) of the cases.²⁹

²² See generally EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932) (providing a compilation of 65 cases of persons convicted in error, mostly on the basis of mistaken identification, circumstantial evidence, perjury, or some combination of these factors); Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (listing 350 cases of innocent persons convicted of capital crimes, some of them executed or almost executed); EDWARD CONNORS ET AL., *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996) (profiling 28 cases of men convicted of some form of sexual assault who were all later exonerated by DNA tests); BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000) (detailing the true stories of several persons exonerated with the aid of the attorneys of the Innocence Project).

²³ BORCHARD, *supra* note 22, at xiii. Borchard presents these 65 cases in short narrative form. *Id.* at viii. Additionally, he argues that all persons wrongfully convicted deserve both indemnification for loss and damage suffered, and a public vindication of his or her character or the state's admission of error. *Id.* at vii.

²⁴ *Id.* at xiii. Borchard noted that juries seem more willing to believe testimony by victims of outrageous crimes than any evidence the defendant presents, including valid alibis. *Id.*

²⁵ *Id.*

²⁶ See Bedau & Radelet, *supra* note 22, at 21-27. The purpose of this article was to show that innocent people can and have been executed in the United States during this century. *Id.* at 26.

²⁷ *Id.* at 57. Erroneous witness identification was sometimes combined with other errors that may have contributed to the conviction, but often the eyewitness testimony was the primary or only cause of the conviction. *Id.* at 60.

²⁸ See CONNORS ET AL., *supra* note 22, at 24-25. This report noted that the criteria established for jurors to evaluate the reliability of eyewitness identifications came from *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Id.* These factors include the accuracy of the witness' prior description of the perpetrator, the witness' opportunity to view the perpetrator at the time of the crime, the level of certainty demonstrated by the witness, the witness' degree of attention, and the length of time between the crime and the confrontation. *Id.*

²⁹ See SCHECK, NEUFELD & DWYER, *supra* note 22, at 263. In many of these cases, more than one factor leading to the false conviction was present. *Id.*

It would appear that the juries cited in the above four studies overvalued the accuracy of the eyewitness testimony presented. Clearly, the juries were unable to appreciate the inherent inaccuracy of human recall. The authors can think of nothing more "relevant to the task at hand"³⁰ than an expert assisting a jury in understanding the limitations of eyewitness identification and thereby avoiding the conviction of an innocent defendant.

This article illustrates that the general principles of eyewitness identification, established through a century of psychological research with healthy volunteers, are the same factors that have resulted in actual erroneous convictions and imprisonments. Employing the circumstances of the 40 most recent convictions exonerated with DNA evidence, we will demonstrate how the known psychological factors resulted in false eyewitness identification. These 40 cases will show why expert testimony relating to eyewitness identification is needed in the courtroom.

II. METHODS

The authors searched two current databases available on the world wide web, which list cases of innocent people who were convicted of crimes and later exonerated with new evidence.³¹ One database is the work of The Innocence Project at the Benjamin N. Cardozo School of Law.³² This site provides case profiles on most of the prisoners in the United States who have been exonerated with new DNA evidence.³³ The authors of The Innocence Project website are in the unique position of being intimately involved with many of these cases and therefore have access to the specific facts of each case that are included in the case profiles.³⁴

The Wrongfully Convicted website is a database maintained by one of the authors that is dedicated to learning from the errors in wrongful convictions.³⁵ The criteria for inclusion in the database are (1) a criminal conviction, (2) new evidence that establishes innocence, (3) exoneration by an official of the government, and (4) a publication that documents the details of the case.³⁶ Some cases have been compiled from older collections (such as Borchard and Bedau &

³⁰ *Daubert Inc. v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (emphasizing that the Federal Rules of Evidence task trial judges with ensuring that expert witness testimony is both reliable and relevant).

³¹ See generally Benjamin N. Cardozo School of Law, *Innocence Project*, at <http://www.innocenceproject.org> (last visited April 15, 2003) (providing an extensive list of individuals who have been wrongfully convicted); Edmund S. Higgins, *Wrongfully Convicted*, at <http://www.DrEdmundHiggins.com> (last visited April 15, 2003) (providing a database of wrongfully convicted individuals and the legal issues surrounding their cases).

³² See Benjamin N. Cardozo School of Law, *Innocence Project*, at <http://www.innocenceproject.org> (last visited Mar. 18, 2003).

³³ *Id.*

³⁴ *Id.*

³⁵ Edmund S. Higgins, *Wrongfully Convicted*, at <http://www.DrEdmundHiggins.com> (last visited Mar. 18, 2003).

³⁶ *Id.*

Radelet) of wrongful convictions.³⁷ More recent cases have been documented through newspaper articles and/or appellate decisions concerning the individual cases.³⁸

These databases were searched to identify the 40 most recent cases that have been exonerated by DNA evidence and that included erroneous eyewitness identification. The search was conducted in January 2003. The specific details for each case that resulted in the erroneous eyewitness identification were collected and categorized as described below.

Elizabeth Loftus, "the preeminent psychological authority in the field of eyewitness testimony,"³⁹ and attorney James M. Doyle have written a comprehensive textbook on the topic.⁴⁰ In the first four chapters they review the known psychological factors that decrease eyewitness performance.⁴¹ From those chapters this study's authors have gathered a list of factors that might apply to the 40 exonerated cases. All factors in the table have been demonstrated in psychological experiments with healthy volunteers. A brief description of the factors taken directly from the Loftus and Doyle book are included below.⁴²

List of Factors Affecting Eyewitness Performance

I. Factors Affecting Acquisition.⁴³

- a. Duration of the event. "[T]he longer a person has to look at something, the better his memory will be."⁴⁴
- b. Stress and fear. "The typical finding is that those who are stressed during some event remember it less well when they are tested later, even though they are not stressed at the time of the later test."⁴⁵
- c. Weapon focus. "The term *weapon focus* refers to the concentration of a crime witness's attention on a weapon – the barrel of a gun or the blade of a knife – and the resultant reduction in ability to remember other details of the crime."⁴⁶
- d. Age. "[A]nalysis suggests that children past twelve years of age are roughly equal to adults in their ability to recognize faces, but younger children are substantially less able."⁴⁷

³⁷ *Id.*

³⁸ *Id.*

³⁹ LOFTUS & DOYLE, *supra* note 4, at 3.

⁴⁰ *Id.*

⁴¹ See generally *id.* at chs. 1-4 (discussing jurors' beliefs about eyewitness testimony, factors determining an eyewitness' perception, factors determining a person's retention and retrieval of events, and limitations on the ability to recognize people).

⁴² *Id.*

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 15.

⁴⁵ See LOFTUS & DOYLE, *supra* note 4, at 29.

⁴⁶ *Id.* at 30.

⁴⁷ *Id.* at 37.

II. Factors Affecting Retention.⁴⁸

- a. Time until retrieval. “The ‘forgetting curve’ shows, in essence, that we forget a good deal of new information soon after we learn it, and that forgetting then becomes more gradual.”⁴⁹
- b. Post-event information incorporation. “[After the event] false information can be introduced into a person’s recollection, and later this information may be reported as if it actually occurred.”⁵⁰

III. Factors Affecting Retrieval.⁵¹

- a. Confidence. “In short, the witnessing situations generally encountered in litigation – short, unexpected, often violent – are those in which a correlation between confidence and accuracy is the most difficult to find.”⁵²
- b. Biased Lineups. “The most common problem with a lineup is that many of the distractors can be eliminated immediately – they are simply not plausible alternatives. The suspect is then available to be picked by default.”⁵³
- c. Sequential presentation of suspects. “With the sequential presentation, the researchers found a reduced rate of false identifications in the lineups that did not contain the perpetrator. The reduction of false identifications occurred without loss of accurate identifications in the lineups in which the perpetrator was there.”⁵⁴
- d. Cross-Racial identification. “It is well established that there exists a comparative difficulty in recognizing individual members of a race different from one’s own.”⁵⁵

Each of the 40 cases was then examined to determine if any of the psychological factors listed above could be identified in that specific case. In each case there was one eyewitness who could be called the ‘primary witness.’ Interestingly, the victim was the primary witness in almost all these cases. That person’s perspective was then used to make the assessment of the psychological factors listed above. The perspective of other witnesses – for example, a bystander – whose identification may have been included in the trial, was not included in this analysis.

⁴⁸ *Id.* at 11.

⁴⁹ *Id.* at 49.

⁵⁰ *Id.* at 57.

⁵¹ See LOFTUS & DOYLE, *supra* note 4, at 11.

⁵² *Id.* at 67.

⁵³ *Id.* at 80.

⁵⁴ *Id.* at 83.

⁵⁵ *Id.* at 86.

III. RESULTS

The 40 cases that included eyewitness identification as part of the convicting evidence presented at trial are presented in Table 1. All the persons were exonerated in the five years between 1998 and 2002. Two cases involved two culprits convicted of the same crime with one victim. Echols and Scott were convicted of raping a woman in Georgia and the Mahan brothers were convicted of raping a woman in Alabama.⁵⁶ It is important to note that there was no report, in any case, of testimony presented at trial by an expert versed in eyewitness identification.

Table 1⁵⁷

#	Name	Year Exonerated	Year Convicted	State
1	Bibbins, Gene	2002	1987	Louisiana
2	Bromgard, Jimmy Ray	2002	1987	Montana
3	Echols, Douglas	2002	1987	Georgia
4	Godschalk, Bruce	2002	1987	Pennsylvania
5	Johnson, Albert	2002	1992	California
6	Johnson, Larry	2002	1984	Missouri
7	May, Herman	2002	1988	Kentucky
8	McGee, Arvin	2002	1989	Oklahoma
9	McMillan, Clark	2002	1980	Tennessee
10	Scott, Samuel	2002	1987	Georgia
11	Sutherland, David	2002	1985	Minnesota
12	Webster, Bernard	2002	1983	Maryland
13	Alexander, Richard	2001	1998	Indiana
14	Anderson, Marvin	2001	1983	Virginia
15	Dixon, John	2001	1992	New Jersey
16	Green, Anthony M.	2001	1988	Ohio
17	Hernandez, Angel	2001	1988	Massachusetts
18	Mayes, Larry	2001	1982	Indiana
19	Pierce, Jeffrey	2001	1986	Oklahoma
20	Pope, David Shawn	2001	1986	Texas
21	Webb, Mark	2001	1987	Texas
22	Atkins, Herman	2000	1988	California
23	Butler, A.B.	2000	1983	Texas
24	Cromedy, McKinley	2000	1994	New Jersey
25	Gregory, William	2000	1993	Kentucky
26	Holdren, Larry	2000	1985	West Virginia
27	Lavernia, Carlos	2000	1985	Texas
28	Miller, Neil	2000	1990	Massachusetts

⁵⁶ See Benjamin N. Cardozo School of Law, *Innocence Project*, at <http://www.innocenceproject.org/case/index.php> (last visited Mar. 18, 2003).

⁵⁷ *Id.*

29	O'Donnell, James	2000	1998	New York
30	Robinson, Anthony	2000	1987	Texas
31	Sarsfield, Eric	2000	1987	Massachusetts
32	Smith, Frank Lee	2000	1986	Florida
33	Villasana, Armand	2000	1999	Missouri
34	Youngblood, Larry	2000	1985	Arizona
35	Abdal, Habib Wahir	1999	1983	New York
36	Clyde, Charles	1999	1982	Louisiana
37	Johnson, Calvin	1999	1983	Georgia
38	Mahan, Dale	1998	1986	Alabama
39	Mahan, Ronnie	1998	1986	Alabama
40	Mitchell, Perry	1998	1984	South Carolina

A. *Factors Affecting Acquisition of Memories*

With the exception of the Frank Lee Smith case, all thirty-nine of the eyewitnesses were the victims of the crime itself (98 percent).⁵⁸ All of the crimes were rape or sexual assault. In the Frank Lee Smith case, the primary eyewitness was a bystander. Because the victim died, Smith was also convicted of murder.⁵⁹ Table 2 shows the findings from the 40 cases with regard to factors affecting the acquisition of memories.

Table 2
Factors Affecting Acquisition of Memories

Factor	Number present (n = 40)
Short duration of exposure to face of the offender	12 (30%)
Stress and fear: Rape/Sexual assault	39 (98%)
Weapon focus	14 (35%)
Age: Younger than 12 years old	2 (5%)

Twenty-five (63 percent) of the cases had at least two factors affecting acquisition of memory. For example, the victim was highly stressed and the offender had a weapon.

B. *Factors Affecting Retention of Memories*

The duration of time between the event and the identification by the eyewitness is shown in Table 3. Post event information that became incorporated into the memory of the event for the victim was clearly evident in five cases. In each case, the victim was shown a photograph of the suspect which they did not

⁵⁸ *Id.*

⁵⁹ *Id.*

recognize and at some later point (ranging from minutes to months) made a "positive" identification of the suspect.

Table 3

Duration of Time from the Event to the Eyewitness Identification

Duration to ID	Number present (n = 40)
Less than a day	8 (20%)
Several days or a week	4 (10%)
Greater than 2 weeks	12 (30%)
No information	16 (40%)

C. Factors Affecting Retrieval of Memories

Reports of eyewitness confidence were not available for every case. However, with one exception, we can assume that the eyewitnesses were confident in their identification at the trial, for it is unlikely that the suspect would have been convicted with a witness who came across as marginally confident. The one exception was the Jimmy Ray Bromgard case where the victim, an eight-year-old girl, did not express full confidence in her identification.⁶⁰ In eight (20 percent) cases there was a clear increase in the confidence of the eyewitness from the initial identification to the trial. In five (13 percent) other cases, after the convicted person was exonerated the victim was reported to still be confident in her identification, despite the DNA evidence establishing the error.

Biased line-ups were apparent in four (10 percent) of the cases. In each of these cases the photo array was constructed such that the suspect stood out in some noticeable way from the fillers. For example, Armand Villasana was the only Latino in an array that included five other white men.⁶¹

The identification methods are presented in Table 4. The sequential method of identification was not used in any of the cases.

Table 4

Identification Methods Used (some methods were used twice)

Method	Number present (n = 40)
Show-up	8 (20%)
Mug shot book	2 (5%)
Photo array	21 (53%)
Lineup	8 (20%)
Unknown	6 (15%)

⁶⁰ *Id.*

⁶¹ *Id.*

Fifteen (38 percent) of the cases were cross racial identifications. Fourteen (35 percent) were white victims and black culprits. One (3 percent) was a white victim and a Hispanic culprit.

IV. DISCUSSION

In the years between 1998 and 2002, 40 men who were wrongfully convicted of serious crimes, based on erroneous eyewitness identifications were released from prison.⁶² Each case was reviewed for the presence of 10 factors known to decrease eyewitness accuracy in staged crimes with healthy volunteers. It was clearly demonstrated that these factors were also present in the actual cases.⁶³

In every case, the validity of the eyewitness' memory was beyond the common knowledge of the members of the jury. What cries out from the review of these imbroglios is the destructive cascade of false impressions, assumptions and judgments initially on the part of the police and prosecutors. This mindset is ultimately fostered on the jury, resulting in the destruction of innocent lives. For example, in *McMullen v. State*,⁶⁴ a decision by the Supreme Court of Florida affirmed the lower court's exclusion of an expert who was to testify on the problems with the eyewitness identification.⁶⁵ The court stated, "we hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony."⁶⁶ Based on the above review of factors affecting eyewitness identification, this seems highly optimistic.

The juries in each of these 40 cases failed to recognize the problems with the eyewitness identification upon which analyses were readily identifiable. There is no reason to believe that there was anything unique or particularly problematic with the juries in each of these cases. It is hard to imagine that any jury would not benefit from a more informed understanding of the malleability of human memory. While it would be presumptuous to assume that a qualified expert in eyewitness identification might have altered the outcome in any of these cases, the results of this analysis support the notion that with the guidance of an expert,

⁶² See *supra* Part III. tbl.1.

⁶³ See *supra* Part II. The ten factors are (1) duration of the event; (2) amount of stress and fear; (3) a weapon focus; (4) age of the witness; (5) time until memory retrieval; (6) post event information incorporation; (7) confidence of eyewitness; (8) biased lineups; (9) sequential presentation of suspects; and (10) cross-racial identification. *Id.*

⁶⁴ 714 So. 2d 368 (Fla. 1998).

⁶⁵ *Id.* McMullen was convicted of aggravated assault and aggravated battery for the shooting of a beer store owner. *Id.* at 369. This was in spite of the fact that the owner's wife initially told police she had never seen the assailant before (McMullen was a regular customer at the store) and three alibi witnesses testified that the defendant was elsewhere at the time the crime was committed. *Id.* at 369, 379.

⁶⁶ *Id.* at 372. The state argued that to allow expert witnesses to testify regarding eyewitness identification would be "invading the province of the jury." *Id.* at 369. The Florida Supreme Court, while upholding the outcome in *McMullen*, held that admissibility of such expert testimony is left to the discretion of the trial judge. *Id.* at 372. *But see* *United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992) (adopting a per se rule prohibiting the use of eyewitness identification experts in trials).

juries will be better able to appreciate the imperfections of memory and thereby better sort out the guilty from the innocent.

Several obstacles have impeded the collection of a complete set of facts in each case. Certain gaps relating to the presence or absence of each of the psychological factors are inevitable with the data collection system used in this study. Consequently, several of the 10 psychological factors may have been present in a case, for example a weapon, but it simply was not mentioned in the article that was reviewed for this analysis. With that in mind, the factors that were present in 30 percent or more of the cases are presented in Table 5 and subsequently reviewed in more detail.

Table 5
Most Common Factors Tending to Decrease Eyewitness Accuracy

Factor	Percent
Non-sequential presentation of suspects	100%
Confident eyewitness	98%
Traumatic event	98%
Cross racial identification: white victim & black suspect	35%
Weapon present	35%
Short duration of seeing the offender's face	30%
Two weeks or greater from the event to the identification	30%

A. *Sequential Presentation of Suspects*

There were no cases in which the suspect was presented to the eyewitness in a sequential manner. The original article describing the sequential presentation method by Lindsay and Wells was published in 1985 and showed a reduction in false identification, while maintaining accuracy in correct identifications.⁶⁷ A report published by the Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, describing the proper way to conduct a sequential lineup, was published in 1999.⁶⁸ While it is unclear if these documents have changed behavior in the field, what is clear from this analysis is that the simultaneous presentation of suspects appears to promote false identifications.

⁶⁷ R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556, 562-63 (1985) (concluding that sequential lineups increase the ratio of accurate identifications to false identifications, thereby helping to protect innocent suspects).

⁶⁸ See generally EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (Technical Working Group for Eyewitness Evidence ed. 1999). This guide, produced by the U.S. Department of Justice, states that it is written to promote accuracy in eyewitness evidence by combining research and practical applications. *Id.* at 1-2. However, it cautions that it is only a guide to "recommended practices for the collection and preservation of eyewitness evidence." *Id.* at 12.

B. *Confident Eyewitness*

The confidence exhibited by the eyewitness at the initial identification has been shown to be only mildly associated with accuracy.⁶⁹ Studies have shown that once an eyewitness has received any sort of confirming feedback from any authority figure, the correlation is lost.⁷⁰ This has been borne out in the cases presented. In eight of the cases, the confidence at the initial identification was marginal, but grew and transformed to complete certainty by the time of the trial. Shockingly, in five other cases, despite DNA evidence proving the wrong man had been convicted, certain eyewitnesses who were subsequently contacted refused to give up their mistaken notion that the identified individual was guilty.⁷¹ This remarkable finding demonstrates how firmly impressions, once burned into the mind of an eyewitness, can be almost impossible to dislodge.

C. *Traumatic Event*

In 39 of the 40 cases, the eyewitness and the victim were the same person.⁷² It is commonly believed that the greater the brutality and trauma of the event, the greater the tendency to retain accurate memories of it.⁷³ "I'll never forget his face," is a common statement by victims.⁷⁴

One model to illustrate this phenomenon is the Yerkes-Dodson Curve, a hypothetical formulation that postulates that moderate stress improves memory, but that excessive stress or trauma will decrease the memory performance.⁷⁵ Psychological studies in staged environments suggest that distress does indeed

⁶⁹ See Siegfried L. Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 322-24 (1995). This article noted that other considerations affect the confidence of the eyewitness without affecting accuracy. *Id.* at 324. Of special concern is the common practice of briefing witnesses in advance of the trial on the types of questions they may encounter during cross-examination. *Id.* Witnesses who were pre-briefed expressed greater confidence in their identifications, and juries were therefore more likely to convict the defendant. *Id.* This practice, however, has no effect on the accuracy of the eyewitness' original identification. *Id.*

⁷⁰ Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 117 (2002). The study described in this article showed that persons who accurately identified the culprit did not show an increase in their certainty when given confirming feedback, but eyewitnesses who incorrectly identified the culprit experienced significant inflation in their confidence when given confirming feedback. *Id.*

⁷¹ See Benjamin N. Cardozo School of Law, *Innocence Project*, at <http://www.innocenceproject.org> (last visited April 15, 2003).

⁷² *Id.* The only case where the eyewitness was not the victim was in the Frank Lee Smith case. *Id.*

⁷³ LOFTUS & DOYLE, *supra* note 4, at 26 (showing that some psychologists who have studied reactions to high stress situations, such as Rape Trauma Syndrome, believe that victims may suppress memories of the attacker for long periods of time before they finally remember their attackers).

⁷⁴ *Id.* at 76.

⁷⁵ *Id.* at 27-28 (citing the example of a Yugoslavian Airlines stewardess who survived both a mid-air explosion on the airplane and falling 30,000 feet, but remembered nothing between getting on the aircraft and waking up in the hospital).

decrease memory performance.⁷⁶ But it would be unethical to seriously traumatize a volunteer in an experiment to thoroughly prove this hypothesis.⁷⁷ Consequently, the actual relationship between excessive trauma and memory performance remains unclear.⁷⁸

The 39 victims, who were all sexually assaulted, were traumatized in such a horrendous manner that they are likely to still be haunted by the crime and continually relive the scenario, e.g., Post Traumatic Stress Disorder.⁷⁹ Yet, when it came to identifying the culprit, they all got it wrong.⁸⁰ On the one hand, while they may not be able to forget the experience, the memories are not all accurate. These unfortunate experiences seem to support the theory of the Yerkes-Dodson Curve.⁸¹

D. Cross-Racial Identification

A commonly held belief is that race is not a determining factor in eyewitness identification.⁸² To the contrary, numerous studies have confirmed that eyewitnesses did better in performance and accuracy in identifying suspects of their own race than those of another racial group.⁸³ Supporting this theory is the fact that in this report 35 percent of the assaults were white victims and black suspects,⁸⁴ whereas in a 2002 FBI crime study report, 7 percent of similar assaults were white victims and black offenders.⁸⁵ This five-fold increase, while possibly a product of the limited number of cases presented here, suggests that the staged experiments accurately reflect the difficulty people have in identifying members of another race.

⁷⁶ *Id.* at 29.

⁷⁷ *Id.* (explaining that current ethically appropriate methods of increasing stress in research situations are (1) showing subjects violent films, (2) exposing subjects to objects they fear (e.g., spiders or snakes), or (3) by letting subjects believe that they will receive electric shocks).

⁷⁸ See Sven-Åke Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 PSYCHOL. BULL. 284, 303-04 (1992) (noting that results from various studies have shown that witnesses have neither a poorer memory of a traumatic event nor a more accurate memory of that event).

⁷⁹ See Edna B. Foa & Gordon P. Street, *Women and Traumatic Events*, 62 J. CLINICAL PSYCHIATRY 29, 30 (2001) (showing that 38 percent of sexual assault victims still exhibited all the diagnostic criteria for Post Traumatic Stress Disorder six months after the attack).

⁸⁰ See *supra* Part III.A-C.

⁸¹ See LOFTUS & DOYLE, *supra* note 4, at 27-28 (explaining that the Yerkes-Dodson curve is shaped like an arch, with the efficiency of a person's memory the greatest while under moderate stress, and lowest at (1) the point of waking and (2) when experiencing severe emotional arousal or trauma).

⁸² See LOFTUS, *supra* note 1, at 172-73 (noting that research shows people are unaware that it is more difficult to identify a person of a different race than their own).

⁸³ Tara Anthony, Carolyn Copper & Brian Mullen, *Cross-Racial Facial Identification: A Social Cognitive Integration*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 296, 299-300 (1992) (reporting results of several studies that showed a statistically significant tendency for people to remember faces of persons in the same race better than faces of persons from other races).

⁸⁴ See *supra* Part III.C.

⁸⁵ See Bureau of Justice Statistics, *Personal Crimes of Violence 1996-2000: Percent Distribution of Single-Offender Victimization, Based on Race of Victims, by Type of Crime and Perceived Race of Offender*, tbl.42, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus/previous/cvus42.pdf> (last visited Mar. 18, 2003).

E. *Weapon Present*

Psychological studies and staged events have shown that the presence of a weapon brandished during the commission of a crime alters the focus of the victim, thereby diverting attention from potentially identifiable physical features of the perpetrator.⁸⁶ Indeed, this factor was present and played a significant role in 35 percent of this study's cases.⁸⁷

F. *Duration of View of Face*

This factor needs little discussion. As pointed out in previous studies, the duration of time the victim views the face of the perpetrator impacts on later attempts at identification.⁸⁸ In this study it was a factor in 30 percent of the cases.⁸⁹

G. *Duration of Time Until Identification*

Of no surprise are published studies showing the decay of accuracy of eyewitness identification with the passage of time, the so-called "forgetting curve."⁹⁰ In this study, it was a factor in 30 percent of the cases, as the time interval was greater than two weeks.⁹¹

V. CONCLUSION

A review of these 40 cases, if nothing else, shows that human memory is malleable and that erroneous eyewitness testimony has convicted innocent people.⁹² These men were fortunate in that there were body fluids or tissue samples still available, sometimes decades after their convictions, on which to perform DNA analysis.⁹³ Additionally, the exonerated were somehow able to marshal the interest and resources of individuals or organizations dedicated to exposing wrongful convictions.⁹⁴

⁸⁶ See LOFTUS & DOYLE, *supra* note 4, at 30-31 (explaining that studies show that "people fixate faster, more often, and for longer durations on unusual or highly informative objects").

⁸⁷ See *supra* Part III.A. tbl.2.

⁸⁸ See LOFTUS & DOYLE, *supra* note 4, at 15-16 (proving through experiments that people were more accurate in identifying a person's face in later viewings if the subjects had more time to examine the face during their first exposure to the photographs).

⁸⁹ See *supra* Part III.A. tbl.2.

⁹⁰ See LOFTUS & DOYLE, *supra* note 4, at 49-51 (explaining that the "forgetting curve" shows that people usually forget much of the new information they learned soon after they learned it, and then forgetting becomes more gradual).

⁹¹ See *supra* Part III.B. tbl.3.

⁹² See *supra* Part III.A-C.

⁹³ See CONNORS ET AL., *supra* note 21, at 19-20. In some of these cases, the evidence containing the DNA was about to be destroyed when the defendant's attorney filed for a court order to stay the destruction. *Id.* In another case, the evidence was missing and presumed destroyed until the defense searched a local crime laboratory. *Id.*

⁹⁴ See generally SCHECK, NEUFELD & DWYER, *supra* note 21 (providing detailed accounts of

It is likely that there are thousands of individuals each year convicted of a full spectrum of crimes they did not commit based solely, or in part, on faulty eyewitness identifications.⁹⁵ Lacking evidence that can be scientifically evaluated and the necessary advocacy, they find themselves at the mercy of frail and faulty human recall.⁹⁶

This study has outlined various psychological demonstrations, research and theories on the problems involved with human memory and eyewitness identification.⁹⁷ We have researched and studied 40 of the most recent cases in which defendants were wrongfully convicted and subsequently exonerated using DNA evidence. Common factors were easily identified. These cases have shown that it is not within the common knowledge of the jury to appreciate the potential for misidentification by witnesses.

It is clearly relevant to the task at hand to provide appropriate assistance to the jury in any case that depends in a large part on eyewitness identification. This can be done by allowing qualified experts into the courtroom. We urge trial judges, most of whom have discretionary authority to allow the use of expert testimony regarding eyewitness identification into evidence,⁹⁸ to allow this testimony. Only by allowing juries to hear testimony regarding the limitations of eyewitness identification will they be able to make more accurate determinations of a defendant's guilt or innocence.

persons exonerated through the work of The Innocence Project). See also Benjamin N. Cardozo School of Law, *Innocence Project* web, at <http://www.innocenceproject.org> (last visited April 15, 2003) (providing an updated database on persons exonerated).

⁹⁵ See CUTLER & PENROD, *supra* note 4, at 7.

⁹⁶ See CONNORS ET AL., *supra* note 21, at xxiii (noting that DNA evidence is usually only available for sexual assault cases, not for such crimes as burglary, robbery, or other similar crimes).

⁹⁷ See generally LOFTUS & DOYLE, *supra* note 4, chs. 1-4 (describing studies regarding witness' perceptions, retention and retrieval of memories, and the ability to recognize people).

⁹⁸ See *McMullen v. State*, 714 So. 2d 368, 370-71 (Fla. 1998) (noting that the Eleventh Circuit has adopted a per se rule prohibiting expert testimony on eyewitness identification, but most other jurisdictions leave the admissibility decision to the trial judge's discretion).

“BAD LAWYERING”

HOW DEFENSE ATTORNEYS HELP CONVICT THE INNOCENT

by Sheila Martin Berry*

“To ‘know thyself’ must mean to know the malignancy of one’s own instincts and to know, as well, one’s power to deflect it.” - Karl A. Menninger, M.D. (1893-1990).¹

I. INTRODUCTION

At least one-fourth of wrongfully convicted individuals know what “bad lawyering” is because it put them where they are today, in prison, even on death row.² Yet those of us who advocate for the wrongfully accused and convicted often fail to recognize our own roles in “bad lawyering,” perpetuating the problem and its tragic consequences.

“Bad lawyering” is generally understood to mean “ineffective assistance of counsel,”³ a relatively new concept arising from the Sixth Amendment⁴ right of a criminal defendant to “have the Assistance of Counsel for his defense.”⁵ Guaranteeing persons charged with crimes the right to representation was, in its time, a bold leap forward over English common law, even if counsel proved to be little more than a warm body with “Esquire” behind its name.⁶

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¹ See Quote Geek, *Quotations from Karl Menninger*, available at http://www.quotegeek.com/Literature/Menninger_Karl/ (visited Mar. 24, 2003).

² BARRY SCHECK ET AL., ACTUAL INNOCENCE 263 (1999).

³ MODEL RULES OF PROFESSIONAL CONDUCT 1.1 (1998) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”).

⁴ U.S. CONST. amend. VI.

⁵ *Id.*

⁶ See Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel*, 5 ROGER WILLIAMS U. L. REV. 417, 425 (2000) (providing that under English common law a person charged with treason or a felony was not entitled to counsel, except

The *quality* of this assistance was not examined until 1932, when the U.S. Supreme Court reversed the convictions of the "Scottsboro Boys."⁷ The reversal was based on Fourteenth Amendment due process violations,⁸ but the Court noted the right to be represented "is not discharged by an assignment (of counsel) at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."⁹ Twenty-three years later, the U.S. Supreme Court held that the right to effective assistance is a constitutional due process right that must be recognized by *all* the states.¹⁰

Finally, in 1970, the right to effective counsel was explicitly recognized as a part of the Sixth Amendment's guarantee of the right to counsel in *McMann v. Richardson*,¹¹ when the Court noted "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel."¹²

In theory, the prosecution's duty is to seek the truth,¹³ and the duty of the defense is to do nothing.¹⁴ The defendant is not required to testify, call any witnesses or present any evidence.¹⁵ He can rely on the fact he is presumed innocent and on the prosecution's burden of proving the charges beyond a reasonable doubt.¹⁶

The realities stand in stark contrast to theory. While jurors give lip service to the presumption of innocence, most believe the defendant "must have done something" or the state would not have brought its substantial resources to bear on him.¹⁷ Witnesses in uniforms and lab coats whose job it is to protect the public are much easier to believe than someone who has already been stigmatized simply by being charged.¹⁸ Instructions reminding the jury that the defendant is not required to testify do little to overcome the impression that his or her silence is an indicator of guilt.¹⁹

Reasonable doubt is the most demanding standard, and the least

for the determination of legal questions the accused might raise).

⁷ *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

⁸ U.S. CONST. amend. XIV.

⁹ See *Powell*, 287 U.S. at 71. See also *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938) (reversing a defendant's conviction after finding assistance of counsel had not been provided and the district court failed to inquire as to whether the defendant had waived his right to counsel).

¹⁰ *Reece v. Georgia*, 350 U.S. 85, 90 (1955).

¹¹ 397 U.S. 759 (1970).

¹² *Id.* at 771 n.14.

¹³ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1998) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

¹⁴ U.S. CONST. amend. V (stating that a defendant cannot be forced to incriminate himself).

¹⁵ *Id.* See also *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (providing that the privilege against self-incrimination protects the accused from being compelled to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature).

¹⁶ See *Moore v. United States*, 345 F.2d 97 n.1 (D.C. Cir. 1965) ("The government has the burden of establishing the guilt of the defendant beyond a reasonable doubt. The defendant is not required to establish his innocence under our system of jurisprudence.").

¹⁷ See generally William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 371-72 (1995) (discussing many common predispositions jurors have regarding the accused, including fixed opinions of the likelihood of guilt).

¹⁸ *Id.*

¹⁹ See, e.g., *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that it violates due process to use a defendant's silence against him).

understood.²⁰ Jurors are told it is such doubt as would cause a reasonable person to hesitate before acting in a matter of importance.²¹ What does that mean? Is it the hesitation experienced when you buy a used car “as is”? Or is it the doubt you feel when your child says he’ll walk and feed the dog every day if you’ll let him keep it? How does a juror decide when there is no clear understanding of the standard by which evidence is to be measured?

With all these strikes against a defendant, doing nothing leads directly to doing time. In practice, that is exactly what happens in too many instances. “Bad lawyering” accounted for 23 percent of wrongful convictions among the first 70 DNA exonerations.²² Examples of the “bad lawyering” in these cases include but certainly are not limited to:

- failure to communicate with the client or communicating in a dismissive, callous or hurried manner;²³
- perfunctory or no attempt at discovery;²⁴
- narrow, shallow or no investigation;²⁵
- failure to retain needed experts and/or test physical evidence;²⁶
- minimal preparation, weak trial advocacy and superficial or tentative cross-examination.²⁷

These failures don’t exist in isolation from each other. The criminal defense attorney who puts a block on his phone to keep prisoner-clients from calling can be the same attorney who doesn’t bother to review the discovery evidence turned over by the state (if a discovery order is even sought), and waits until the deadline for identifying witnesses has arrived to begin looking for experts.

Small wonder, then, that with trial approaching, these inadequate advocates urge their clients to plead to the charge in exchange for whatever deal the prosecutor is willing to offer. Professionals estimate that in somewhere between 90 percent and 99 percent of these cases, the client is guilty and almost any deal is a good deal.²⁸ But, if true, in 1 percent to as many as 10 percent of criminal

²⁰ See Laufer, *supra* note 17, at 364-65 (discussing how according to empirical data, many jurors misunderstand basic legal standards presented during preliminary and charging instructions and citing a comprehension error rate of approximately 50 percent for reasonable doubt instructions in a Florida study).

²¹ See Shelagh Kenney, *Fifth Amendment—Upholding the Constitutional Merit of Misleading Reasonable Doubt Jury Instructions*, 85 J. CRIM. L. & CRIMINOLOGY 989, 1020 n.242 (1995) (referencing Idaho’s currently approved reasonable doubt instructions).

²² See The Innocence Project, *Causes and Remedies of Wrongful Convictions*, available at <http://www.innocenceproject.com/causes/index.php> (last visited Mar. 31, 2003).

²³ See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. 5 (1998) (providing that “Competent handling of a particular matter involves inquiry into analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners”).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ No one can provide accurate statistics on this because, even when people are cleared by DNA,

convictions, the defendant then is factually innocent.²⁹ In 1998, the most recent year for which figures are available, almost 928,000 adults were convicted of felonies in state courts.³⁰ That means at least 9,280 and as many as 92,800 innocent people were convicted of crimes they did not commit.³¹ These are the figures for just one year, for felonies only, and do not include similar convictions in federal courts. In addition, 90 percent of those innocent people pled guilty.³²

The Georgia Court of Appeals recently vacated the conviction of Richard Anthony Heath and issued a ruling condemning what it called "assembly-line" justice.³³ Heath pled guilty to charges of driving under the influence and causing a crash that injured three people.³⁴ In more than 300 previous criminal representations however, Heath's lawyer never took a case to trial.³⁵ According to the Georgia Court of Appeals Judge G. Alan Blackburn, his representation "was so deficient that it effectively equaled no assistance at all."³⁶

The Georgia decision is unusual. In most states, a knowing and voluntary guilty plea waives all non-jurisdictional errors.³⁷ Ineffective assistance claims, usually the only appellate route available in cases where the defendant says he was misled or tricked into changing his plea, are met with the judicial equivalent

the state, with rare exception, refuses to concede one's innocence. The high percentage of innocent people who plead guilty or no contest further obscures a head count with even a stab at accuracy. *But see* The Innocence Project of the National Capitol Region (providing a list of resources, databases, and national projects going on surrounding the area of wrongful convictions), available at <http://www.uocss.org/socialaction/innocenceproject.html> ("Based in part on a 1996 *National Institute of Justice Report*, reasonably credible estimates are that up to 10 percent of our national prison population may be factually innocent of the crimes of which were convicted. In other words, there may be close to 200,000 innocent people currently serving time in American prisons.") (last visited Mar. 25, 2003).

²⁹ *Id.* See also James Leibman et al., *Capital Attrition: Error Rates In Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850, 1852 (2000) (providing an error rate of 68 percent and stating seven percent of retrials lead to acquittal).

³⁰ See U.S. Dept. of Justice, *Felony Sentences in State Courts, 1998*, available at <http://www.ojp.usdoj.gov/bjs/glance/felconv.htm> (last visited Mar. 23, 2003).

³¹ *Id.*

³² Dirk Olin, *Plea Bargain*, THE N.Y. TIMES MAG., Sept. 29, 2002, at 29 (quoting Albert Alschuler, University of Chicago Law Professor).

³³ Heath v. State, No. A02A1604, 2002 Ga. App. LEXIS 1525, at *1 (Ga. App. Nov. 26, 2002).

³⁴ *Id.* at *1-2.

³⁵ *Id.* at *6 n.5.

³⁶ *Id.* at *2-3. See also Bill Rankin, *Indigent Defense Lawyer Blasted as Guilty Plea Tossed*, ATLANTA JOURNAL-CONSTITUTION, Nov. 30, 2002, at A1.

³⁷ See United States v. Broce, 488 U.S. 563, 569 (1989). The Court wrote:

A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

Id.

of rolled eyes and barely stifled yawns.³⁸ The procedural bar is raised, and any innocence claims are stifled.³⁹

Factually innocent defendants who reject plea agreement offers but are convicted due, at least in part to incompetent trial counsel, seldom fare better when raising the issue on appeal.⁴⁰ As F. Lee Bailey observed, "Appellate courts have only one function, and that is to correct legal mistakes of a serious nature made by a judge at a lower level. Should a jury have erred by believing a lying witness, or by drawing an attractive but misleading inference, there is nothing to appeal."⁴¹

Eyes roll and yawns are stifled as appellate judges consider the ineffective assistance claims of appellants convicted by juries. The decisions generally begin with a recitation of what the appellant must prove: that counsel's performance was deficient, and such deficient performance prejudiced the defendant.⁴² This is followed by a warning that the trial court's findings of what trial counsel did or did not do will be upheld unless clearly in error, and that the appellate court proceeds on an assumption that while trial counsel's performance may not have been ideal, it was nonetheless satisfactory.⁴³ The appellant must

³⁸ See, e.g., *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995) (allowing a broad range of defense attorney omissions at trial). See also Curtis Harris, *The Courage of His Conviction*, CITY LIMITS MONTHLY (Jan. 2002), available at <http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=104>. The article provides:

Court-assigned lawyers for the indigent don't have the resources to conduct their own investigations; they're paid so little, in fact, that they can barely stay in business, just \$25 an hour for out-of-court work. In preparation for trials, defense attorneys have extremely limited access to evidence such as police reports and grand jury minutes--a constraint that also makes it difficult to get a conviction overturned. What lawyers need is time: to interview clients, investigate cases, think about them. But fees are so incredibly low that work goes undone, says Jonathan Gradess, executive director of the New York Defense Association. That right to counsel, supposedly the crown jewel in the Bill of Rights, is not really counsel at all. If you don't have the tools of forensic evidence, you can appeal the case, but you don't have the evidence to get a conviction overturned.

Id.

³⁹ Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*, 44 VAND. L. REV. 45, 67 (1991) (noting that the "institutional reluctance" to reverse convictions for ineffective assistance of counsel thus manifests itself in the court's use of an almost impossible standard).

⁴⁰ Kate Malleson, *Appeals Against Conviction and the Principal of Finality*, 21 J. OF LAW & SOC. 51 (1994).

⁴¹ James McCloskey, *Convicting the Innocent*, 8 CRIM. JUST. ETHICS No. 1 (1989) (quoting F. Lee Bailey).

⁴² *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁴³ See *supra* note 38 and accompanying text. See also *Strickland*, 466 U.S. at 694 (stating that a defendant must demonstrate that defense counsel's performance prejudiced the defense or that "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."); *Lethal Indifference, The Justice Project: Campaign for Criminal Justice Reform* (providing a detailed study of the benefits and problems surrounding the habeas process), available at <http://justice.policy.net/relatives/21081.pdf> ("[t]he quality and

prove trial counsel's performance was so lacking that it deprived him of a fair trial and calls the verdict into question.⁴⁴ A few paragraphs later, the court concludes that the appellant was not denied effective assistance of trial counsel.⁴⁵ Judgment and order affirmed.⁴⁶

In Texas, Calvin Burdine's lawyer slept through substantial portions of his client's 1984 capital murder trial, including the questioning of witnesses.⁴⁷ He also made derogatory remarks about homosexuals, including his client, during the trial.⁴⁸ In 1999, the U.S. District Court for the Southern District of Texas granted Burdine's writ of habeas, finding that a sleeping lawyer is the equivalent of no lawyer.⁴⁹ But the next year, a three-judge panel of the Fifth Circuit Court of Appeals disagreed, reversing the lower court and reinstating Burdine's conviction and death sentence.⁵⁰ None of the evidence, the appellate panel decided, supported a presumption of prejudice against Burdine.⁵¹ They warned that "[t]here are real dangers in presuming prejudice merely from a lack of alertness."⁵²

In 2001, the same facts were viewed differently by the same court sitting *en banc*.⁵³ The District Court's grant of habeas was affirmed.⁵⁴ Judge Benavides wrote for the majority:

When a state court finds on the basis of credible evidence that defense counsel repeatedly slept as evidence was being introduced against a defendant, that defendant has been denied counsel at a critical stage of his trial. In such circumstances, the Supreme Court's Sixth Amendment jurisprudence compels the presumption that counsel's unconsciousness prejudiced the defendant.⁵⁵

In one respect, Calvin Burdine was fortunate.⁵⁶ By the time his habeas was

consistency of attorney performance in the latter stages of the appellate process was studied, especially the critical state habeas corpus proceeding. The findings of this report reveal that a high number of people are being propelled through the state habeas process with unqualified attorneys and an indifferent Court." (last visited Mar. 8, 2003).

⁴⁴ See *Strickland*, 466 U.S. at 694.

⁴⁵ See Bob Burtman, *Criminal Injustice*, INDEP. WKLY., Oct. 16, 2002 (providing a broad range of sources regarding the death penalty, available at <http://deathpenaltyinfo.org/article.php?did=297&scid=17> (discussing the reluctance of courts to overturn convictions based on ineffective assistance of counsel).

⁴⁶ *Id.*

⁴⁷ *Burdine v. Johnson*, 66 F. Supp. 2d 854, 856 (S.D. Tex. 1999).

⁴⁸ *Id.* at 856.

⁴⁹ *Id.* at 866.

⁵⁰ *Burdine v. Johnson*, 231 F.3d 950, 965 (5th Cir. 2000).

⁵¹ *Id.* at 964.

⁵² *Id.* at 958.

⁵³ *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (*en banc*).

⁵⁴ *Id.*

⁵⁵ *Id.* at 338.

⁵⁶ See Stephen B. Bright, *Keep the Dream of Equal Justice Alive*, Address at the Yale Law School Commencement (May 24, 1999), available at <http://www.schr.org/reports/docs/commence.doc>. The address provides:

heard, his trial attorney was dead.⁵⁷ Had Burdine's lawyer been living, it is likely he would have vehemently denied any deficiency in his performance. The *en banc* decision could well have mirrored that of the three-judge panel had Burdine's counsel been there to insist he was just resting his eyes when observers thought he was sleeping, and that he used pejorative terms to describe his client as a *strategy*, to ensure jurors understood his references.⁵⁸

Despite the jokes about defense attorneys who appeal convictions based on their own ineffective assistance, intractable denial is the norm. Examples abound. In North Carolina, a state commission established a regional Office of Capital Defender to help reduce the number of murder defendants being sentenced to death in the Forsyth County area, which accounts for 14 of the state's current death row inmates.⁵⁹ Robert Hurley, the state's capital defender, assured the public that establishment of the office was not a comment on the Forsyth County Bar, but local lawyers did not see it that way.⁶⁰ John Barrow, the president of the Forsyth County Criminal Defense Trial Lawyers Association, said he was outraged by Hurley's comments.⁶¹ "He has demeaned the criminal-defense bar in Forsyth County who handle capital cases," Barrow said. "He's wrong."⁶² Michael Grace, a local criminal-defense lawyer, said that several factors cause Forsyth to lead the state in death-penalty convictions.⁶³ Jurors in Forsyth tend to be conservative and favor death sentences for some convicted killers, he said, an opinion that Hurley and Mike Klinkosum, a newly hired assistant capital defender, agree with. Forsyth prosecutors have much experience in capital-murder cases, and have won many death-penalty convictions, all three men said.⁶⁴ "People have not been put on death row because of incompetent

The *Houston Chronicle* described one of the trials as follows: Seated beside his client . . . defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again. Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the [case against his client, George McFarland]. When [the judge] finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial. The 72-year-old longtime Houston lawyer explained: It's boring. This performance does not violate the Sixth Amendment right to counsel, the trial judge explained, because, while the Sixth Amendment guarantees the right to a lawyer, it does not guarantee that the lawyer has to be awake.

Id.

⁵⁷ *Id.*

⁵⁸ See *Burdine*, 262 F.3d at 336.

⁵⁹ See John Hinton, *Office to Take Capital Cases; Defenders Will Try to Reduce the Number of Death Sentences*, WINSTON-SALEM J., Dec. 3, 2002, at 1.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

counsel,” Grace said.⁶⁵

The Texas Defender Service examined the state habeas appeals of nearly all death row inmates since 1995.⁶⁶ The study, “Lethal Indifference,” found those inmates had a one in three chance of being executed without their cases being adequately investigated or argued by a competent appeals attorney.⁶⁷

The study cited as an example the case of Leonard Rojas, executed on December 4, 2002 for the murder of his wife and brother.⁶⁸ Rojas’ state habeas lawyer was assigned by the Texas Court of Criminal Appeals, despite the fact he had been disciplined three times by the state bar and given two probated suspensions.⁶⁹ He caught another suspension a few weeks after undertaking Rojas’ case.⁷⁰ It is not surprising that the attorney’s writ was woefully inadequate, he ignored issues of competency of defense and prosecutorial misconduct and he failed to preserve Rojas’ right to file a federal habeas.⁷¹

But the habeas attorney did not see it that way.⁷² He said his representation was not as bad as the Texas Defender Service made it out to be.⁷³ His only concession is his failure to preserve Rojas’ right to federal habeas.⁷⁴ “I didn’t make sure it got into federal court,” he said, “That’s the thing I did not do.”⁷⁵

Exonerations are taking place in a shocking number of innocent death row inmates. Between 23 and 25 innocent people have been exonerated from Florida’s death row since 1976 and the national number of wrongfully convicted death row inmates is more than 100.⁷⁶ The focus is now on the re-examination of the quality of defense counsel on capital cases.⁷⁷ The stakes are highest in these cases, literally a matter of life and death. There is no reason to believe bad lawyering plays any lesser role in non-capital cases, from mandatory life felonies to 30-day misdemeanors.

⁶⁵ See Hinton, *supra* note 59, at 1.

⁶⁶ See The Justice Project: Campaign for Criminal Justice Reform, *Lethal Indifference*, available at <http://justice.policy.net/relatives/21081.pdf> (last visited Mar. 8, 2003).

⁶⁷ JimYardley, *Texas Death Row Appeals Lawyers Criticized*, N.Y. TIMES, Dec. 3, 2002, at A29.

⁶⁸ *Id.* See also *Rojas v. State*, 986 S.W.2d 241, 252 (Tex. Crim. App. 1998) (upholding the defendant’s conviction for capital murder, after finding that no reversible error occurred).

⁶⁹ See Texas Execution Information Center, *Leonard Rojas* (providing a source of information about recent and upcoming prisoner executions in Texas), available at <http://www.txexecutions.org/reports/288.asp> (“According to the Texas Defender Service, the lawyer, David Chapman, had a mental disorder, had never worked on a capital appeals case before, and had his law license put on probated suspension three times. Chapman disputed the claims that he bungled Rojas’ appeal, noting that Rojas gave three confessions to police.”) (last visited Mar. 8, 2003).

⁷⁰ *Id.*

⁷¹ See James Kimberly, *Attorney Castigated for Bungling Appeal*, HOUSTON CHRON., Dec. 2, 2002, at A28.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Yet Another Innocent Person Freed from Florida Death Row; National Count of Wrongfully Convicted Continues to Grow*, National Coalition to Abolish the Death Penalty (Jan. 24, 2003), available at http://www.ncadp.org/html/florida_press_release_-_1_24.html.

⁷⁷ See Jim Vertuno, *Study: Innocent at risk in Texas system*, MONTANA FORUM, Dec. 3, 2002, available at <http://www.montanaforum.com/rednews/2003/12/03/build/freedoms/texasdeathrow.php?nnn=5> (last visited April 15, 2003).

Truth in Justice, the educational non-profit directed by the author, receives a steady stream of correspondence from relatives and friends of prison inmates with innocence claims who cite bad lawyering for the conviction.⁷⁸ More often than not they begin, "He couldn't afford a real lawyer, so he had a public defender."⁷⁹

Public defenders are often blamed for bad lawyering in criminal cases because they are commonly underpaid and overworked.⁸⁰ It is widely acknowledged that the resources available to public defenders' offices (money and staff) are dwarfed by the resources of prosecutors.⁸¹ It is equally well understood that many private practice attorneys who are appointed to represent indigent defendants seek such appointments because their skills are so poor, it's the only way they can make a living.⁸²

But there is as much bad lawyering in the private sector as in indigent defense. In many parts of the country, the challenge has changed from finding a highly competent criminal defense attorney to finding a criminal defense attorney at all.⁸³ The criminal defendant who can afford to pay has far fewer choices and less information on which to base those choices than he would if he needed a real estate lawyer to handle a closing.⁸⁴

People who do not expect to need the services of a criminal defense lawyer know next to nothing about how to find one. Shame and disgrace keep many of them from asking friends and neighbors for referrals. They may simply dial the number of someone they have heard of, whether the press was good or bad. Increasingly, people turn to the Internet to find lawyers, either directly or indirectly. It is no less a crapshoot than the yellow pages.

⁷⁸ See Truth in Justice, *Discussion Forum*, available at <http://www.truthinjustice.org> (last visited Mar. 8, 2003).

⁷⁹ *Id.*

⁸⁰ *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992) ("The state paid \$11.84 per hour [for the defense attorney]. Unfortunately, the justice system got what it paid for.")

⁸¹ See Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW AND CONTEMP. PRO. 81 (Winter 1995) (referring to studies that show woefully inadequate resources and funding for public defenders at both the state and federal level).

⁸² *Id.* at 86 (discussing the low esteem in which the general public holds public defenders and how they are often viewed as incompetent).

⁸³ See McCloskey, *supra* note 41. See also Stephen B. Bright, *Keep the Dream of Equal Justice Alive*, Address at the Yale Law School Commencement (May 24, 1999), available at <http://www.schr.org/reports/docs/commence.doc>. The address provided:

Sometimes a poor person stands alone at the bar of justice, as did Exzavious Gibson, a man condemned to death in Georgia, with an IQ in the 80s, who stood before a judge, bewildered, at the first hearing for review of his case. The judge asked him if he was ready to proceed. Gibson replied that he needed a lawyer. The judge explained that he was not entitled to a lawyer and asked whether he would like to put up any evidence he had. Gibson replied that he didn't know what to do; he needed a lawyer. Nevertheless, the judge proceeded with the hearing.

Id.

⁸⁴ See *Ex Parte Adams*, 768 S.W.2d 281 (Tex. Crim App. 1989). Adam's trial lawyer was a real estate attorney ill-equipped to handle his defense.

I was surprised recently to see a particular Milwaukee, Wisconsin lawyer listed as a referral attorney at the website of a multidisciplinary practice specializing in defending false allegations of child abuse, domestic abuse and sexual harassment. His bio compared him to “Clarence Darrow and other legendary barristers.”⁸⁵ But when *Milwaukee Magazine*⁸⁶ rated 189 Wisconsin lawyers in 13 disciplines, the same lawyer topped two categories, “Vastly Overrated” and “Least Integrity.”⁸⁷ Comments included, “Clients erroneously believe that obnoxious lawyers are effective lawyers,” and “A disgrace to the legal profession in particular and the human race in general.”⁸⁸ The comments are supported by his disciplinary history:

- 1970: Suspended for one year for harassing and threatening a local judge until the judge committed suicide.⁸⁹
- 1988: Suspended for two years for, among other breaches, cutting a media rights deal based on his client’s case prior to trial.⁹⁰
- 1991: Reinstatement denied.⁹¹
- 1993: Reinstatement denied.⁹²
- 1994: Reinstated⁹³
- 1996: Public reprimand⁹⁴
- 2002: Complaint pending; case will be heard by Wisconsin Supreme Court in 2003⁹⁵

Once the unwary have put all their assets into a high-priced but unethical and ineffective defense lawyer, they are as stuck as any indigent forced to take whatever the court gives them. The warning signs may be clear—calls unanswered, evidence untested, witnesses never interviewed, experts not consulted, and the most glaring warning sign, questions met with temperamental

⁸⁵ See Alan D. Eisenberg Biography, *Legacy of Controversy and Triumph*, available at <http://www.alaneisenberg.com/bioprint.htm> (last visited Mar. 8, 2003).

⁸⁶ See *A Good Lawyer*, MILWAUKEE MAG., Oct. 1999, available at <http://www.milwaukeeemagazine.com/toplawyers/> (last visited Apr. 15, 2003).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *State v. Eisenberg*, 180 N.W.2d 529 (Wis. 1970).

⁹⁰ *In re Eisenberg*, 423 N.W.2d 867 (Wis. 1988).

⁹¹ *In re the Reinstatement of the License of Alan D. Eisenberg, to Practice Law*, 470 N.W.2d 898 (Wis. 1991).

⁹² *In re the Reinstatement of the License of Alan D. Eisenberg, to Practice Law*, 498 N.W.2d 840 (Wis. 1993).

⁹³ See *A Good Lawyer*, MILWAUKEE MAGAZINE, Oct. 1999, available at <http://www.milwaukeeemagazine.com/toplawyers/> (last visited Apr. 15, 2003).

⁹⁴ *Id.*

⁹⁵ See Cary Spivak & Dan Bice, *Eisenberg Has a Distinction of His Own Doing*, MILWAUKEE J. SENTINEL, available at <http://www.jsonline.com/news/metro/may02/40985.asp> (last modified May 4, 2002).

outbursts and threats of abandonment.⁹⁶

By the time they figure out they have got a lemon, there is no money left to retain another lawyer. When the lemon lawyer offers them a plea deal on the eve of trial, they're likely to take it even though they are innocent. Those who go to trial find themselves represented by an attorney who is unprepared, unmotivated and whose incompetence has the effect of adding another prosecutor to the state's team.

A Georgia woman wrote me about the attorneys she had retained for her sons, Cecil and James Simmons, convicted in Florida on the uncorroborated testimony of a retarded man of abducting, raping and murdering a Kentucky woman who was traveling through the area.⁹⁷

Since the arrest and conviction of my sons—two different trials, two different lawyers— we are left with the lingering question: IS THERE REALLY HONESTY WITHIN THE SYSTEM? Post-conviction, I began my own investigations of the [attorneys] who represented them [at trial]. [The] lawyer of first son—his foster son was incarcerated for bludgeoning a local man to death. His foster son was convicted and given 7 years for his confessed crime. [There] also [were] sexual [assault] charges against the lawyer that represented our other son. Two weeks prior to [younger] son's trial, sexual [assault] charges were dropped against him due to 'unavailability' of claimant who was his prior secretary. [This] information was sent to me by the Bar Association [after sons were convicted].

But her story only gets worse:

[w]e retained two more lawyers. (We have had to retain two separate lawyers all during Appeals). Our youngest son's lawyer we paid \$11,000.00 plus \$1,000.00 up front to review the transcript, which we paid for (\$2.50 per page, over 1,800 pages of trial alone). Two weeks later this lawyer wrote us a letter and

⁹⁶ See The Justice Project: Campaign for Criminal Justice Reform, *Gary Nelson Profiles of Injustice*, available at <http://justice.policy.net/proactive/newsroom/release.vtml?id=31845> (last visited Mar. 8, 2003). The website describes the story of one criminal defendant as follows:

[The defendant] was represented at his two-day trial by a sole practitioner who had never tried a death penalty case. During a time when Nelson's attorney was personally experiencing financial problems, he was paid between \$15 and \$20 per hour. His request for co-counsel was rejected. No funds were provided for an investigator, and the attorney didn't even ask for funds for an expert witness. The attorney's closing argument at trial was 255 words. Gary Nelson was sentenced to death. His trial attorney was later disbarred for other reasons.

Id.

⁹⁷ Letter on file with the author.

had me to do the research work, which involved driving over 400 miles one way, and go to the venue of trials and gather information for him. This I did. After this we heard no more from him [Over a year later], I called his office to see if the Appeals were nearing completion and to see if he had filed for habeas corpus; this had to be done by the middle of Nov. that year [because] Florida has a two year time frame from the date of direct appeal denial. To make this short, my calls were not answered. After days of trying to locate this man—now bear in mind his office was 11 hours from our home—on the fourth day I was told he no longer practiced in that county, and his whereabouts were in question. This lawyer took our money and left town, along with all the documents I had sent to him—documents I would never be able to acquire as another lawyer had secretly supplied them to me. After I filed a complaint with the Bar Association and 3 years later, they found our case worthy of \$2,500 refundable. They disbarred him, but only by my investigations were they able to locate him for papers to be served. He had moved to another state and become a real estate broker.

These parents have been through a total of 11 lawyers. Substantive Brady issues raised in the state habeas, including undisclosed evidence that points toward state employees as the perpetrators, were deemed insufficient to undermine the certainty of the jury's verdict. The second son expects similar findings in his state habeas.

Some instances of incompetent assistance are so conspicuous that a reasonable person must question whether they are deliberate. The same Georgia mother quoted above wrote me about the conduct of her elder son's trial attorney:⁹⁸

Pretrial, Cecil's lawyer called me at home. He asked me to go over the [key witness'] deposition and present to him questions I feel should be clarified by [the key witness], on the stand. I did. I spent long hours, days, doing just this. In the course of [the key witness'] testimony for the prosecution, the prosecutor made a point to be silent while he returned to his table, knowing all eyes were on him, even mine. [The prosecutor] picked up a piece of yellow legal paper and returned to the podium which was within 3 ft. of me. [The prosecutor] began to ask [the key witness] questions. [They were] the questions I had sent to the Defense Attorney, my legal paper, my handwriting. The Defense attorney was in front of me. I tapped him on the shoulders [and] asked him what is going on. He jerked his shoulder from me [and] gave me a nasty look. At the next

⁹⁸ Letter on file with the author.

recess, I confronted him with this. He asked me did I think I was the only one able to obtain yellow paper, and did I really think they would be stupid enough to carry out such an act?

He also sat right there and let the prosecutor, during his closing, signal for the cameras to roll (all local television station were allowed in court), turn around to the jurors, and state loudly in dramatization: "EVEN JAMES SIMMONS ADMITTED HOW THEY HANDCUFFED KRISTI AND REPEATEDLY RAPED AND KILLED HER." Before I could tap him again, Cecil had leaned over to him and asked him wasn't he going to OBJECT—this was untrue. He told Cecil, the jurors knew this was an INADVERTENT statement, the jurors are not as emotionally involved as you and the family. Well, you know and I know those jurors went into deliberations thinking they had a CONFESSION from the brother. You know as well as I know, these actions also tainted all possibility of James receiving an unbiased trial, in that small little county. Defense did not preserve this, so it could not be used for [appeal] purposes. When I brought this to the attention of other lawyers, they said the same—it was just an inadvertent statement, the jurors did not comprehend this as the defendant and family would.

One of the most insidious forms of bad lawyering leading to the conviction of innocent people falls outside Sixth Amendment review.⁹⁹ Cutting leniency deals with the prosecution in exchange for testimony against another criminal defendant occurs outside the courtroom and off the record, and it is rationalized as effective advocacy on behalf of a client.¹⁰⁰ But when the client is a "snitch"¹⁰¹

⁹⁹ See The Innocence Project, *Causes and Remedies*, available at <http://www.innocenceproject.org/causes/snitches.php> (last visited Mar. 8, 2003). The website provides:

The use of jailhouse informants, especially in return for deals, special treatment, or the dropping of charges, has proven to be a specious form of evidence, as has testimony that has only appeared after rewards were offered. Often, the testimony of these snitches and informants has been the key in sending an innocent man or woman to prison for a crime he or she did not commit.

Id.

¹⁰⁰ See Rob Warden, *The Snitch System: How Incentivised Witnesses Put 38 Innocent Americans on Death Row*, Northwestern Law School, Center on Wrongful Convictions (Apr. 25, 2002), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/Snitch.htm> ("False testimony by incentivised witnesses is the second most prevalent factor in wrongful convictions in U.S. capital cases, exceeded only by incorrect or perjured eyewitness testimony, found in 53.5 percent of cases.").

¹⁰¹ See Dr. Edmund Higgins, *False Informant* (providing a database of 316 wrongfully convicted people), available at <http://www.dredmundhiggins.com> ("A 'jailhouse snitch' is the most notorious false informant. This is the person who claims that the accused 'confessed' to him while in jail.") (last visited Mar. 8, 2003).

willing to sell an innocent person down the river to save his own skin,¹⁰² the defense attorney who brokers the deal becomes party to the very miscarriage of justice against which his profession is intended to guard.¹⁰³

What role do informant/snitch testimony and false witness testimony play in wrongful convictions? These were a significant factor in 16 percent of the convictions of the first 70 DNA exonerations.¹⁰⁴ Examples of the devastating effects of this business-as-usual collusion between defender and prosecutor can be found across the country. In the Chicago, Illinois case of the Ford Heights Four,¹⁰⁵ Dennis Williams, Kenny Adams, Willie Rainge and Verneal Jimerson, Dave Protes and Rob Warden investigated a snitch who had been put up to his incriminating lie by the brother of a man who turned out to be one of the real murderers.¹⁰⁶

In Crewe, Virginia in 1996, Sheila Barbour Stokes provided the key, and only evidence linking Larry Fowlkes to the robbery and murder of a Nottoway County woman.¹⁰⁷ In exchange for her testimony, Stokes avoided prosecution for her fourth felony offense.¹⁰⁸ Fowlkes was convicted with no physical evidence linking him to the crime, and despite a solid alibi.¹⁰⁹ Stokes has since recanted, reaffirmed, and again recanted her testimony, while Fowlkes serves a 45-year prison sentence.¹¹⁰

Behind each leniency-for-testimony deal, there is a defense attorney bartering the most favorable terms he can get for his client. Just as the overwhelming majority of prosecutors who obtain convictions of innocent people know or should know the defendant is probably not guilty,¹¹¹ so too do defense attorneys know or should know when the deals they cut will result in convicting

¹⁰² See *id.* ("Typically, the informant receives favorable treatment in return for his damaging testimony.").

¹⁰³ See, e.g., Northwestern Law School, Center on Wrongful Convictions, available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/GrayMemo3.pdf> (providing a factual account of the Gray case) (last visited Mar. 8, 2003).

¹⁰⁴ See The Innocence Project, *Causes and Remedies of Wrongful Convictions*, available at <http://www.innocenceproject.com/causes/index.php> (last visited Mar. 31, 2003).

¹⁰⁵ See Northwestern Law School: Center on Wrongful Convictions, *Memorandum Opinion and Order* (providing a further resource for data on wrongful convictions hosted by Northwestern), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/GrayMemo1.pdf> (providing the opinion of the Gray case) (last visited Mar. 8, 2003).

¹⁰⁶ See generally DAVID PROTES & ROBERT WARDEN, *A PROMISE OF JUSTICE: THE EIGHTEEN YEAR FIGHT TO SAVE FOUR INNOCENT MEN* (1998) (telling the story of how a district attorney's need to have a double murder solved quickly lead to four innocent men serving a combined 65 years in prison).

¹⁰⁷ Frank Green, *Story Changes – Again: Woman's Testimony Sent a Man to Prison*, RICHMOND TIMES-DISPATCH, Aug. 11, 2002, at B1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Martin Kuz, *No Way Out Lawyers Say the Case Against Bob Gondor and Randy Resh Could be Titled The Insider's Guide to Prosecutorial Misconduct*, CLEVELAND SCENE, Jan. 15, 2003 (providing a general news source), available at <http://www.clevescene.com/issues/2003-01-15/feature.html/1/index.html> (noting that prosecutors in the case committed grievous misconduct. Author Martin Yant stated: "An assistant prosecutor told me . . . that there was hardly a day that went by that he didn't worry that they convicted two innocent men for a crime they didn't commit").

the innocent.

Often there is no pretense that anything less than framing an innocent person lies at the heart of the agreement. A Wisconsin inmate serving a life sentence for murder, for which he has compelling innocence claims of his own, received a phone call from his defense attorney with a “get out of prison” offer from the same District Attorney who had prosecuted him.¹¹² All he had to do was help frame an innocent man by falsely testifying the target had solicited him for a “hit contract” on the District Attorney.¹¹³

The district attorney (DA) had obtained a conviction against a police officer for murder, arson and mutilating a corpse in the death of the cop’s estranged wife.¹¹⁴ But it was a precarious conviction, dependent on the continued concealment of evidence that no crimes had been committed in the first place,¹¹⁵ and the DA was worried his hard work would fall apart on appeal.¹¹⁶ Fresh charges against the police officer would give the DA a bargaining chip—if the cop would drop his appeal, the DA would drop the new charges.

The inmate’s initial, vehement rejection of the offer was followed by a written reiteration of his refusal.¹¹⁷ His attorney wrote him, urging him to reconsider:

I have not struck any deal with [the District Attorney] concerning a re-sentencing and/or amendment of charges to a 30-year prison sentence. However, I thought that I should pass that information on to you so that you could consider the same and what the State wants of you in the event we reach a point where your motions are denied and/or later appeal is denied and you find yourself once again in the same position you are currently in, life in prison without parole. Hence, please think about the potential offer and agreement which the State might be willing to enter into and what would be required of you.¹¹⁸

The inmate had no problem grasping the inherently unlawful and unethical nature of the offer. When the District Attorney who proffered the deal was unanimously endorsed by Wisconsin’s Federal Nominating Committee for presidential appointment as U.S. Attorney, the inmate forwarded documentation of the offer to Senators Herb Kohl and Russ Feingold.¹¹⁹ They “got it” and ten days later, the Senators removed the District Attorney from the list of nominees forwarded

¹¹² See *John Maloney Asks Court to Throw Out Conviction*, Target Two Investigation (WBAY TV television broadcast, Feb. 7, 2003).

¹¹³ *Id.*

¹¹⁴ *Wisconsin v. Maloney*, 619 N.W.2d 308 (Wis. Ct. App. 2000).

¹¹⁵ See Truth in Justice, *Wrongfully Convicted Cops*, available at <http://www.truthinjustice.org/cops.htm> (last visited Mar. 10, 2003).

¹¹⁶ *Id.*

¹¹⁷ Letter on file with the author.

¹¹⁸ *Id.*

¹¹⁹ Cary Spivak & Dan Bice, *Nominee Cuts Fuel Partisan Bickering*, MILWAUKEE JOURNAL-SENTINEL, available at <http://www.jsonline.com/news/Metro/dec01/spiceco102120101a.asp> (last modified Dec. 1, 2001).

to President Bush.¹²⁰

The only one, apparently, who did not “get it” was the defense attorney who urged his client to “think about the potential offer . . . and what would be required of you.” When Jeanne Anthony of WHBY-Radio reported the deal in a documentary that re-examined the conviction of the District Attorney’s target, she opted not to name the inmate or his lawyer.¹²¹ Ms. Anthony was stunned, following the first broadcast of the program, to receive an irate call from the inmate’s lawyer complaining because he was not identified.

II. CONCLUSION

We have come a long way in acknowledging that, in the words of retired Florida Supreme Court Justice Gerald Kogen, “innocent people are convicted every day.” And we have responded. At this writing, there are 40 innocence projects in the United States.¹²² Increasing numbers of lawyers and law firms are undertaking pro bono and reduced fee representations of the wrongfully convicted.

But we still have a long way to go. Innocent people continue to be convicted every day, and bad lawyering in every form facilitates many of these convictions.¹²³ How can we be part of the solution rather than part of the problem? More regulations and laws are not the answer.¹²⁴ Bad lawyering is already unethical and often unlawful.

The resolution is close at hand. It lies within each of us. Examine your own conduct honestly rather than defensively. Assess yourself from the viewpoint of the innocent person charged with a crime someone else committed, or a crime that never happened in the first place. From that perspective, are slap-dash explanations of law and procedure good enough? When the rest of your life is on the line, is it okay that your lawyer does not have time to subpoena or even interview alibi witnesses? After you have sold all your possessions to pay legal fees, do you mind that your lawyer fails to retain experts who could clear you in order to maximize his profits? How about the lawyer who represents the guy you never even met, the state’s star witness against you? Do you feel satisfaction that he’s gotten his client a sweetheart deal in exchange for testifying against you?

Start with yourself. If you don’t want to be the client in these scenarios, do not be the lawyer in them. Do not turn a blind eye to the bad lawyering going on around you, either. Challenge yourself and your colleagues to be what you claim to be, advocates for the innocent. Take the advice offered nearly 2,500 years ago by the Greek philosopher, Socrates: “The shortest and surest way to live with honour in the world, is to be in reality what we would appear to be.”

¹²⁰ *Id.*

¹²¹ See Jeanne Anthony, *The John Maloney Case: Murder or Miscarriage of Justice?* (WHBY radio broadcast, July 24, 2002).

¹²² See generally Innocence Project, *Other Projects by State*, available at http://www.innocenceproject.org/about/other_projects.php (last visited Mar. 24, 2003).

¹²³ See generally Innocence Project, *Causes & Remedies*, available at <http://www.innocenceproject.org/causes/index.php> (last visited Mar. 24, 2003).

¹²⁴ See generally Innocence Project, *Legislation*, available at http://www.innocenceproject.org/legislation/display_description.php?id=Senate-Bill-486 (visited Mar. 24, 2003). The Innocence Protection Act is pending in both the House of Representative and the Senate and would safeguard and standardize post-conviction DNA testing for inmates. *Id.*

EDITOR'S POSCRIPT

A writ of *habeus corpus* requesting a new trial, was filed on behalf of John Maloney by Lew Wasserman and has resulted in an evidentiary hearing held in Brown County Circuit Court on May 21, 2003.¹ At the evidentiary hearing, Mr. Maloney's former attorneys testified regarding decisions they made during the trial in 1999.² The petition asserts that Maloney's defense attorneys, Bridget and Gerald Boyle, were ineffective in keeping a taped conversation out of the trial either by not challenging the laws about secret recordings or by not challenging the prosecutors' unethical involvement.³ Since John Maloney's trial, Gerald Boyle has been admonished for providing ineffective assistance of counsel in another case, Corey Martin's, whose conviction was overturned by a Wisconsin appeals court.⁴ The Appeals Court ruled that Boyle's argument, limited to one paragraph and without any supporting citations, constituted ineffective assistance of counsel.⁵ The prosecutors in John Maloney's case have until June 20, 2003 to file a response to the hearing and briefs of Maloney's attorney.⁶ The Circuit Court Judge promises to rule on the petition within sixty days.

¹ Andy Nelesen, *Convicted Killer Seeking New Trial*, GREEN BAY PRESS-GAZETTE, May 22, 2003.

² *Id.*

³ *Id.*

⁴ Cary Spivak and Dan Bice, *Boyle admonished for 'deficient performance'*, MILWAUKEE JOURNAL SENTINEL, Aug. 8, 2000.

⁵ *Id.*

⁶ *See supra* note 1.

USING CORAM NOBIS TO ATTACK WRONGFUL CONVICTIONS: A NEW LOOK AT AN ANCIENT WRIT

by Daniel F. Piar*

I. INTRODUCTION

Coram nobis is an ancient common-law writ that provides a means of collateral attack in criminal cases where some event outside the trial record has rendered a conviction fundamentally flawed.¹ The writ has historically been used both in England and in the United States to provide a judicial remedy of last resort to the wrongfully convicted when other modes of appeal or collateral attack are unavailable.² The writ survives in American federal and state practice, though it has met with varying fates in varying jurisdictions.³ In the federal courts and in some states, the writ continues to be available in a more expansive way than at common law, with the goal of affording justice where extreme judicial measures are necessary.⁴ In other states, the writ has survived in name, but its scope and availability have been curtailed from what they were at common law.⁵ Finally, in a large number of states, *coram nobis* has been displaced by modern statutory procedures for post-conviction relief.⁶ Some of the states that have abolished the writ in form have nonetheless preserved it in spirit by ensuring that their post-conviction schemes include remedies equivalent to those historically offered by *coram nobis*.⁷ There are other states, however, in which the absence or restriction of *coram nobis* relief can cause certain cases to fall into a procedural void, in which there may be no mechanism available for attacking an allegedly wrongful conviction.⁸ Such situations, I shall argue, are inconsistent both with the writ as historically understood and with the concepts of fair play and substantial justice that should inform our procedures for post-conviction relief.⁹

In all of these jurisdictions, an understanding of *coram nobis* can inform modern criminal procedure by focusing attention on the need for accessible emergency relief in cases involving fundamentally flawed convictions.¹⁰ Thus, the words of one commentator nearly a century ago continue to hold true: "Bench and bar may properly regard this ancient writ not merely as a relic of

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¹ See, e.g., Andrew J. Schatkin, *Criminal Procedure*, 46 SYRACUSE L. REV. 405, 482 n.485 (1995) (defining writ of *coram nobis*).

² See *infra* Part II. See also Michelle L. Curley, *The Common Law Writ of Error Coram Nobis Remains Available as a Civil Procedure to Challenge Collaterally a Criminal Judgment*, 59 MD. L. REV. 767, 770-72 (2000) (explaining English and American uses of writ).

³ See *id.* at 770.

⁴ See *infra* Part III.

⁵ See *infra* Part IV.A.

⁶ See *infra* Part IV.B.

⁷ *Id.*

⁸ *Id.*

⁹ See *infra* Part V.

¹⁰ *Id.*

antiquity, but as an emergency remedy which may still be found useful.”¹¹

II. A BRIEF HISTORY OF *CORAM NOBIS*

The writ of *coram nobis* (and its close cousin *coram vobis*)¹² was developed in sixteenth-century England as a means for correcting errors of fact that lay outside the record, and which might affect the validity of the proceedings.¹³ It differed from the common-law writ of error in two important respects.¹⁴ First, *coram nobis* was not directed to a higher tribunal, but was sought in the court that had originally issued the judgment for the correction of its own proceedings.¹⁵ Second, *coram nobis* was designed to address errors of fact, not of law.¹⁶ It is important to note that *coram nobis* did not involve claims that evidence was wrongly admitted, wrongly interpreted or insufficient.¹⁷ Rather, it involved claims that facts existed that were unknown to the court at the time of judgment that may have rendered the proceedings invalid or fatally irregular.¹⁸ Examples of situations where the writ was used at common law include the incompetence of a defendant to be tried, or the marriage of the parties at the time of the suit.¹⁹

¹¹ Note, *The Writ of Error Coram Nobis*, 37 HARV. L. REV. 744, 747 (1927).

¹² “*Coram nobis*” means, literally, “before us,” while “*coram vobis*” means “before you.” See Brendan W. Randall, *United States v. Cooper: The Writ of Error Coram Nobis and the Morgan Footnote Paradox*, 74 MINN. L. REV. 1063, 1066-67 (1990) (discussing history of *coram nobis* and comparisons to *coram vobis*); Abraham L. Freedman, *The Writ of Error Coram Nobis*, 3 TEMPLE L. Q. 365, 367-70 (1929) (discussing history of writ). The *coram nobis* writ was directed to the Court of the King’s Bench; because the king nominally presided over that court, the regal pronoun was used. *Id.* *Coram vobis* was directed toward the inferior Court of Common Pleas, which was addressed with the more familiar “you.” *Id.* The essence of the writ was the same, and the distinction between the two has not been important in American law. *Id.*

¹³ For various histories of the writ, see *Sanders v. State*, 85 Ind. 318 (1882) (detailing history and grounds for allowance under Indiana law); John S. Gillig, *Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 KY. L.J. 265, 319-30 (1994-95) (discussing development of writ in Kentucky law); Morgan Prickett, *The Writ of Error Coram Nobis in California*, 30 SANTA CLARA L. REV. 1, 3-14 (1990) (discussing common-law origins of the writ and its emergence in California). See generally Freedman, *supra* note 12 (discussing history of writ); Albert F. Neumann, Comment, *Criminal Law — Writ of Error Coram Nobis*, 11 WIS. L. REV. 248 (1936) (giving background of writ); and Larry W. Yackle, *POST-CONVICTION REMEDIES* § 37 (1981) (examining history of writ).

¹⁴ See Jonathon C. Lipson, *Fighting Fiction with Fiction—The New Federalism in (A Tobacco Company) Bankruptcy*, 78 WASH. U. L.Q. 1271, 1305 (2000) (defining common-law writ of error).

¹⁵ *Chambers v. State*, 158 So. 153, 154 (Fla. 1934). See also Neumann, *supra* note 13, at 249 (discussing history of writ and defining scope of its applications). See generally Yackle, *supra* note 13 (discussing the history of the writ).

¹⁶ *Chambers*, 158 So. at 154.

¹⁷ See generally *id.*

¹⁸ Freedman, *supra* note 12, at 367. See also Note, *supra* note 11, at 744 (“...[B]ut [coram nobis] cast no aspersions on the competency or finding of the court in its first judgment, for it lay only to call up facts which were unknown to the court at the time of judgment and which were not inconsistent with the record.”); 3 WILLIAM BLACKSTONE, COMMENTARIES *406-07 (stating that errors known at the time of trial but which were not brought before the court do not constitute errors that would permit *coram nobis* relief).

¹⁹ BLACKSTONE, *supra* note 18, at *407 n.5. See also *United States v. Morgan*, 346 U.S. 502, 507 n.9 (1954) (giving examples of uses of the writ before the King’s bench in England).

Among the most significant features of the writ, to which we shall return below, was that it could be sought to correct these errors of fact "however late discovered and alleged."²⁰ A grant of *coram nobis* typically resulted in the provision of a new trial in light of the events or evidence brought forward by the petition.²¹

Coram nobis was recognized in American law as early as 1810 by Chief Justice Marshall in *Strode v. The Stafford Justices*.²² A number of states likewise made it part of their law, and in the United States, the writ developed along slightly more liberal lines than it had in England.²³ While the writ was understood to be available to correct pure factual errors lying outside the record, as at common law, it also was extended to reach matters that might be characterized as legal or jurisdictional, even where they may have been (or should have been) apparent to the judge at the time of conviction.²⁴ For instance, the writ was used to set aside a guilty plea induced by threats of mob violence, although the threats were known to the judge at the time of the plea.²⁵ The writ was also used to reopen guilty pleas by defendants who did not understand the nature of their pleas,²⁶ to reopen pleas that were entered without awareness of the right to counsel,²⁷ to set aside trials and pleas based on confessions extorted by threats and beatings,²⁸ and to vacate the conviction of a person later found to have been insane during his trial.²⁹ One could argue that at least some of these errors were legal, not factual, or at least that they were not pure extrajudicial facts in the strictest sense of the common-law writ. Nonetheless, such fine distinctions seem not to have been very important in American law; and the courts that turned to *coram nobis* in these situations seemed more concerned with the provision of

²⁰ BLACKSTONE, *supra* note 18, at *407 n.5. See also Note, *supra* note 11, at 745 ("The writ was available in criminal as well as civil proceedings, and could be brought at any time after judgment."). For a modern illustration of this point, see *Hirabayashi v. United States*, 828 F.2d 591, 605 (9th Cir. 1987) (allowing *coram nobis* relief more than 40 years after conviction).

²¹ See, e.g., *Sanders v. State*, 85 Ind. 318, 334 (1882) (granting new trial); *Chambers*, 158 So. at 155 (stating that when a judgment is reversed for the alleged error of fact set out in the petition the defendant would be required to enter his plea to the indictment and the cause would proceed upon the new plea to final disposition of the case).

²² 23 F. Cas. 236 (C.C.D. Va. 1810) (No. 13,537).

²³ See generally *Curley*, *supra* note 2, at 770 (exploring development of *coram nobis* in both England and America).

²⁴ See *Sanders*, 85 Ind. at 329 (allowing an accused the opportunity to present for review alleged errors of fact and law).

²⁵ *Id.* According to the facts accepted as true by the appellate court, the mob was outside the courthouse when Sanders entered his plea, a juror remarked upon the "intense excitement" among the crowd at the trial, and Sanders' lawyers advised him to plead guilty to save his life. *Id.* The judge who took the plea said that he had "not drawn an easy breath" until Sanders had been rushed onto the train that would take him to prison. *Id.* at 320. See also *State v. Calhoun*, 32 P. 38 (Kan. 1893) (involving threat of mob violence against the defendant).

²⁶ *Dobosky v. State*, 109 N.E. 742 (Ind. 1915).

²⁷ See *United States v. Morgan*, 346 U.S. 502, 508 n.14 (1954) (collecting cases where *coram nobis* was applied).

²⁸ *Chambers v. State*, 158 So. 153, 158 (Fla. 1934).

²⁹ *Adler v. State*, 35 Ark. 517 (1880).

justice than with an exacting application of common-law forms.³⁰ In more recent times, some courts have further expanded the writ to encompass errors of law so fundamental as to affect the power of the trial court to act, as, for instance, where a defendant was convicted under a statute that was later declared invalid or unconstitutional.³¹ In its American form, then, *coram nobis* came to be considered an extreme and flexible remedy (at least within its limited sphere), to be used as a last resort to prevent serious miscarriages of justice.³² As one commentator remarked, "These extensions and modifications significantly show that the writ possesses germs of growth and flexibility sufficient to make it a valuable remedy in unusual situations."³³

Despite this early vigor, the writ gradually began to be supplanted by other remedies in both the federal and state courts.³⁴ Procedural devices such as motions for new trials,³⁵ direct appeals,³⁶ motions in arrest of judgment,³⁷ motions for relief from illegal sentences,³⁸ and, to some extent, *habeas corpus*,³⁹

³⁰ See *Cline v. United States*, 453 F.2d 873, 874 (5th Cir. 1972) (recognizing *coram nobis* as a remedy used primarily to achieve justice).

³¹ See *United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989). See also 39 AM. JUR. 2D *Habeas Corpus* § 249 (2002) (collecting cases).

³² Note, *supra* note 11, at 746 (noting American expansion of *coram nobis* beyond common-law grounds). Where the writ survives today it is used to correct a wide variety of fundamental flaws in criminal convictions, including the withholding of exculpatory evidence by the state, recanted or perjured testimony, involuntary guilty pleas, ineffective assistance of counsel, and newly discovered evidence. See *infra* Parts III. and IV.A. For an overview of these uses of the writ and their variations from jurisdiction to jurisdiction, see 39 AM. JUR. 2D *Habeas Corpus* §§ 241-50 (2002) (collecting cases).

³³ Note, *supra* note 11, at 747.

³⁴ See, e.g., *United States v. Mandel*, 853 F. Supp. 177 (D. Md. 1994) (noting that FED. R. CIV. P. 60 was intended to supplant the use of *coram nobis* in some instances).

³⁵ See, e.g., FED. R. CRIM. P. 33 ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires . . . Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty."). The principal difference between a *coram nobis* petition and a motion for new trial is one of timing: a motion for new trial must normally be sought within a limited time (a maximum of three years), while traditional *coram nobis* relief could be sought at any time. *Id.*

³⁶ See 28 U.S.C. § 1253 (2000) (allowing direct appeals to Supreme Court in certain instances).

³⁷ See, e.g., FED. R. CRIM. P. 34 (2003). This Rule provides:

Upon the defendant's motion or on its own, the court must arrest judgment if . . . the indictment or information does not charge an offense; or . . . the court does not have jurisdiction of the charged offense . . . [t]he defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court sets during the 7-day period.

Id. These kinds of motions also are typically limited as to time (seven days after judgment), unlike traditional *coram nobis*. *Id.*

³⁸ See, e.g., 28 U.S.C. § 2255 (2000). This statute differs from *coram nobis* because it allows relief only from an illegal sentence and only to a person who is presently in custody, in the nature of *habeas corpus*. *Id.* Unlike *coram nobis*, it does not permit the reopening of judgments and is not available to a petitioner who has been released from custody. *Id.* See also *United States v. Morgan*, 346 U.S. 502, 510-11 (1954) (discussing differences between *coram nobis* and § 2255).

³⁹ The major practical difference between *habeas corpus* and *coram nobis* in modern law is that *habeas corpus* will lie only where the petitioner is in custody, whereas *coram nobis* can be used

provided more liberal post-conviction relief than was known at common law. This caused some judges and commentators to ask whether *coram nobis* was obsolete.⁴⁰ Some states abolished the writ in enacting statutory schemes for post-conviction litigation.⁴¹ The federal courts abolished the writ in civil cases in 1937, which at least initially called into question its availability in criminal cases, as well.⁴² By the early twentieth century many courts and commentators were expressing doubt as to the writ's continued viability.⁴³

III. THE FEDERAL REVIVAL OF *CORAM NOBIS*

Coram nobis received new life in the criminal field in the mid-twentieth century with a trio of Supreme Court decisions regarding post-conviction proceedings in general and *coram nobis* in particular.⁴⁴ Taken together, these cases highlighted both the constitutional importance of adequate post-conviction relief and the procedural importance of *coram nobis* in post-conviction litigation.⁴⁵

In the first of these cases, *Mooney v. Holohan*,⁴⁶ the petitioner claimed that he had been convicted of murder based on perjured testimony, and he sought federal *habeas corpus* relief.⁴⁷ The Court dismissed the petition because the

even after a sentence has been served and a petitioner released. 28 U.S.C. §§ 2241, 2255. Further, *coram nobis* is an attack on the validity of a conviction because of facts unknown at trial, while *habeas corpus* is an attack on the legality of detention for reasons that may or may not have to do with the factual basis for the conviction. *Id.* See also *Herrera v. Collins*, 506 U.S. 390 (1993) (explaining purpose and elements of *habeas corpus*).

⁴⁰ See, e.g., *Chambers v. State*, 158 So. 153, 154 (Fla. 1934) (noting disuse of writ in light of statutory remedies); *Sanders v. State*, 85 Ind. 318, 326 (1883) (noting the possible decrease in prominence of *coram nobis* in light of statutory bases of attacks on judgments); *State v. Robertson*, 378 P.2d 39, 40-41 (Kan. 1963) (noting that *coram nobis* is likely rendered obsolete by modern procedural devices); Note, *supra* note 11, at 746 ("Although the writ was apparently once allowed in early federal practice, its present availability is doubtful.")

⁴¹ See, e.g., *Dewey v. Smith*, 230 N.W. 180, 180-81 (Mich. 1930) (stating that writ of *coram vobis* has been made obsolete by statutory methods of correcting error); *Boyd v. Smyth*, 205 N.W. 522, 523-24 (Iowa 1925) (holding, through statutory construction, that *coram nobis* became annulled when it was omitted in revised statute); *State v. Hayslip*, 107 N.E. 335, 335 (Ohio 1914) ("We find that in Ohio the common-law writs and pleas are designated and defined by statute just as crimes are designated and defined by statute.")

⁴² FED. R. CIV. P. 60(b). This Rule provides in part that "writs of *coram nobis* [and] *coram vobis*... are abolished..." See also *Morgan*, 346 U.S. at 513 (Minton, J., dissenting).

⁴³ See, e.g., *Neumann*, *supra* note 4, at 250 ("Text writers and decisions have repeatedly referred to the writ as obsolete, outdated, and superceded by modern statutory practice."); Note, *supra* note 11, at 746 ("Although the writ was apparently once allowed in early federal practice, its present availability is doubtful."); *Humphreys v. State*, 224 P. 937, 938 (Wash. 1924) (stating that statute encompassed all issues related to issuance of new trial and therefore *coram nobis* relief was inapplicable).

⁴⁴ These cases were *Mooney v. Holohan*, 294 U.S. 103 (1935); *Hysler v. Florida*, 315 U.S. 411 (1942); and *United States v. Morgan*, 346 U.S. 502 (1954).

⁴⁵ *Id.*

⁴⁶ 294 U.S. 103 (1935) (per curiam).

⁴⁷ *Id.* at 111.

petitioner had failed to exhaust his state *habeas corpus* remedies.⁴⁸ In so doing, the Court declared that the states were required by the Due Process clause to afford some sort of judicial remedy to address allegedly wrongful convictions:

. . . [T]he Attorney General [of California] urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise. We are not satisfied, however, that the state has failed to provide such corrective judicial process. The prerogative writ of *habeas corpus* is available in that State. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States.⁴⁹

A few years later, in *Hysler v. Florida*,⁵⁰ the Court noted the place of *coram nobis* in fulfilling this obligation to afford due process.⁵¹ Clyde Hysler sought to attack his murder conviction, claiming that the testimony against him had been perjured and coerced.⁵² He unsuccessfully sought *coram nobis* relief in the Florida state courts, and the case was accepted by the Supreme Court to determine whether Florida had afforded Hysler adequate means under the Fourteenth Amendment to attack his conviction.⁵³ The Court held that the availability of *coram nobis* satisfied the constitutional requirement of a collateral attack mechanism:

This common law writ [of *coram nobis*], in its local adaptation, is Florida's response to the requirements of *Mooney v. Holohan* for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process.

....

Such a state procedure of course meets the requirements of the Due Process Clause.

....

Florida then had ample machinery for correcting the Constitutional wrong of which Hysler complained.⁵⁴

These decisions thus made plain the constitutional requirement that mechanisms for post-conviction review be afforded, and affirmed the place of *coram nobis* as

⁴⁸ *Id.* at 115.

⁴⁹ *Id.* at 113 (internal citations omitted).

⁵⁰ 315 U.S. 411 (1941).

⁵¹ *Id.* at 415-16.

⁵² *Id.* at 412-13.

⁵³ *Id.* at 413.

⁵⁴ *Id.* at 415-16 (internal citations omitted).

one method of providing such review.

A decade after *Hysler*, the Court in *United States v. Morgan*⁵⁵ took up the place of *coram nobis* as a matter of federal criminal procedure.⁵⁶ Morgan was convicted in 1939 of a federal crime, for which he served a four-year sentence.⁵⁷ In 1950 he was convicted of a state charge and sentenced as a repeat offender based on the older federal conviction.⁵⁸ He then sought *coram nobis* relief in the federal court to vacate his 1939 conviction, claiming that he had entered that plea without a competent waiver of counsel.⁵⁹ The trial court treated the petition as a motion under 28 U.S.C. § 2255, a federal *habeas corpus* statute for attacking sentences, and denied relief because Morgan was no longer in federal custody as required by the statute.⁶⁰ The Second Circuit Court of Appeals reversed, holding that Section 2255 did not supersede common-law means of collateral attack, such as *coram nobis*.⁶¹

The Supreme Court affirmed the court of appeals and directed the trial court to entertain the *coram nobis* petition.⁶² The Court first explored the nature of *coram nobis*:

The writ of *coram nobis* was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment, and was used in both civil and criminal cases. While the occasions for its use were infrequent, no one doubts its availability at common law.⁶³

The Court went on to note the uses of the writ in both English and American law:

Coram nobis has had a continuous although limited use also in our states. Although the scope of the remedy at common law is often described by references to the instances specified by Tidd's Practice . . . its use has been by no means so limited. The House of Lords in 1844 took cognizance of an objection through the writ based on a failure properly to swear witnesses . . . It has been used, in the United States, with and without statutory authority but always with reference to its common-law scope – for example, to inquire as to the imprisonment of a slave not

⁵⁵ 346 U.S. 502 (1954). See generally Randall, *supra* note 12 (providing an extended discussion of *Morgan* and the denomination of *coram nobis* relief as civil or criminal).

⁵⁶ See *id.* at 503.

⁵⁷ *Id.*

⁵⁸ *Id.* at 503-04.

⁵⁹ Compare *id.* at 504, with 28 U.S.C. § 2255 (2000) (allowing a person "in custody" to move to vacate an illegal sentence).

⁶⁰ *Morgan*, 346 U.S. at 504.

⁶¹ *Id.* at 504-05.

⁶² *Id.* at 512-13.

⁶³ *Id.* at 507 (footnotes omitted).

subject to imprisonment, insanity of a defendant, a conviction on a guilty plea through the coercion of fear of mob violence, [and] failure to advise of [the] right to counsel.⁶⁴

The Supreme Court then upheld the availability of *coram nobis* in federal criminal cases.⁶⁵ Addressing the Section 2255⁶⁶ question, it sided with the court of appeals, noting that there was nothing in the legislative history or in federal precedent that compelled the conclusion that Section 2255 was designed to “. . . impinge upon prisoners’ rights of collateral attack upon their convictions.”⁶⁷ Because Morgan was not in custody at the time of his petition, he could not avail himself of the habeas corpus provision Section 2255, nor were there any other statutory bases on which he could then seek relief.⁶⁸ Accordingly, the Court held that *coram nobis* must remain available as an extraordinary means to correct fundamental error:

[Morgan] alleges he was nineteen, without knowledge of the law and not advised as to his rights Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court.⁶⁹

The Court did, however, note that there must be “sound reasons” for failing to seek earlier relief, suggesting that laches might bar a *coram nobis* petition.⁷⁰ The Court reinforced this point elsewhere in its opinion: “Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice.”⁷¹ This appears to represent the Court’s attempt to balance the competing interests in the provision of collateral attack and the need for finality in criminal cases.⁷²

⁶⁴ *Id.* at 507-08 (footnotes omitted).

⁶⁵ *Id.* at 510.

⁶⁶ 28 U.S.C. § 2255 (2000) (permitting persons in custody to attack sentences).

⁶⁷ *Morgan*, 346 U.S. at 511 (quoting *United States v. Hayman*, 342 U.S. 205, 219 (1952)) (internal quotations and citations omitted). Morgan of course was not a federal “prisoner” at the time, but the point seems to have been that Section 2255 was not intended to interfere with the rights of persons not in custody to attack their convictions by other means. *Id.*

⁶⁸ *Id.* at 511-13.

⁶⁹ *Id.* at 511-12. The Court found the power to entertain the writ in the All Writs section of the Judicial Code, which allowed the federal courts to issue all writs that are “agreeable to the principles and usages of law.” *Id.* at 506-07. The All Writs Act is currently codified in substantially the same form at 28 U.S.C. § 1651.

⁷⁰ *Id.* at 512.

⁷¹ *Morgan*, 346 U.S. at 511.

⁷² *Id.* The other major limit on *coram nobis* in some federal courts is the requirement that the petitioner be suffering collateral consequences from his conviction in order to invoke the writ. See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (ruling that petitioner was in fact suffering negative collateral consequences as a result of a 40-year-old conviction). Some courts

Morgan thus affirmed the place of *coram nobis* relief in federal criminal procedure, where the writ remains available.⁷³ In one of the more interesting applications of the writ, *Hirabayashi v. United States*,⁷⁴ the Ninth Circuit applied *coram nobis* to vacate the 40-year-old misdemeanor convictions of Gordon Hirabayashi for violating a curfew and a military-area exclusion order aimed at persons of Japanese ancestry during World War II.⁷⁵ The petition was based on a military report uncovered in 1982, which tended to show that the orders were based on racist principles rather than on exigencies of national defense.⁷⁶ With a nod to *Morgan*, the Ninth Circuit noted the important role of *coram nobis* in federal criminal litigation:

In *United States v. Morgan*, the Supreme Court held that *coram nobis* relief is available to challenge the validity of a conviction, even though the sentence has been fully served, 'under circumstances compelling such action to achieve justice.' As we recently explained in *Yasui v. United States*,⁷⁷ the *coram nobis* writ 'fills a void in the availability of post-conviction remedies in federal criminal cases.' A convicted defendant who is in federal custody and claims that his sentence 'was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack' may move to have his sentence vacated under 28 U.S.C. § 2255. Such *habeas corpus* relief is not available, however, to a defendant who has served his sentence and has been released from custody. In such a situation, 'no statutory avenue to relief [exists] from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact.' Nor is a motion for new trial based on newly discovered evidence available to petitioners who have long since served their sentences because such a motion must be filed within two years of the date of final judgment in the original proceeding. Thus, the *coram nobis* writ allows a court to vacate its judgments 'for errors of fact . . . in those cases where the errors [are] of the most fundamental

take the position that any conviction is presumed to carry sufficient collateral consequences. *Id.* at 606 ('[C]oram nobis relief is available to prevent manifest injustice even where removal of a prior conviction will have little present effect on the petitioner') (quoting from *Holloway v. United States*, 393 F.2d 731, 732 (9th Cir. 1968) (internal quotations and citation omitted)). Other circuits require a showing that a petitioner is presently facing tangible consequences of his conviction. *See, e.g.*, *United States v. Stoneman*, 870 F.2d 102, 106 (3d Cir. 1989) (requiring a showing of continuing consequences of conviction for invocation of *coram nobis*). For a thorough survey of the collateral consequences requirement in federal law, see *United States v. Loftus*, 796 F. Supp. 815, 820 n.8 (M.D. Pa. 1992).

⁷³ *Morgan*, 346 U. S. at 513.

⁷⁴ 828 F.2d 591 (9th Cir. 1987).

⁷⁵ *Id.* at 592-93.

⁷⁶ *Id.* at 593.

⁷⁷ 772 F.2d 1496, 1498 (9th Cir. 1985).

character, that is, such as rendered the proceeding itself invalid.⁷⁸

The Ninth Circuit therefore upheld the use of *coram nobis* to vacate Hirabayashi's convictions, based on evidence discovered decades after the wrong had occurred.⁷⁹

Hirabayashi highlights one of the most important modern functions of the writ, which is the filling of procedural gaps in modern post-conviction relief.⁸⁰ Without *coram nobis*, Hirabayashi would have fallen into a procedural void: he was too late to move for a new trial and too free to invoke the Section 2255 remedy.⁸¹ The *coram nobis* writ filled this void and thus carried out its traditional broad purpose of providing relief in extreme cases where no other device is available.⁸²

Other liberal uses of the writ can be found in federal practice. For instance, in *Blanton v. United States*,⁸³ the Sixth Circuit held that *coram nobis* could be used to raise claims of ineffective assistance of counsel 10 years after the petitioner's conviction and three years after he had fired his allegedly ineffective lawyer:

Although laches may apply to *coram nobis* proceedings, the doctrine does not bar Blanton's petition. Blanton's *coram nobis* petition involves claims of ineffective assistance by McLellan, and those claims could not have been brought in his previous appeals or *habeas* petitions because McLellan represented him during those matters. The appeal of Blanton's second *habeas* petition was dismissed in 1988, and McLellan's representation of Blanton apparently ended at that time. Blanton filed his *coram nobis* petition in late 1991. Three years was not an unduly long delay; it was a reasonable amount of time for Blanton to obtain new counsel and file suit.⁸⁴

The *Blanton* court went on, however, to affirm the denial of *coram nobis* relief on the merits.⁸⁵ Nonetheless, by excusing a three-year delay in seeking the writ, the Sixth Circuit demonstrated a traditionally liberal and flexible view of the availability of *coram nobis* relief to achieve justice.

Coram nobis also has been used to vacate convictions following significant

⁷⁸ *Id.* at 604 (internal quotations and citations omitted).

⁷⁹ *Id.* at 608. *But see* *Moody v. United States*, 874 F.2d 1575, 1577 (11th Cir. 1989) (stating that *coram nobis* is unavailable to raise claims of newly discovered evidence relevant to guilt or innocence).

⁸⁰ *Hirabayashi*, 828 F.2d at 604.

⁸¹ *Id.*

⁸² *Moody*, 874 F.2d at 1577. See *infra* Part IV.A. for a discussion of this "gap-filling" role in state courts.

⁸³ 94 F.3d 227 (6th Cir. 1996).

⁸⁴ *Id.* at 231-32.

⁸⁵ *Id.* at 233-35.

changes in the law of conviction. In *United States v. Marcello*,⁸⁶ the Fifth Circuit vacated a nine-year old conviction after an intervening decision of the Supreme Court declared that the type of conduct for which the defendants were convicted did not violate the statute at issue.⁸⁷ The defendants were charged with carrying out a scheme to bribe state and local government officials in Louisiana.⁸⁸ In 1980, they were convicted of racketeering based on a so-called "intangible rights" theory, under which official corruption deprived citizens of their intangible rights to good government, in violation of the mail and wire fraud statutes.⁸⁹ In 1987, however, the Supreme Court held the intangible-rights theory invalid and declared that the mail and wire fraud statutes applied only to tangible property rights.⁹⁰ Consequently, the conduct for which the defendants had been convicted did not violate the statute.⁹¹ One of the defendants, Roemer, had already served his sentence by the time the law changed⁹² and he therefore sought, and was granted, *coram nobis* relief:

In *United States v. Morgan* the Supreme Court held that *coram nobis* should issue to correct only errors which result in a complete miscarriage of justice. An error of 'the most fundamental character' must have occurred and no other remedy may be available. On appeal the government does not challenge the propriety of the use of this writ. In this case, Roemer appealed his case at each stage of the proceedings and, being denied all relief, served his sentence. The only meaningful remedy available to him is that provided by the writ of *coram nobis*. *McNally* makes clear that Roemer was indicted and convicted under the RICO statute for conduct which is not a federal offense. He sought relief promptly after *McNally*. Accordingly, he must be absolved of the consequences flowing from his branding as a federal felon.⁹³

Coram nobis thus intervened in Roemer's case where he had no other way to attack a subsequently invalid conviction, and the writ again served its historic purpose of affording relief that would otherwise be unavailable in a highly unusual situation.⁹⁴

⁸⁶ 876 F.2d 1147 (5th Cir. 1989).

⁸⁷ *Id.* at 1154.

⁸⁸ *Id.* at 1149.

⁸⁹ *Id.*

⁹⁰ *McNally v. United States*, 483 U.S. 350, 361 (1987). For a discussion of the role of *coram nobis* in the aftermath of *McNally*, see M. Diane Duszak, Note, *Post-McNally Review of Invalid Convictions Through the Writ of Coram Nobis*, 58 FORDHAM L. REV. 979 (1990).

⁹¹ *Marcello*, 876 F.2d at 1154.

⁹² *Id.* at 1155. Roemer's co-defendant, Marcello, was still in custody and he therefore was able to obtain relief under 28 U.S.C. § 2255 (2000). *Id.*

⁹³ *Id.* at 1154 (citations omitted).

⁹⁴ For other examples of post-*McNally* grants of *coram nobis*, see *United States v. Loftus*, 796 F. Supp. 815 (M.D. Pa. 1992) (granting *coram nobis* relief to petitioner who proved that previous mail

The federal treatment of *coram nobis* maintains its best common-law features and improves upon them for the liberal provision of justice. The federal courts have expanded the grounds for the writ to include fundamental flaws that are arguably legal in nature rather than factual.⁹⁵ Moreover, the courts have placed no time limits on seeking relief other than laches. This ensures that a petitioner who is properly diligent in seeking the writ can obtain relief whenever grounds for relief appear.⁹⁶ The writ therefore can serve as a flexible means for correcting the most fundamental injustices.⁹⁷ At the same time, the courts have been careful to ensure that *coram nobis* remains an extreme remedy by limiting it to situations in which no other relief is available and (in some courts) by requiring a showing of continuing negative consequences to the petitioner if the writ is not granted.⁹⁸ In a legal system in which individual liberty is prized and in which manifest injustice is abhorred, the federal approach appears to strike the right balance between finality and relief. Furthermore, it preserves an important escape hatch in cases where a serious wrong must be redressed.

Notably, *Morgan* was not decided on constitutional grounds, but on grounds of federal criminal procedure. It therefore did not require the states to preserve *coram nobis*.⁹⁹ Hence, those states that wanted to limit the writ, or to supplant it with other procedures, remained free to do so. As we shall see below, this has sometimes worked to the detriment of the kind of emergency justice espoused in *Morgan* and other federal cases.¹⁰⁰

IV. CORAM NOBIS IN THE STATES

Coram Nobis also plays an important function in state criminal procedure. By contrast to the fairly uniform practices of the federal courts, state treatment of *coram nobis* varies widely from jurisdiction to jurisdiction. Some states apply *coram nobis* as it has historically been interpreted in federal jurisdictions. On the other hand, many states limit either the timing or scope of the writ. In still other states, *coram nobis* has been abolished altogether, in favor of comprehensive post-conviction statutes. Section IV.A. explores state treatment of *coram nobis* in

fraud conspiracy was invalid and he suffered continuing negative consequences as a result) and *United States v. Slay*, 673 F. Supp. 336 (E.D. Mo. 1987) (granting in part and denying in part motion for writ of *coram nobis*).

⁹⁵ See *Marcello*, 876 F.2d at 1149 (noting that changes in law of conviction entitled defendant to *coram nobis* relief following release from custody).

⁹⁶ See *Craven v. United States*, No. 01-3048, 2001 WL 1590549, at *2 (6th Cir. Dec. 10, 2001) (applying laches to *coram nobis* petition).

⁹⁷ For another statement of this principle, see *United States v. Ransom*, 985 F. Supp. 1017, 1019 (D. Kan. 1997) ("If defendant is innocent of the crime of which he was convicted and does not have any other effective opportunity to raise this claim, then there is a compelling reason to grant relief pursuant to a writ of *coram nobis*.").

⁹⁸ See *Marcello*, 876 F.2d at 1154 (recognizing negative consequences which flow from a felony conviction).

⁹⁹ *United States v. Morgan*, 346 U.S. 502 (1954), accord *Skok v. State*, 760 A.2d 647, 658 (Md. 2000) (noting that while states are not bound by *Morgan* most nonetheless follow the decision as persuasive authority).

¹⁰⁰ See *infra* Parts IV.A and IV.B.

its common-law form, while section IVB. explores the role of the writ in light of modern statutory post-conviction relief.

A. *The Current Uses of Coram Nobis in Post-Conviction Relief*

Many states continue to use *coram nobis* as a means of post-conviction relief.¹⁰¹ Before turning to specific cases, a few broad features of the writ in modern state practice can be noted. *Coram nobis*, where recognized, continues to be available on a wide variety of grounds that vary from state to state.¹⁰² These include newly discovered evidence,¹⁰³ prosecutorial misconduct (principally the withholding of exculpatory evidence),¹⁰⁴ recanted or perjured testimony,¹⁰⁵ guilty pleas entered without a knowing and voluntary waiver of rights,¹⁰⁶ and ineffective assistance of counsel.¹⁰⁷ As in the federal courts, the writ may also encompass “legal errors of constitutional significance such as jurisdictional defects.”¹⁰⁸ A petitioner seeking *coram nobis* must show that the grounds on which relief is sought were unknown by him at trial, or otherwise could not have been discovered and presented at trial in the exercise of due diligence.¹⁰⁹ *Coram nobis* is generally considered unavailable if other statutory remedies were or could have been used.¹¹⁰ In this respect, it continues to serve as a remedy of last resort, where no other means are available to do justice.¹¹¹

¹⁰¹ See *Skok*, 760 A.2d at 647 (applying *coram nobis* despite Post Conviction Procedure Act).

¹⁰² Compare *id.* (allowing *coram nobis* relief when defendant had no other remedy), with *State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999) (restricting time within which writ can be sought).

¹⁰³ See, e.g., *Mixon*, 983 S.W.2d at 672-73 (Tenn. 1999) (holding that recanted testimony constitutes newly discovered evidence warranting issuance of *coram nobis* relief); *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001) (holding that the right to present newly discovered evidence far outweighs any governmental interest in preventing the litigation of stale claims); 39 AM. JUR. 2D *Habeas Corpus* § 247 (2002) (discussing newly discovered evidence); Thomas R. Malia, Annotation, *Coram Nobis on Ground of Other's Confession to Crime*, 46 A.L.R. 4th 468 (1986).

¹⁰⁴ See, e.g., *Pitts v. State*, 986 S.W.2d 407, 409 (Ark. 1999) (per curiam) (citing advances in DNA technology); *Larimore v. State*, 938 S.W.2d 818, 822 (Ark. 1997) (stating that prosecutorial misconduct is a serious and fundamental error warranting *coram nobis* relief). See generally 39 AM. JUR. 2D *Habeas Corpus* § 244 (2002) (discussing elements necessary to establish claim to relief).

¹⁰⁵ *State v. Ratliff*, 71 S.W.3d 291 (Tenn. Crim. App. 2001). See generally 39 AM. JUR. 2D *Habeas Corpus* § 246 (2002) (discussing elements of relief and citing cases).

¹⁰⁶ *Skok*, 760 A.2d at 649-50. See generally 39 AM. JUR. 2D *Habeas Corpus* § 247 (2002) (discussing newly-discovered evidence).

¹⁰⁷ See generally 39 AM. JUR. 2D *Habeas Corpus* § 245 (2002) (discussing issues related to inadequate assistance of counsel).

¹⁰⁸ *In re Brockmueller*, 374 N.W.2d 135, 138 (S.D. 1985).

¹⁰⁹ See generally 39 AM. JUR. 2D *Habeas Corpus* § 234-35 (2002) (stating elements for relief).

¹¹⁰ See, e.g., *Edwards v. State*, 633 N.W.2d 623, 625 (S.D. 2001) (per curiam) (“The writ of *coram nobis* can only be used to remedy a profound injustice where the petitioner has no other available remedy.”); *State v. El-Tabech*, 610 N.W.2d 737, 747 (Neb. 2000) (requiring defendants to pursue other remedies when such relief exists); *Skok*, 760 A.2d at 662 (“[O]ne is not entitled to challenge a criminal conviction by a *coram nobis* proceeding if another statutory or common law remedy is then available.”).

¹¹¹ See, e.g., *State v. Larimore*, 17 S.W.3d 87, 92, 94 (Ark. 2000) (allowing writ only under compelling circumstances by asking whether there is a reasonable probability that the judgment of conviction would not have been rendered if the error were disclosed at trial); *State v. Grisgraber*,

Several states mirror the federal courts in making *coram nobis* available in its more liberal, Americanized form to correct injustices by filling gaps in statutory schemes of post-conviction relief.¹¹² A prime example is the Maryland case of *Skok v. State*.¹¹³ Pasquale Skok was a resident alien who had been adopted by two U.S. citizens.¹¹⁴ In 1994 he pled guilty and no contest, respectively, in two different cases charging him with cocaine possession.¹¹⁵ Following these pleas, the U.S. Immigration and Naturalization Service instituted deportation proceedings against him based on the convictions.¹¹⁶ In an effort to avoid deportation, Skok brought an action in late 1997 seeking *coram nobis* and other relief from his 1994 convictions.¹¹⁷ He claimed that the lower courts had not ensured that he was entering his pleas voluntarily and with a full understanding of the consequences, in violation of Maryland law.¹¹⁸ Skok was denied relief in the lower courts and he appealed to the Maryland Supreme Court.¹¹⁹

A threshold question was whether Skok could appeal the denial of *coram nobis* at all: the State argued that such appeals were precluded by the Maryland Post Conviction Procedure Act, which had abolished *coram nobis* in favor of a unified statutory procedure for challenging convictions.¹²⁰ Significantly, the Act provided a remedy only for a person in state custody, which Skok was not.¹²¹ The court acknowledged that the Post Conviction Procedure Act had indeed supplanted *coram nobis*, but only where the Act would provide a sufficient remedy in its place:

The Post Conviction Procedure Act 'was designed to create a statutory remedy for collateral challenges to criminal judgments . . . and to substitute this remedy for habeas corpus and *coram nobis* actions challenging criminal judgments', but . . . '[i]n situations where the Post Conviction Procedure Act did not provide a remedy . . . , the enactment of the new statute provided no reason for restricting appeals'¹²²

439 A.2d 377, 379 (Conn. 1981) ("A writ of error *coram nobis* lies only in the unusual situation where no adequate remedy is provided by law.")

¹¹² The major cases discussing this similarity are found in Parts IV.A. and IV.B. States such as Maryland, South Dakota and Indiana most closely mirror liberal federal interpretations. See, e.g., *Skok*, 760 A.2d at 662 (stating that *coram nobis* relief is available whenever a defendant would have no other relief); *In re Brockmueller*, 374 N.W.2d at 137 (allowing *coram nobis* where statutes would provide no recourse for the defendant); *Lile v. State*, 671 N.E.2d 1190 (Ind. Ct. App. 1996) (applying comprehensive post conviction statute in place of *coram nobis* and allowing defendant relief).

¹¹³ 760 A.2d 647 (Md. 2000).

¹¹⁴ *Id.* at 649.

¹¹⁵ *Id.* at 648-49.

¹¹⁶ *Id.* at 649.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 649-50.

¹¹⁹ *Skok*, 760 A.2d at 652.

¹²⁰ *Id.* at 653.

¹²¹ *Id.*

¹²² *Id.* (quoting *Gluckstern v. Sutton*, 574 A.2d 898 (Md. 1990) (internal citations and quotations omitted)). See also *Ruby v. State*, 724 A.2d 673, 678 (Md. 1999) ("[T]he Act is not a substitute for common law remedies when, for example, the defendant is *not in custody or on probation or*

Because Skok was not in custody and therefore “had no remedy under the Post Conviction Procedure Act,” the court held that he was free both to invoke the common-law remedy of *coram nobis* and to appeal its denial by the lower courts, because he would otherwise be left without a remedy.¹²³

The court also adopted a broad view of the scope of *coram nobis* relief.¹²⁴ It noted that at common law the purpose of the writ was only to correct errors of fact not appearing in the record, though historically, at least in the United States, this had included a claim like Skok’s that a plea had been entered involuntarily.¹²⁵ Relying primarily on *Morgan*,¹²⁶ however, the court found broader grounds for invoking *coram nobis*: “The court in *Morgan* noted that *coram nobis* as applied in American jurisdictions had not been confined solely to matters of fact. The Court’s conclusion commends itself to us as an appropriate and salutary application of this ancient writ in the contemporary setting”¹²⁷ Thus, the *Skok* court extended *coram nobis* to “. . . errors of a constitutional or fundamental proportion,”¹²⁸ whether characterized as errors of fact or errors of law, including the voluntariness of pleas, the minority or incapacity of a petitioner at the time of a plea, the withholding of exculpatory evidence by the state, the use of perjured testimony by the state, and other unspecified “legal errors of constitutional significance.”¹²⁹ Important to this holding was the court’s recognition of the collateral consequences attending criminal convictions, such as recidivist sentencing and the loss of civil liberties:

In light of these serious collateral consequences, there should be a remedy for any convicted person who is not incarcerated and not on parole or probation, who is suddenly faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional or fundamental grounds. Such person should be able to file a motion for *coram nobis* relief regardless of whether the alleged infirmity in the conviction is considered an error of fact or an error of law.¹³⁰

parole. * * * The original common law remedies with their common law attributes continue to be viable.”).

¹²³ *Id.* at 653-54.

¹²⁴ *Id.* at 657.

¹²⁵ *Skok*, 760 A.2d at 655-57. The *Skok* court, and those that it cited, viewed the voluntariness of a plea as a fact, the absence of which would preclude acceptance of the plea. *Id.* See also *Sanders v. State*, 85 Ind. 318, 333 (1882) (granting *coram nobis* to reopen plea induced by fear of imminent mob violence).

¹²⁶ *United States v. Morgan*, 346 U.S. 502 (1954).

¹²⁷ *Skok*, 760 A.2d at 659 (quoting from *Commonwealth v. Sheehan*, 285 A.2d 465, 468 (Pa. 1971) (internal citation and quotations omitted)).

¹²⁸ *Id.* (quoting, in part, 3 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE CRIMINAL 2D § 592 at 429-32 (1982)).

¹²⁹ *Id.* (collecting cases).

¹³⁰ *Id.* at 661.

The Maryland court thus aligned itself with liberal, Americanized *coram nobis* by characterizing the writ as a remedy for a wide range of fundamental errors.¹³¹

The court did, however, acknowledge the extreme nature of the writ by adopting a list of restrictions on its use, based on *Morgan* and other cases applying *Morgan*:

(1) The grounds for challenging the conviction “must be of a constitutional, jurisdictional or fundamental character”;

(2) A “presumption of regularity attaches to the criminal case,” and the burden is on the petitioner to show some irregularity;

(3) The petitioner “must be suffering or facing significant collateral consequences from the conviction”;

(4) Principles of waiver are applicable to *coram nobis* proceedings;

(5) *Coram nobis* may not be used to relitigate issues previously decided; and

(6) *Coram nobis* may not be invoked “if another statutory or common law remedy is then available.”¹³²

As in *Morgan*,¹³³ the *Skok* court balanced the need for post-conviction relief with the state’s interest in finality and in ensuring that *coram nobis* remained a rare and extreme remedy. The court remanded *Skok*’s case for a hearing on his claims.¹³⁴

Coram nobis received similar treatment in South Dakota in *In re Brockmueller*.¹³⁵ Brockmueller was convicted twice for drunk driving in 1981.¹³⁶ In 1982 he was convicted of a third offense, which was elevated to a felony because of the two prior convictions.¹³⁷ In 1983, the South Dakota Supreme Court held that the lower courts did not have subject matter jurisdiction over drunk driving charges unless the state filed a formal charging document, which had not been done in either of Brockmueller’s 1981 cases.¹³⁸ Thus, in 1984, Brockmueller’s two 1981 convictions were vacated for lack of jurisdiction.¹³⁹

Brockmueller then petitioned for a writ of *coram nobis* to overturn his 1982 felony conviction, which had been based on the now-vacated 1981 convictions.¹⁴⁰ His petition was granted, and the state appealed.¹⁴¹ As in the *Skok*¹⁴² case, there was some question as to whether the writ continued to be available in light of

¹³¹ *Id.*

¹³² *Id.* at 661-62.

¹³³ *United States v. Morgan*, 346 U.S. 502 (1954).

¹³⁴ *Id.* at 663.

¹³⁵ 374 N.W.2d 135 (S.D. 1985).

¹³⁶ *Id.* at 136.

¹³⁷ *Id.*

¹³⁸ *Id.* at 137.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *In re Brockmueller*, 374 N.W.2d at 137.

¹⁴² *Skok v. State*, 760 A.2d 647 (Md. 2000).

modern post-conviction relief statutes.¹⁴³ South Dakota had previously abolished *coram nobis* as part of a comprehensive statutory scheme for post-conviction relief, but then had repealed that statute, replacing it with a *habeas corpus* remedy applicable only to petitioners then in custody.¹⁴⁴ Because Brockmueller had been released, he could not avail himself of this remedy.¹⁴⁵ Other statutory remedies were likewise unavailable: a motion in arrest of judgment could be made only within 10 days of the judgment, which had long since passed.¹⁴⁶ A motion to correct or reduce an illegal sentence had to be brought within one year and in any case would address only the sentence, not the validity of the underlying conviction.¹⁴⁷ Thus, the court declared that *coram nobis* would be available “. . . because the foregoing statutes provide no recourse to vacate the invalid felony conviction . . . To allow a felony conviction to stand when it is based on a void conviction would be an injustice of the first magnitude.”¹⁴⁸ As to the scope of the writ, the court remarked that the writ could address not only errors of fact, as at common law, but also “. . . legal errors of constitutional significance such as jurisdictional defects.”¹⁴⁹ The court added that *coram nobis* should remain an extraordinary remedy, not available where other remedies would suffice, but to be used only in the exceptional case as a means of last resort:

It will be the rare case indeed in which the writ of *coram nobis* will be recognized as the appropriate remedy. It will not be countenanced as merely another avenue of appeal, but will be limited to those cases, such as the one before us, when its application is necessary to remedy what would otherwise be a profound injustice.¹⁵⁰

These and other state cases¹⁵¹ follow the same liberalized approach to *coram nobis* recognized in the federal courts: while allowing the writ to lie only in extreme circumstances, they nonetheless view the writ as broad enough to encompass fundamental errors lying outside the record of the case, whether

¹⁴³ *In re Brockmueller*, 374 N.W.2d at 137.

¹⁴⁴ *Id.* at 138.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 138-39.

¹⁴⁹ *In re Brockmueller*, 374 N.W.2d at 138-39.

¹⁵⁰ *Id.* at 139. For a more detailed look at this case and the development of post-conviction relief in South Dakota, see Robert R. Nelson, *Coram Nobis as a Post-Conviction Remedy: Flight of the Phoenix?*, 32 S.D. L. REV. 300 (1987).

¹⁵¹ For examples from other states, see *State v. El-Tabech*, 610 N.W.2d 737, 748 (Neb. 2000) (recognizing *coram nobis* as a remedy “where no other form of judicial relief existed,” while interpreting Nebraska *coram nobis* statute); *Jessen v. State*, 290 N.W.2d 685, 688 (Wis. 1980) (recognizing existence of writ as fundamental common law remedy despite repeal of state *coram nobis* statute); *Dobie v. Commonwealth*, 96 S.E.2d 747, 752-53 (Va. 1957) (recognizing availability of writ “where there was no other remedy”).

characterized as errors of fact or errors of law.¹⁵² They place no apparent time limits on the seeking of the writ, thus allowing it to correct injustice whenever it becomes apparent.¹⁵³ At the same time, by placing restrictions on the use of the writ they ensure that it will remain limited to extreme cases of fundamental error.¹⁵⁴ They therefore preserve *coram nobis* as a viable and flexible remedy to correct manifest injustice.¹⁵⁵

But not all jurisdictions that preserve *coram nobis* have done so in the same liberal spirit. In a few states where the writ has survived it has been restricted as to time or limited in scope.¹⁵⁶ Tennessee, for instance, has continued to recognize *coram nobis* by statute and permits it on fairly broad grounds, including subsequently or newly discovered evidence.¹⁵⁷ However, the writ must be sought within one year after judgment of conviction.¹⁵⁸ This represents a significant departure both from the common-law practice and from other more liberal modern treatments of the writ, wherein laches is the only time bar for seeking *coram nobis* relief.¹⁵⁹ It also creates a potential void in Tennessee's post-conviction relief where grounds for *coram nobis* arise or are discovered after the one-year mark. The potential effect of this gap is illustrated in *State v. Mixon*,¹⁶⁰ in which the Tennessee Supreme Court upheld this significant time restriction on the writ.¹⁶¹

Mixon was convicted in November 1994 of attempted rape and other crimes based on the testimony of his 13-year-old daughter, who had accused him of attempting to molest her while the two were alone.¹⁶² Mixon denied the charges and argued at trial that his daughter had falsely accused him because he was

¹⁵² *In re Brockmueller*, 374 N.W.2d at 138-39. See also *United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989) (allowing *coram nobis* relief on legal issue); *United States v. Morgan*, 346 U.S. 502 (1954) (stating that writ of *coram nobis* was available at common law to correct errors of fact).

¹⁵³ See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (allowing relief where the circumstances compel such an action to achieve justice).

¹⁵⁴ See *Blanton v. United States*, 94 F.3d 227 (6th Cir. 1996) (noting that laches may apply to *coram nobis* proceedings).

¹⁵⁵ It is important to note that both the *Skok* and *Brockmueller* decisions used *coram nobis* to fill procedural gaps in a system of statutory post-conviction relief. See *Skok v. State*, 760 A.2d 647, 653 (Md. 2000) (giving relief where Post Conviction Procedure Act would have afforded no remedy); *In re Brockmueller*, 374 N.W.2d at 139 (applying writ because to do otherwise would result in 'a profound injustice'). We shall return to this issue in Part IV.B below.

¹⁵⁶ The major cases discussing these restrictions are found in Part IV.A. Tennessee, Connecticut and Arkansas are states that have most notably restricted *coram nobis* relief. See, e.g., *State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999) (setting strict time limit for seeking relief); *State v. Grisgraber*, 439 A.2d 377 (Conn. 1981) (disallowing relief more than three years after conviction becomes final); *Smith v. State*, 784 S.W.2d 595 (Ark. 1990) (strictly limiting grounds for *coram nobis* relief).

¹⁵⁷ TENN. CODE ANN. § 40-26-105 (2002).

¹⁵⁸ *Id.* § 27-7-103. See also *Mixon*, 983 S.W.2d at 668-70 (discussing legislative history of predecessor statutes and applying currently codified statute such that one year limitation period begins once judgment is announced).

¹⁵⁹ See, e.g., *United States v. Morgan*, 346 U.S. 502, 511-12 (1954) (discussing cases and interpreting 28 U.S.C. § 2255 in light of writ); *Hirabayashi v. United States*, 828 F.2d 591, 605 (9th Cir. 1987) (dismissing argument for application of laches).

¹⁶⁰ 983 S.W.2d 661 (Tenn. 1999).

¹⁶¹ *Id.* at 663, 667.

¹⁶² *Id.* at 664.

trying to keep her from dating an 18-year-old boyfriend.¹⁶³ In March 1995 his motion for new trial was denied and he was sentenced.¹⁶⁴ In December 1995, he filed a petition for *coram nobis*.¹⁶⁵ The petition included an affidavit from his daughter recanting her trial testimony and stating that she and her mother (who was divorcing Mixon at the time of the alleged crime) had fabricated the rape charges.¹⁶⁶ Although the trial court acknowledged that without the daughter's testimony Mixon probably would not have been prosecuted,¹⁶⁷ Mixon's petition was denied in the trial court because "recanted testimony does not constitute newly discovered evidence which can support issuance of a writ of error *coram nobis*."¹⁶⁸

On appeal, the Tennessee Supreme Court held that such newly-discovered evidence would indeed afford grounds for *coram nobis* relief.¹⁶⁹ More importantly, however, the court addressed the statute of limitations for seeking the writ.¹⁷⁰ The precise issue was whether Mixon's one-year limit began to run when the judgment became final or when the appeal was completed.¹⁷¹ The court ruled in favor of starting the time when the judgment became final in the trial court (in Mixon's case, after the March 1995 denial of his motion for new trial).¹⁷² This meant that Mixon's petition was both timely and colorable, but in resolving these issues the court advanced a troubling rationale for the shorter time limit:

[F]inality concerns mitigate against applying the interpretation advanced by Mixon and the State [allowing the one-year limit to begin running after the appeal]. The administration of justice and the integrity of our court system demand, in addition to fair treatment under the law, a certain degree of finality to criminal judgments. Since a convicted defendant had no other avenue for seeking relief at common law, it was entirely appropriate for due diligence to be the only time limitation on the writ [of *coram nobis*]; however, criminal procedure has drastically changed in the past thirty years. Convicted defendants now have the right to move for a new trial, the right to appeal, the right to seek post-conviction relief, and the right to file *habeas corpus* petitions. The post-conviction statute now provides a method by which courts may address claims of actual innocence which are based on newly discovered scientific evidence. Finally, convicted

¹⁶³ *Id.* at 663-64. He also accused her of retaliating against him because of his desire to withdraw her from public school and enroll her at a private Christian academy. *Id.*

¹⁶⁴ *Id.* at 665.

¹⁶⁵ *Mixon*, 983 S.W.2d at 665.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 672-73.

¹⁷⁰ *Id.* at 668-70.

¹⁷¹ *Mixon*, 983 S.W.2d at 668.

¹⁷² *Id.* at 671.

defendants who discover new non-scientific evidence of actual innocence too late to file a motion for new trial or petition for writ of error *coram nobis* may always seek executive clemency. Clearly, in this modern procedural regime, the writ of error *coram nobis* is no longer a convicted defendant's only hope for relief.¹⁷³

The court thus favored restrictive time limits on *coram nobis* in light of the other relief available and the state's interest in the finality of judgments. But this reasoning could lead to great injustice in other cases like *Mixon's*. Imagine that *Mixon's* daughter had not recanted until just after the one-year limit. *Mixon* then could not seek *habeas corpus*, because *habeas corpus* generally will not lie in Tennessee (nor in most other states) to attack the merits of a facially valid conviction.¹⁷⁴ He could not move for a new trial because his 30-day window under Tennessee law would have closed.¹⁷⁵ He could not seek post-conviction relief under the Tennessee Post-Conviction Relief Act because that statute also contains a one-year limit, which may be exceeded for newly discovered evidence only if that evidence is scientific evidence establishing actual innocence.¹⁷⁶ While the Tennessee courts have made some exceptions to this limit for non-scientific evidence,¹⁷⁷ they have rejected exceptions in other such cases.¹⁷⁸ Therefore, the availability of such relief appears to be a case-by-case gamble. For all these reasons, possibly the only recourse available to *Mixon* would be to petition for executive clemency – a very slender reed on which to rest one's hopes for meaningful post-conviction relief in light of what may have been a very serious wrong.¹⁷⁹ *Mixon* was fortunate that the true facts in his case were discovered and brought forward within a year,¹⁸⁰ but it is not difficult to see that facts sufficient to seek *coram nobis* may take much longer to surface.

¹⁷³ *Id.* at 670-71 (internal citations and quotations omitted).

¹⁷⁴ *State v. Ritchie*, 20 S.W.3d 624, 630 (Tenn. 2000). See also *State ex. rel. Smith v. Bomar*, 368 S.W.2d 748, 749 (Tenn. 1963) (disallowing collateral attacks unless underlying judgment declared void).

¹⁷⁵ TENN. R. CRIM P. 33(b) (2003).

¹⁷⁶ TENN. CODE ANN. § 40-30-202 (2002). The code also allows jurisdiction in a few other restricted circumstances not applicable in *Mixon's* case. *Id.*

¹⁷⁷ See, e.g., *Sample v. State*, 82 S.W.3d 267, 279 (Tenn. 2002) (allowing late-filed claim for post-conviction relief based on alleged withholding of exculpatory evidence by balancing state's interest in finality against petitioner's interest in collateral attack); *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992) (allowing late-filed claim for post-conviction relief based on allegedly excessive sentencing).

¹⁷⁸ *Wright v. State*, 987 S.W.2d 26, 29-30 (Tenn. 1999) (rejecting untimely motion for post-conviction relief based on alleged withholding of exculpatory evidence in capital case by balancing state's interest in finality against petitioner's interest in collateral attack).

¹⁷⁹ See *Penn v. State*, 670 S.W.2d 426, 430 (Ark. 1984) (“[T]he judicial system with its machinery for seeking and finding the truth is a far better forum for determining justice than the clemency route; clemency is always a remedy after the legal system has given a case its full measure of deserved attention.”).

¹⁸⁰ Ironically, after its thorough review of *coram nobis*, the *Mixon* court did not pass judgment on the merits of *Mixon's* petition. *State v. Mixon*, 983 S.W.2d 661, 673-75 (Tenn. 1999). Instead, it sidestepped that issue and granted *Mixon* a new trial based on the improper introduction at trial of *Mixon's* prior sexual battery conviction. *Id.*

Tennessee's curtailment of *coram nobis*, its reliance on finality concerns and its failure to see ways in which other avenues of relief may be insufficient have created a gap in post-conviction relief into which someone like *Mixon* might easily fall in other cases.¹⁸¹

Other states have limited the writ in similar ways.¹⁸² In Connecticut, for example, *coram nobis* relief may not be sought more than three years after a conviction becomes final.¹⁸³ This limit appears to be derived from Connecticut's historical treatment of *coram nobis* in civil cases.¹⁸⁴ However, criminal cases are quite different creatures, with quite different consequences. While the legal system's interest in finality in civil cases is strong, possibly justifying such a firm limitation, the immediate and collateral consequences of a criminal conviction are typically much more severe than those of a civil judgment and deserve a more liberal means of collateral attack.¹⁸⁵ It should be noted that Connecticut's three-year limitation also applies to motions for a new trial, with one narrow exception: a motion based on DNA evidence that was unavailable or undiscoverable at the time of trial may be brought at any time.¹⁸⁶ The narrowness of the exception proves the shortcomings of the rule: by restricting *coram nobis* in this way, Connecticut, like Tennessee, appears to have limited an important means of collateral attack in extreme cases.¹⁸⁷

Arkansas has also limited *coram nobis*, both by restraining the scope of the

¹⁸¹ The flaws in this system may have been realized by the Tennessee Supreme Court. See *State v. Workman*, 41 S.W.3d 100, 103-04 (Tenn. 2001). In *Workman*, the Tennessee Supreme Court did allow a *coram nobis* petition to be brought after the one-year period based on newly discovered evidence in a capital case. *Id.* The court appeared to base this ruling on a petitioner's heightened interest in presenting all possible evidence in capital litigation. *Id.* It remains to be seen whether this liberality will extend to non-capital cases. Compare *State v. Ratliff*, 71 S.W.3d 291, 297-98 (Tenn. Crim. App. 2001) (applying *Workman* to permit untimely *coram nobis* petition in non-capital case), with *Thompson v. Bell*, No. M2001-02460-CCA-OTCO, 2002 WL 1885260, at *2 (Tenn. Crim. App. Aug. 15, 2002) (applying *Mixon* time bar to *coram nobis* petition despite *Workman*), and *Swiggett v. State*, No. E2002-00174-CCA-R3-PC, 2002 WL 31309174 (Tenn. Crim. App. Oct. 15, 2002) (stating that defendant falls outside the *Workman* exception). Interestingly, the *Workman* majority cites *Mixon* only once, and then only in passing. See *Workman*, 41 S.W.3d at 104.

¹⁸² But see CONN. GEN. STAT. § 52-582 (2003) (allowing relief based on DNA evidence despite strict three year limitations period).

¹⁸³ See, e.g., *State v. Grisgraber*, 439 A.2d 377, 379 (Conn. 1981) (stating that, at common law, the writ could not be pursued outside of three years from time of judgment by the judge who sentenced defendant); *State v. Henderson*, 787 A.2d 514, 515 (Conn. 2002) (allowing any judge to vacate the conviction within three years).

¹⁸⁴ *Grisgraber*, 439 A.2d at 378. *Grisgraber* is the leading case on criminal *coram nobis* in Connecticut and cites *Montville v. Alpha Mills Co.*, 84 A. 933 (Conn. 1912), *Hurlbut v. Thomas*, 10 A. 556 (Conn. 1887) and *Jeffrey v. Fitch*, 46 Conn. 601, 604 (1879) for the three-year limitations period. All these, however, are civil cases.

¹⁸⁵ See Morton J. Horwitz, Comment, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982) (examining the evolution and reasons behind a public wrong and a private wrong).

¹⁸⁶ CONN. GEN. STAT. § 52-582 (2003).

¹⁸⁷ Accord *State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999) (restricting *coram nobis* relief to one year within final judgment).

writ and by limiting the time in which it may be sought.¹⁸⁸ As recently as 1984, Arkansas seemed to be aligning itself with the traditionally liberal view of *coram nobis*. In *Penn v. State*¹⁸⁹ the Arkansas Supreme Court recognized the availability of *coram nobis* to a petitioner based on the confession of another inmate to the murder for which he had been convicted.¹⁹⁰ In doing so, the court relied in part on a “gap-filling” view of *coram nobis*, much like the one espoused in *Hirabayashi*,¹⁹¹ *Skok*¹⁹² and *Brockmueller*.¹⁹³ “In simple terms, this writ is a legal procedure to fill a gap in the legal system – to provide relief that was not available at trial because a fact exists which was not known at that time and relief is not available on appeal because it is not in the record.”¹⁹⁴ While noting that such newly discovered evidence had normally not supported *coram nobis* relief in Arkansas, the court nonetheless seemed to hint that the scope of the writ might generally cover such a situation.¹⁹⁵ Unlike the *Mixon*¹⁹⁶ court, the *Penn* court interpreted modern developments in criminal procedure to require the literal allowance of post-conviction relief:

Criminal law and procedure in criminal cases have changed dramatically in the last two decades. Due process of law is not the same as it was 30 years ago or even 10 years ago. . . . The rule of reason is simply that the writ ought to be granted or else a miscarriage of justice will result.¹⁹⁷

Just a few years later, however, the court began to retreat from the implications of *Penn* and began strictly to limit the scope of *coram nobis* relief.¹⁹⁸ In *Smith v. State*,¹⁹⁹ the petitioner claimed that he had new evidence indicating that someone else had committed the crime for which he was convicted.²⁰⁰ In refusing to recognize *coram nobis* as a basis for relief, the court tersely limited *Penn* to its specific facts: “*Penn* did not establish the writ of *coram nobis*. It merely expanded the remedy to include, as a grounds for relief, a confession by a third party to the crime after trial and before we have decided the case on appeal.

¹⁸⁸ Compare *Penn v. State*, 670 S.W.2d 426 (Ark. 1984) (relying on *coram nobis* to provide relief after confession by another inmate exculpated defendant), with *Brown v. State*, 955 S.W.2d 901 (Ark. 1997) (refusing to follow *Penn*), and *Larimore v. State*, 938 S.W.2d 818 (Ark. 1997) (creating a non-exhaustive list of situations where *coram nobis* may be sought).

¹⁸⁹ 670 S.W.2d 426 (Ark. 1984).

¹⁹⁰ *Id.* at 427-28.

¹⁹¹ *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

¹⁹² *Skok v. State*, 760 A.2d 647 (Md. 2000).

¹⁹³ *In re Brockmueller*, 374 N.W.2d 135 (S.D. 1985).

¹⁹⁴ *Penn v. State*, 670 S.W.2d 426, 428 (Ark. 1984).

¹⁹⁵ *Id.* (arguably limiting decision to the facts of this case).

¹⁹⁶ 983 S.W.2d 661 (Tenn. 1999).

¹⁹⁷ *Penn*, 670 S.W.2d at 429.

¹⁹⁸ See *Smith v. State*, 784 S.W.2d 595 (Ark. 1990) (refusing to hold that *Penn* established the writ of *coram nobis* in Arkansas). See also *Robertson v. State*, No. CR 95-17, 2001 WL 259147 (Ark. March 15, 2001) (establishing an exclusive list of grounds for *coram nobis* relief).

¹⁹⁹ 784 S.W.2d 595 (Ark. 1990).

²⁰⁰ *Id.*

That is all *Penn* holds.²⁰¹

Later, in *Brown v. State*,²⁰² the court refused to make *coram nobis* available on grounds of a third-party confession.²⁰³ The *Brown* court distinguished *Penn* by saying that *Penn*'s claim of a third-party confession had been brought before his appeal was complete, while *Brown*'s was not (and indeed had been raised some 20 years after his conviction).²⁰⁴ Because *Penn*'s allegations were less stale than *Brown*'s, the court felt that *Penn*'s claim could be better evaluated by the trial court.²⁰⁵ *Brown*'s claim, on the other hand, ran afoul of the state's interest in finality:

[T]he ruling in *Penn* did not open the door to other petitions beyond those which qualified under the narrow facts of that case and which were brought within that narrow window of time in which the judicial system is best in a position to weigh with accuracy the merit of the petitioner's claim."²⁰⁶

A petitioner in *Brown*'s situation had other options, according to the court: a motion for new trial (limited to 30 days after the entry of final judgment)²⁰⁷ or, if the evidence were discovered later, executive clemency: "Assertions of a third-party confession after a judgment is affirmed may be addressed to the executive branch in a clemency proceeding."²⁰⁸ Thus, the *Smith* and *Brown* cases apparently limited the time for seeking *coram nobis* to the time in which the petitioner's direct appeal was pending, at least in cases involving third-party confessions to the crime.²⁰⁹ After such time, the Arkansas courts now appear to throw an erstwhile petitioner back on executive clemency, much as the *Mixon* court did in Tennessee.²¹⁰

In addition to the time limitation, the Arkansas courts seem to have evolved tight substantive limitations on the scope of the writ.²¹¹ In *Larimore v. State*,²¹² the supreme court noted that *coram nobis* is an extreme remedy, limited in scope to factual matters outside the trial record.²¹³ In doing so, the court listed what

²⁰¹ *Id.* at 596.

²⁰² 955 S.W.2d 901 (Ark. 1997) (per curiam).

²⁰³ *Id.* at 903.

²⁰⁴ *Id.* at 902.

²⁰⁵ *Id.* at 902-03.

²⁰⁶ *Id.* at 902.

²⁰⁷ *Id.* See also ARK. R. CRIM. P. 33.3(b) (Michie 2002) (setting forth requirements to move for a new trial).

²⁰⁸ *Brown*, 955 S.W.2d at 903.

²⁰⁹ *Id.* at 902.

²¹⁰ See *State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999) (stating that defendants always have the option of seeking executive clemency as relief for contested convictions).

²¹¹ Compare *Larimore v. State*, 938 S.W.2d 818, 822 (Ark. 1997) (stating some circumstances where a defendant should be entitled to *coram nobis* relief), with *Robertson v. State*, No. CR 95-17, 2001 WL 259147 (Ark. March 15, 2001) (stating exclusive categories where a defendant would be entitled to relief).

²¹² 938 S.W.2d 818 (Ark. 1997).

²¹³ *Id.* at 822.

appeared to be a non-exclusive set of situations that might support issuance of the writ: "Error *coram nobis* is a rare remedy. It is available only where there is an error of fact extrinsic to the record, *such as* insanity at the time of trial, a coerced guilty plea or material evidence withheld by the prosecutor that might have resulted in a different verdict."²¹⁴ In later cases this non-exhaustive list appears to have hardened into an exclusive list of the bases for *coram nobis* relief. Thus, in *Robertson v. State*,²¹⁵ the supreme court stated:

We have held that a writ of error *coram nobis* was available to address certain errors of the most fundamental nature that are found in *one of four categories*: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal.²¹⁶

The court repeated this limiting language the following year in another *coram nobis* case, *Hazelwood v. State*.²¹⁷ This shift in rhetoric appears to narrow *coram nobis* still further by limiting the grounds for relief to those enumerated in the court's list – a list that is much narrower than both the common-law and the liberal Federal uses of the writ. Thus, in Arkansas, as in Tennessee, the court may well be creating a procedural gap in post-conviction relief, especially in cases involving newly discovered evidence. This gap may leave a petitioner with no chance for judicial relief in cases where fundamental flaws are discovered after the expiration of a relatively short time period.²¹⁸

One response to all of this is that finality is critical to a system of criminal justice.²¹⁹ The application of time limits to *coram nobis* simply means that defendants must be diligent in investigating their cases within the more restrictive time limits.²²⁰ Substantive limitations on the scope of the writ can be likewise be justified in order to ensure an end to litigation by requiring that defendants act promptly to discover any flaws in their proceedings in time to raise them by means of other post-conviction remedies.²²¹ This is a legitimate point: neither I nor the various courts that have approved a liberalized version of *coram nobis* mean to suggest that petitioners should be able to attack their convictions *ad infinitum*.

But in our society, where we have overwhelmingly chosen to value and to protect individual liberty against the punitive power of the state, there should

²¹⁴ *Id.* (emphasis added) (quoting *Davis v. State*, 925 S.W.2d 768, 775 (1996)).

²¹⁵ No. CR 95-17, 2001 WL 259147 (Ark. March 15, 2001).

²¹⁶ *Id.* at *1 (emphasis added) (quoting *Pitts v. State*, 986 S.W.2d 407 (Ark. 1999)).

²¹⁷ No. CR 96-1287, 2002 WL 31151168, at * 1 (Ark. Sept. 26, 2002).

²¹⁸ *See, e.g.*, *State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999) (holding that the one-year statute of limitations begins to run when the judgment becomes final in the trial court, thereby extinguishing claims of newly discovered evidence at any point beyond this period).

²¹⁹ *See, e.g.*, *Daniels v. United States*, 532 U.S. 374, 378 (2001) (extolling virtues of finality in criminal judgments).

²²⁰ *Cf. McCleskey v. Zant*, 499 U.S. 467, 492 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.").

²²¹ *Id.*

remain some last recourse, accessible whenever necessary, for the most extreme cases of injustice.²²² Rigid time limits fail to recognize the complexities that may arise in pursuing or uncovering extraordinary grounds for relief.²²³ An exceptional remedy – a collateral attack on a fundamentally invalid sentence – should not be constrained by pedestrian limitations of timing or scope.²²⁴ Grounds may arise for relief that could not be foreseen, and a process should exist that is flexible enough to account for the vagaries of human affairs, however they may strike at the validity of a criminal proceeding. Those who decry protracted post-trial litigation should also recall that *coram nobis* has always been of very limited application (though flexible where it does apply).²²⁵ In addition, petitioners who are deliberately dilatory in their collateral attacks can be dealt with simply by denying relief based either on laches or on bad-faith pleading.²²⁶ Hence, *coram nobis*, even where liberally applied, may not present a sufficient foothold for the bringing of myriad post-conviction claims.

Further, while some courts fall back on executive clemency as a last resort, meaningful recourse must be judicial, not executive.²²⁷ Clemency petitions are subject to the caprices of individual elected executives, and while judges, too, may be elected, at least they typically either act in groups or can be appealed to higher authorities.²²⁸ Moreover, judges are better trained and steeped in the ways and means of evaluating cases and administering justice than most officeholders.

In all of this there is, of course, a societal choice: a choice between liberal and conservative regimes for dealing with post-conviction claims. But at the very least it should be recognized that when one restricts *coram nobis* in the way that some states have,²²⁹ one is acting in opposition to the tradition of the common law and its broad American evolution.

²²² Cf. Alfredo Garcia, *Toward An Integrated Vision of Criminal Procedure Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1 (1993) (attempting to synthesize values underlying criminal procedure protections of the Constitution).

²²³ See *United States v. Morgan*, 346 U.S. 502, 507 (1954) (noting that the common law purpose of *coram nobis* was to correct errors without limitation of time for seeking relief).

²²⁴ See ABA STANDARDS FOR CRIMINAL JUSTICE 22-2.4(a) (2d ed. 1980) (“A specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound.”).

²²⁵ See *Morgan*, 346 U.S. at 507-08, 511 (noting that *coram nobis* has a limited use in the United States but is available under certain circumstances to achieve justice).

²²⁶ See ABA STANDARD FOR CRIMINAL JUSTICE 22-2.4 (2d ed. 1980) (Commentary).

²²⁷ See Rochelle L. Haller, *The Innocence Protection Act: Why Federal Measures Requiring Post-Conviction DNA Testing and Preservation of Evidence are Needed in Order to Reduce the Risk of Wrongful Executions*, 18 N.Y.L. SCH. J. HUM. RTS. 101, 119-120 n.126 (2001) (arguing that the possibility of executive clemency is not sufficient to protect the rights guaranteed in the Eighth and Fourteenth Amendments).

²²⁸ See *id.* (arguing that entrusting claims of innocence into the hands of politicians subverts the Constitution).

²²⁹ Tennessee, Connecticut and Arkansas are states that have notably restricted *coram nobis* relief. See *supra* Part IV.A.

B. Coram Nobis and Modern Post-Conviction Relief Statutes

While some states have preserved *coram nobis*, others have abolished it by enacting post-conviction relief statutes.²³⁰ In these states, as in those that have preserved the writ, there appear to be two divergent trends.²³¹ Some states preserve the scope of relief traditionally available under *coram nobis* as part of their statutory schemes, which results in equivalent or greater relief being available to petitioners as compared to the common-law writ.²³² Other states, however, have enacted post-conviction relief statutes that simultaneously abolish the writ and substitute procedures that are less broad than those available under traditional *coram nobis*, resulting in a potential narrowing of the opportunities for collateral attack in typical *coram nobis* situations.²³³

A number of states hew closely to both the American Bar Association's Standards for Criminal Justice and the Uniform Post-Conviction Procedure Act²³⁴ in providing post-conviction relief that is liberal both as to timing and scope. Typical of these is Indiana's statute, which reads in part as follows:

Section 1. Remedy – To Whom Available – Conditions

(a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:

....

(2) that the court was without jurisdiction to impose sentence; [or]

....

(4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; [or]

....

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error

²³⁰ Indiana, for example, has explicitly abolished all common law remedies including *coram nobis*. See 35 IND. CODE R. PC1 (West 2002) (appendix).

²³¹ Compare 35 IND. CODE R. PC1 (appendix) (allowing post-conviction relief to any person at any time even though such relief is not expressly given under guise of *coram nobis*), with 42 PA. CONS. STAT. § 9543 (a)(1)(i) (2002) (abolishing *coram nobis* and allowing only collateral attacks to those who are in custody).

²³² See 35 IND. CODE R. PC1 (appendix) (allowing post-conviction relief to any person at any time even though such relief is not expressly given under guise of *coram nobis*).

²³³ See 42 DEL. R. CRIM. P. 61 (2002) (abolishing *coram nobis*). See also *State v. Lewis*, 797 A.2d 1198, 1201 (Del. 2002) (stating that Rule 61 relief is only available to one in custody.)

²³⁴ See ABA STANDARDS FOR CRIMINAL JUSTICE 22-2.1-22-6.3 (2d ed. 1980) (addressing scope of post-conviction procedures and the grounds for relief they should encompass). See also UNIF. POST-CONVICTION PROCEDURE ACT § 1, 11A U.L.A. 274 (1966) (stating to whom the remedy is available and conditions for relief).

heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute at any time a proceeding under this Rule to secure relief.

(b) This remedy . . . comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence and it shall be used exclusively in place of them.²³⁵

This rule supplants the *coram nobis* writ, as stated in subsection (b), but it retains the outlines of liberal, Americanized *coram nobis* in the relief that it provides.²³⁶ The remedy extends to “any person” who has been convicted or sentenced, whether or not he is presently in custody or otherwise serving a sentence.²³⁷ This comports with the traditionally broad scope of *coram nobis* by permitting collateral attack by someone who may not be serving a sentence, but who may suffer continuing disabilities as the result of a wrongful conviction.²³⁸ Further, the grounds of the relief include those addressed by traditional *coram nobis*: lack of jurisdiction in the trial court, matters of fact not included in the record and, in the catch-all clause, any ground of error “heretofore available” under the common-law writs.²³⁹ Finally, the relief provided may be sought “at any time,” just as *coram nobis* traditionally knew no time limits and could afford justice whenever the pertinent facts were discovered.²⁴⁰ Thus, the essence of *coram nobis* relief lives on in such liberal schemes, even though the writ itself is abolished.²⁴¹

²³⁵ 35 IND. CODE R. PC1 (appendix) (discussing post-conviction remedies).

²³⁶ Compare *Lile v. State*, 671 N.E.2d 1190, 1194 (Ind. Ct. App. 1996) (holding post-conviction relief generally applicable to petitioner who had served his sentence, though particular petition before the court was barred by laches), with *United States v. Morgan*, 346 U.S. 502, 507 (1954) (noting that the common law purpose of *coram nobis* was to correct errors without limitation of time for seeking relief).

²³⁷ See, e.g., *Lile*, 671 N.E.2d at 1194 (holding post-conviction relief applicable to petitioner who had served his sentence).

²³⁸ See *Hirabayashi v. United States*, 828 U.S. 591, 604 (9th Cir. 1987) (stating that *coram nobis* relief provides important protections to petitioner who may be suffering collateral consequences of a wrongful conviction).

²³⁹ See 35 IND. CODE R. PC1 (appendix) (stating various claims under which a person may seek relief from conviction). Cf. *Hysler v. Florida*, 315 U.S. 411 (1941) (recognizing that *coram nobis* allows for judicial correction of a wrong that results in the deprivation of life or liberty when unattended).

²⁴⁰ See 35 IND. CODE R. PC1 (appendix) (stating that such a challenge may proceed at any time).

²⁴¹ A number of states have enacted identical or similar statutes. See, e.g., ALA. R. CRIM. P. 32.1 (2002); ALASKA STAT. §§ 12.72-010, 12.72-020 (Michie 2002); HAW. R. OF PENAL P. 40 (Michie 2003); N.C. GEN. STAT. § 15A-1411 (2002); N.D. CENT. CODE §§ 29-32.1-01, 29-32.1-03 (2001); OKLA. STAT. ANN. tit. 22 § 1080 (West 2002); OR. REV. STAT. §§ 138.510, 138.540 (1986) (imposing two-year limit, except in cases invoking grounds “which could not reasonably have been raised” earlier); R.I. GEN. LAWS § 10-9.1-1 (2002). Other states have declared by judicial decision that their post-conviction relief procedures encompass *coram nobis* in its more liberal forms. See,

In many other states, however, the advent of comprehensive post-conviction relief statutes has curtailed or eliminated the relief that was formerly available under *coram nobis*.²⁴² While traditional *coram nobis* was available at any time, subject only to laches, some modern post-conviction schemes limit the time in which virtually any post-conviction relief may be sought.²⁴³ In Wyoming, for example, a comprehensive post-conviction relief statute has supplanted *coram nobis*.²⁴⁴ That statute contains a seemingly strict five-year time limit: "No petition under this act shall be allowed if filed more than five (5) years after the judgment of conviction was entered."²⁴⁵ As of this writing, there appear to be no reported cases extending or excusing this time limit. Such a time limitation appears to be destructive of the historical understanding of *coram nobis*-type relief. American law, as expressed in *Mooney v. Holohan*,²⁴⁶ historically has recognized that there needs to be some safety valve for situations in which manifest injustices are discovered well after a conviction.²⁴⁷ Strict time limits simply foreclose this possibility in derogation of the rights of the convicted.²⁴⁸

The experience of Colorado with strict time limits illustrates the point.²⁴⁹ In 1973 the Colorado legislature passed a statute setting absolute time limits for collaterally attacking criminal convictions: six months for petty offenses, 18 months for misdemeanors, no time limits for first-degree felonies and three years for all other felonies.²⁵⁰ The only exceptions to this time bar were cases in which the trial court lacked personal or subject-matter jurisdiction, or in which the failure to seek relief sooner was caused by the mental incompetence or

e.g., *Janiec v. McCorkle*, 144 A.2d 561, 568-70 (N.J. Super. Ct. App. Div. 1958) (recognizing historical availability of *coram nobis* to prevent injustice and declaring equivalent relief available under New Jersey rules of procedure); *State v. Lucero*, 563 P.2d 605, 606 (N.M. Ct. App. 1977) (interpreting New Mexico rules of procedure as retaining "... all substantive rights protected by the old writ of *coram nobis*"); *State v. Bishop*, 439 A.2d 255, 263 (R.I. 1982) (no time limit for seeking relief under post-conviction relief statute).

²⁴² See, e.g., WYO. STAT. ANN. § 7-14-101 (Michie 2002) (supplanting common law writ of *coram nobis* in its entirety).

²⁴³ Compare WYO. STAT. ANN. § 7-14-103(d) (setting general five-year time limitation), with COLO. REV. STAT. § 16-5-402(1) (2002) (setting absolute time limits for collaterally attacking criminal convictions depending on type of crime at issue).

²⁴⁴ WYO. STAT. ANN. § 7-14-101. See *Murray v. State*, 776 P.2d 206, 208 (Wyo. 1989) (construing section 7-14-101 as supplanting *coram nobis*).

²⁴⁵ WYO. STAT. ANN. § 7-14-103(d).

²⁴⁶ 294 U.S. 103 (1935) (*per curiam*).

²⁴⁷ *Id.* at 112.

²⁴⁸ See ABA STANDARDS FOR CRIMINAL JUSTICE 22-2.4(a) (1980) ("A specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound."). See also UNIF. POST-CONVICTION PROCEDURE ACT § 3, 11A U.L.A. 333 (1966) (allowing filing of application for post-conviction relief "at any time.").

²⁴⁹ Compare COLO. REV. STAT. § 16-5-402(1) (2002) (setting absolute time limits for collaterally attacking criminal convictions), with *People v. Germany*, 674 P.2d 345, 354 (Colo. 1983) (en banc) (declaring statute unconstitutional to the extent that it precluded collateral attack without regard to the surrounding circumstances of conviction).

²⁵⁰ COLO. REV. STAT. § 16-5-402(1). See also *Germany*, 674 P.2d at 347 (applying section 16-5-402). Prior to the passage of this statute, *coram nobis* had apparently ceased to be recognized in Colorado. See *Hackett v. People*, 406 P.2d 331, 332 (Colo. 1965) (en banc) (stating writ had become almost obsolete).

psychiatric commitment of the accused.²⁵¹ The statute was challenged in *People v. Germany*²⁵² by a set of five petitioners who were seeking to attack old convictions that were later used to enhance subsequent sentences.²⁵³ The Colorado Supreme Court held the statute unconstitutional to the extent that it precluded collateral attack without regard to the surrounding circumstances.²⁵⁴

The court began by acknowledging the limits on governmental power that undergird the American criminal justice system:

[I]t is axiomatic that a conviction imposed in violation of a basic constitutional right may not be used to support guilt or to enhance punishment. This precept finds its source in the principle that unconstitutional convictions, in addition to being of suspect reliability, abridge the very charter from which the government draws its authority to prosecute anyone.²⁵⁵

While the state has a legitimate interest in the finality of criminal judgments, that interest cannot overcome a person's right to be permitted to challenge his conviction absent some culpable procedural default.²⁵⁶ The court noted a variety of situations in which a conviction might become subject to attack after the statutory time bar, as when a statute is later declared unconstitutional, or when evidence of prosecutorial misconduct surfaces after the cut-off period.²⁵⁷ Where there were legitimate reasons for attempting to challenge a conviction after the time bar, the court held that it would be a deprivation of due process to prevent such attacks:

We are satisfied that the United States and Colorado Constitutions prevent the state from employing a system of forfeiture with respect to constitutional claims solely on the basis of a time bar, without affording an accused a meaningful opportunity to establish that the failure to make a timely challenge was the result of circumstances amounting to justifiable excuse or excusable neglect.²⁵⁸

The court thus declared the statute unconstitutional.²⁵⁹ The *Germany* case

²⁵¹ COLO. REV. STAT § 16-5-402(2); See also *Germany*, 674 P.2d at 347 (reiterating requirements and exceptions of statute).

²⁵² 674 P.2d 345 (Colo. 1983) (en banc).

²⁵³ *Id.* at 347. The lead plaintiff, *Germany*, alleged that he had entered his guilty plea involuntarily and therefore unconstitutionally. *Id.* at 348.

²⁵⁴ *Id.* at 354.

²⁵⁵ *Id.* at 349.

²⁵⁶ *Id.* at 350.

²⁵⁷ *Germany*, 674 P.2d at 352-53.

²⁵⁸ *Id.* at 353.

²⁵⁹ *Id.* at 354. The statute was subsequently amended to allow a court to hear a petition for relief "[w]here the court hearing the collateral attack finds by a preponderance of the evidence that the failure to seek relief within the applicable time period was the result of circumstances amounting to

highlights the major shortcoming of statutory time bars, which is simply that events can happen that might give rise to grounds for relief long after a conviction is entered.²⁶⁰ While the *Germany* court did not mention *coram nobis*, its decision nonetheless drew upon the essence of the writ – extreme relief that can span a great length of time – in protecting the rights of its citizens, no matter when the need for such protection becomes apparent.²⁶¹

Another area that has been significantly affected by the replacement of *coram nobis* with statutory post-conviction schemes is the availability of relief to a petitioner who has served his sentence or otherwise been discharged from custody.²⁶² As noted above,²⁶³ the availability of post-custody relief was one of the important features separating *coram nobis* from *habeas corpus*, which applies only where a petitioner is seeking release from custody.²⁶⁴ Yet many statutory post-conviction schemes preclude post-custody relief by simultaneously abolishing *coram nobis* and providing relief only to persons who are in custody or otherwise serving a sentence.²⁶⁵ Pennsylvania, for example, has enacted an exclusive statutory scheme for post-conviction relief that applies only to a petitioner who is “currently serving a sentence of imprisonment, probation or parole for the crime.”²⁶⁶ Thus, in *Commonwealth v. Ahlborn*,²⁶⁷ a petitioner sought statutory post-conviction relief, claiming that his guilty plea to a drunk driving charge was entered without full knowledge of its nature and consequences.²⁶⁸ However, before a hearing could be held on his petition, he was unconditionally released from custody.²⁶⁹ The Pennsylvania Supreme Court held that under the plain language of the statute, relief was unavailable to the

justifiable excuse or excusable neglect.” COLO. REV. STAT § 16-5-402(2)(d) (2002). This would seem to leave the door open to *coram-nobis*-type relief where extrinsic facts or other grounds are uncovered only after the expiration of the statutory time limits. See generally *People v. Wiedemer*, 852 P.2d 424, 441-42 (Colo. 1993) (en banc) (discussing factors that might give rise to finding of justifiable excuse or excusable neglect).

²⁶⁰ Cf. 725 ILL. COMP. STAT. 5/122-1 (West 2002) (allowing any person who asserts that their rights under the Constitution have been denied to petition for a rehearing within six months after a denial of appeal or three years of conviction, whichever is sooner, unless they can show that the delay was not due to his or her culpable negligence).

²⁶¹ See *Wiedemer*, 852 P.2d at 443 (holding that the amended § 16-5-402, which created a good cause exception to time limits as a legislative response to *Germany*, was constitutional).

²⁶² Cf. *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (encouraging states to provide a clear method of post-conviction relief); *D. Josev Brewer, Al-Shabazz v. State: Excluding Noncollateral Claims From the Scope of Post-Conviction Relief*, 51 S.C. L. REV. 839 n.7 (2000) (noting that state post-conviction statutes have developed almost entirely in response to the encroachment of the federal courts into state post-conviction remedy issues).

²⁶³ See *supra* note 39. See also *Skok v. State*, 760 A.2d 647, 661-62 (Md. 2000) (stating that a defendant without any other remedy for collaterally attacking a conviction must be allowed to pursue a *coram nobis* petition and that such a defendant must have served his sentence or been released from custody).

²⁶⁴ *Id.*

²⁶⁵ See *supra* note 232.

²⁶⁶ 42 PA. CONS. STAT. § 9543(a)(1)(i) (2002). See also *id.* § 9542 (supplanting *coram nobis* and other remedies with statutory post-conviction relief).

²⁶⁷ 699 A.2d 718 (Pa. 1997).

²⁶⁸ *Id.* at 719.

²⁶⁹ *Id.*

petitioner because of his release.²⁷⁰ The petitioner argued that he would suffer ongoing consequences from his conviction, including the suspension of his driver's license and the possibility of enhanced future sentences.²⁷¹ However, the court refused to consider whether such consequences might have affected the legislature's intent in passing the statute:

Appellant asserts that, despite having been released from custody, he will continue to suffer consequences of his convictions. Specifically, he cites a driver's license suspension and the possibility of future sentencing and recidivist enhancements. Appellant argues that, because convictions can result in ongoing consequences, the legislature would not have intended that review under the PCRA [Post-Conviction Relief Act] would be unobtainable. The search for legislative intent is at an end, however, where the language used by the legislature is clear.²⁷²

A number of other states have imposed the same restrictions, by both abolishing *coram nobis* and limiting relief under the superseding post-conviction statutes either to persons who are in custody or to persons who are under ongoing restraints (such as parole or probation) as the result of a conviction.²⁷³

This restriction eviscerates one of the most important features of *coram nobis*: the provision of relief in extreme cases, at any time, to those wrongfully convicted, including those who have already served potentially unjust sentences.²⁷⁴ As noted above,²⁷⁵ the collateral consequences of a wrongful

²⁷⁰ *Id.* at 720.

²⁷¹ *Id.*

²⁷² *Id.* (citing *Commonwealth v. Bursick*, 584 A.2d 291, 293 (Pa. 1990), and *Commonwealth v. Bell*, 516 A.2d 1172, 1175 (Pa. 1986)).

²⁷³ DEL. R. CRIM. P. 61 (2002) (abolishing *coram nobis*). See also *State v. Lewis*, 797 A.2d 1198, 1201 (Del. 2002) (stating that Rule 61 relief is only available to a petitioner in custody); ME. REV. STAT. ANN. tit. 15, § 2122 (West 2002) (establishing exclusive means of post-conviction relief and abolishing *coram nobis*); *Yde v. State*, 376 A.2d 465, 466 (Me. 1977) (statutory post-conviction relief unavailable to petitioner discharged from custody); ME. REV. STAT. ANN. tit. 15, § 2124 (successor statute to statute construed in *Yde* which limits availability of post-conviction relief to persons suffering specified restraints or impediments as a result of conviction); WYO. STAT. ANN. § 7-14-101(b) (Michie 2002) (limiting statutory post-conviction relief to "any person serving a felony sentence."); *Murray v. State*, 776 P.2d 206, 208 (Wyo. 1989) (stating that statutory procedure supersedes *coram nobis*).

²⁷⁴ See also ABA STANDARDS FOR CRIMINAL JUSTICE 22-2.3 (2d ed. 1980). This standard provides:

Except for a claim which does not attack the validity of a criminal judgment, the availability of post conviction relief should not be conditioned upon the applicant's attacking a sentence of imprisonment then being served or other present restraint. The right to seek relief from an invalid conviction and sentence ought to exist: (a) even though the applicant has not yet commenced service of the challenged sentence; (b) even though the applicant has completely served the challenged sentence; or (c) even though the challenged sentence did not commit the applicant to prison, but was rather a fine,

conviction can persist well after incarceration and may include deportation, the continuation of civil disabilities and the possibility of sentence enhancement in the event of any future convictions.²⁷⁶ The expansion of post-conviction relief to persons not in custody may thus be an essential feature of a system that seeks to correct injustice where necessary. Notably, restrictions on such relief are not the inevitable consequence of modern statutory procedures: as we have seen, some states, while abolishing *coram nobis*, have continued to make post-conviction relief available to petitioners whether or not they are in custody.²⁷⁷ This was precisely the point of *Morgan*,²⁷⁸ *Hirabayashi*,²⁷⁹ *Skok*²⁸⁰ and *Brockmueller*,²⁸¹ discussed above,²⁸² which turned to *coram nobis* expressly to provide relief in cases where a petitioner was out of custody and would have no remedy at all but for the writ. Pennsylvania and other states take recourse in statutory interpretation to deny relief, but other courts have upheld *coram nobis* in the face of seemingly restrictive statutory regimes.²⁸³ They do so by relying on the principle that some remedy must be afforded where manifest injustice has occurred. The difference appears to be that some courts (or legislatures) are content to leave a petitioner without a remedy, while others are willing to read the statutes in the context of the common law in order to do justice.²⁸⁴ Insofar as this is a judicial or a legislative choice, one would prefer a choice in favor of justice, not in favor of technical bars to relief.

probation, or suspended sentence.

Id.

²⁷⁵ See *supra* Part IV.A. (discussing *Skok v. State*, 760 A.2d 647 (Md. 2000)).

²⁷⁶ *Id.*

²⁷⁷ See *supra* notes 186-89 and accompanying text.

²⁷⁸ *United States v. Morgan*, 346 U.S. 502 (1954).

²⁷⁹ *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

²⁸⁰ *Skok v. State*, 760 A.2d 647 (Md. 2000).

²⁸¹ *In re Brockmueller*, 374 N.W.2d 135 (S.D. 1985).

²⁸² See *supra* Parts III. and IV.A.

²⁸³ See *People v. Germany*, 674 P.2d 345, 354 (Colo. 1983) (en banc) (declaring statute unconstitutional which restricted relief without any exceptions for extreme circumstances).

²⁸⁴ See, e.g., *Skok*, 760 A.2d at 653. Speaking with reference to the Maryland Post Conviction Procedure Act, the court stated:

[The Act] was designed to create a statutory remedy for collateral challenges to criminal judgments . . . and to substitute this remedy for habeas corpus and *coram nobis* . . . [but] . . . in situations where the Post Conviction Procedure Act did not provide a remedy . . . , the original common law remedies with their common law attributes continue to be viable.

Id. (quoting *Gluckstern v. Sutton*, 574 A.2d 898, 912 (Md. 1990), and *Ruby v. State*, 724 A.2d 673, 678 (Md. 1999) (internal quotations and citations omitted)).

V. CONCLUSION

Coram nobis has retained an important role in American law, despite the occasional report of its demise.²⁸⁵ This ancient English writ, expanded and liberalized in accordance with American conceptions of individual justice, has remained available in many jurisdictions as a means of extraordinary post-conviction relief.²⁸⁶ In other jurisdictions it continues to underpin and to inform more modern post-conviction regimes.²⁸⁷ And in those jurisdictions that have limited or done away with the relief formerly available under the writ, it can serve as a reminder that there are time-honored ways of righting manifest injustice that need not be cast aside as American law enters its new century.²⁸⁸

²⁸⁵ See *supra* pp. 2-5.

²⁸⁶ See discussion *supra* Part III.

²⁸⁷ See discussion *supra* Part IV.A.

²⁸⁸ See discussion *supra* Part IV.B.

THE COMPLICITY OF JUDGES IN THE GENERATION OF WRONGFUL CONVICTIONS

by Hans Sherrer*

I. INTRODUCTION

Wrongful convictions do not occur in a vacuum of judicial indifference. Every wrongful conviction results from a deliberative process involving law enforcement investigators, prosecutors, and one or more trial level and appellate judges.¹ Although prosecutors, police investigators, defense lawyers and lab technicians have all been lambasted in books and magazines for their contribution to wrongful convictions, judges have, by and large, been given a free pass.² This hands-off attitude may be due to the fact that sitting in their elevated positions, judges are often thought of by lay people and portrayed by the news and other broadcast media, as impartial, apolitical men and women who possess great intelligence, wisdom, and compassion, and are concerned with ensuring that justice prevails in every case.³ Reality, however, is far different from that idealistic vision.⁴

In *Courts on Trial: Myth and Reality in American Justice*, one of the few serious critiques of this country's judiciary by an insider, Judge Jerome Frank wrote, "Our courts are an immensely important part of our government. In a democracy, no portion of government should be a mystery. But what may be called "court-house government" still is mysterious to most of the laity."⁵ Judge Frank's book was in stark contrast to what he referred to as "the traditional hush-policy concerning the courts."⁶ That unspoken policy continues to obscure the inner workings of the courts.

Peering beneath the public façade that has long protected judges from serious scrutiny, reveals that from their lofty perch they are the most crucial actor in the

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¹ See Thomas P. Sullivan, *Repair or Repeal: Report of the Illinois Governor's Commission on Capital Punishment*, 49 FED. LAW. 40 (2002) (discussing and examining the suggestions made by the Illinois Commission on Capital Punishment, including improvements in police investigations, the use of in-custody informants and accomplice testimonies during trial and the sentencing phase).

² See Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutor's Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853 (2002) (concluding that a prosecutor's use of inconsistent factual theories in separate trials for a defendant and a co-defendant is unconstitutional and urging judicial intervention).

³ See VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT 23-24* (Thunder's Mouth Press 2001).

⁴ See *id.*

⁵ JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 1 (1973) (Jerome Frank was a judge on the United States Court of Appeals for the Second Circuit).

⁶ *Id.* at 1.

real-life drama of an innocent person's prosecution and conviction.⁷ This theme is explored in the following seven interrelated sections: Part II: Judges are political creatures, Part III: The violence of judges, Part IV: The judicial irrelevance of innocence, Part V: The control of defense lawyers by judges, Part VI: Appellate courts cover up the errors of trial judges, Part VII: Why the judiciary is dangerous for innocent people, and Part VIII: The unaccountability of judges.

This critique of the judiciaries contribution to creating a broad group of legally disadvantaged people – those who are wrongly convicted – is offered in the spirit of increasing an understanding of the nature of their involvement in the process. It is only by criticism's such as this that a constructive dialogue can hope to be initiated toward lessening the judiciaries enabling role in the wrongful conviction process, without which there can be no expectation of a reduction in their incidence.

II. JUDGES ARE POLITICAL CREATURES

Contrary to their carefully cultivated public image of being independent and above the frays of everyday life, judges are influenced and even controlled by powerful and largely-hidden political, financial, personal and ideological considerations.⁸ Renowned lawyer Gerry Spence clearly recognized in *From Freedom To Slavery* that judges are, first and foremost, servants of the political process:

We are told that our judges, charged with constitutional obligations, insure equal justice for all. That, too, is a myth. The function of the law is not to provide justice or to preserve freedom. The function of the law is to keep those who hold power, in power. Judges, as Francis Bacon remarked, are 'the lions under the throne'. . . . Our judges, with glaring exceptions loyally serve the . . . money and influence responsible for their office.⁹

Despite never ending proclamations of their independence, members of the judiciary, all the way from a local judge in small town USA to a U. S. Supreme Court justice, are inherently involved in all manners of political intrigue and subject to a multitude of political and other pressures.¹⁰ The political nature of judges that affects their conduct and rulings is an extension of the fact that there

⁷ See GERRY SPENCE, O.J. THE LAST WORD 170-72 (1997) (pointing out how much power and control judges hold over the courtroom).

⁸ See GERRY SPENCE, FROM FREEDOM TO SLAVERY: THE REBIRTH OF TYRANNY IN AMERICA 109 (1995) (noting that judges serve those responsible for putting them in power).

⁹ *Id.*

¹⁰ See Tony Mauro, *Thurgood Marshall helped the FBI*, USA TODAY, Dec. 2, 1996, at A1 (detailing how Justice Marshall had worked as a mole for the FBI while inside the NAACP, and at the same time, he publicly criticized the agency).

is not a single judge in the United States, whether nominated or elected, whether state or federal, that is not a product of the political process as surely as every other political official whether a city mayor, a county commissioner, a state representative, a member of Congress or the President.¹¹

Vincent Bugliosi, the former L.A. deputy D.A. most well known for prosecuting Charles Manson, clearly understands that every judge in this country is only a thinly veiled politician in a black robe:

The American people have an understandably negative view of politicians, public opinion polls show, and an equally negative view of lawyers. Conventional logic would seem to dictate that since a judge is normally both a politician and a lawyer, people would have an opinion of them lower than a grasshopper's belly. But on the contrary, the mere investiture of a twenty-five-dollar black cotton robe elevates the denigrated lawyer-politician to a position of considerable honor and respect in our society, as if the garment itself miraculously imbues the person with qualities not previously possessed. As an example, judges have, for the most part, remained off-limits to the creators of popular entertainment, being depicted on screens large and small as learned men and women of stature and solemnity as impartial as sunlight. *This depiction ignores reality.*¹²

A high level of knowledge, understanding, compassion and independence of thought is not a necessary prerequisite for a person to become a judge. A person typically goes through the motions of being a judge while neither *doing* the grunt work and studious research required to do a competent *or* conscientious job, nor *having* the critical thinking skills necessary to do so even if they wanted to.¹³

However, the depth of a person's loyalty to the prevailing political ideology, which is an indicator of how they will rule once in power, is an essential attribute for an aspiring judge.¹⁴ Law Professor John Hasnas explains in *The Myth of the Rule of Law* that if a person's world-view is inconsistent with the prevailing political ideology, they will not knowingly be considered, nominated or otherwise endorsed to be a state or federal judge:

Consider who the judges are in this country. Typically, they are people from a solid middle-to upper-class background who performed well at an appropriately prestigious undergraduate

¹¹ See JOEL GROSSMAN, *LAWYERS AND JUDGES* 24-39 (John Wiley ed. 1965) (discussing how judges are appointed by the political parties that are in power on a national and state level).

¹² BUGLIOSI, *supra* note 3, at 23-24 (emphasis added).

¹³ See, e.g., ANNE STRICK, *INJUSTICE FOR ALL* 159 (1996) (quoting one judge as saying, "People think that alcoholism is the occupational disease of judges. It is not alcoholism; laziness is our occupational disease. It is terribly difficult to make some judges work.") (footnote omitted).

¹⁴ SPENCE, *supra* note 8, at 109 (noting that judges "loyally serve the . . . money and influence responsible for their office"). See also GROSSMAN, *supra* note 11, at 24-39 (discussing the appointment of judges according to the controlling political parties).

institution. . . . To have been appointed to the bench, it is virtually certain that they were both politically moderate and well-connected, and, until recently, white males of the correct ethnic and religious pedigree. It should be clear that, culturally speaking, such a group will tend to be quite homogeneous, sharing a great many moral, spiritual, and political beliefs and values.¹⁵

Although state judicial candidates are typically “merit” rated by a professional organization, such as a state bar, and federal judicial candidates by the American Bar Association, all so-called “merit” valuation processes are fraught with political considerations and an undercurrent of backroom wheeling and dealing by power brokers.¹⁶ The inherently political nature of the judiciary stands in stark contrast to what children are taught in school: that judges should be venerated as fountains of wisdom protecting the rights of the people and trying to do the right thing.¹⁷ Given that a judge’s political leanings and societal position has a profound impact on his or her perspective and decision making process, it is to be expected that their rulings will be consistent with the multitude of factors making up his or her roots.¹⁸ As noted in *Injustice For All*,

Until laws are applied to facts, they are paper law only. Until facts are selected out of the variety each side urges, their weight is purely hypothetical. The judge brings both to earth and life. He chooses for belief particular facts; chooses that law which, he states, applies to those facts; and declares his ruling – backed by government’s coercive power.¹⁹

¹⁵ John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 215 (1995). Professor Hasnas writes,

Consider, for example, people’s beliefs about the legal system. They are obviously aware that the law is inherently political. The common complaint that members of Congress are corrupt, or are legislating for their own political benefit or for that of special interest groups demonstrates that citizens understand that the laws under which they live are a product of political forces rather than the embodiment of the ideal of justice. Further, as evidenced by the political battles fought over the recent nominations of Robert Bork and Clarence Thomas to the Supreme Court, the public obviously believes that the ideology of the people who serve as judges influences the way the law is interpreted.

Id. at 200.

¹⁶ This process ensures that the sort of judges described by Professor Hasnas as, “homogeneous, sharing a great many moral, spiritual, and political beliefs and values,” continue to be seated. *See id.* at 215.

¹⁷ *See* BUGLIOSI, *supra* note 3, at 23-24 (observing the elevated status of the judge in society).

¹⁸ *See* Hasnas, *supra* note 15, at 215 (explaining that the reason the law tends to be stable is due to the fact that judges share similar moral, ethnic, political and religious backgrounds upon which they draw their presuppositions).

¹⁹ STRICK, *supra* note 13, at 148.

That observation emphasizes the role of a judge's belief system in how a case turns out, because it dictates every aspect of how he or she deals with it.

The existence of identifiable voting blocks among appellate judges from the Supreme Court on down that are definable by the political leanings of the judges belonging to them, is just one indicator that regardless of an issue or the relative merits of an appellant, the political inclinations of the judges is the most identifiable factor deciding how they vote.²⁰ The politically less powerful party, particularly in federal court, is the least likely to be the winner of these voting contests.²¹

That is to be expected considering the economic, educational, and ideological world of judges is far removed from the poor, modestly educated or otherwise politically impotent segment of society occupied by the people most often attacked by the law enforcement process.²² Since such people are outside the caste from which judges are drawn, it is not a political priority for them to be protected, and no judge will unduly risk using any political capital to do so.²³ A consequence of politically impotent people being most often subject to a criminal prosecution is that they are also the most common victims of a wrongful prosecution and conviction.²⁴ A prime example of that are the four lower class, politically impotent innocent men on Illinois' death row who had to be pardoned by Governor George Ryan on January 10, 2003 because judges had failed to release them.²⁵

Thus, the political nature of the state and federal judiciary significantly contributes to the immersion of innocent men and women even deeper into the quicksand-like depths of the law enforcement system without their innocence being detected. Those people are at best only peripherally related to the attainment or retainment of a judge's position, so their welfare is not a political necessity for a judge to be concerned about.²⁶

²⁰ See Hasnas, *supra* note 15, at 215.

²¹ A lawyer with considerable experience in federal court described it to the author as the "rich man's court," because the wealthiest litigant in a civil case is most likely to prevail. By inference that means apart from any other prejudices of a judge supporting the government's position, it would be expected to win most cases simply because no defendant can match its "wealth." This same lawyer also emphasized to the author that the most important qualification to become a federal judge was to have the right political connections.

²² See Hasnas, *supra* note 15, at 215 (noting that judges are typically from middle to upper-middle class backgrounds, well educated and until recently, white males).

²³ See, e.g., ABRAHAM S. BLUMBERG, *THE SCALES OF JUSTICE* 21 (Abraham S. Blumberg ed., 2d ed. 1973) (observing that the poor, middle class and less dominant social groups are disproportionately targeted by the criminal justice system compared to dominant social groups).

²⁴ Statistics from the Bureau of Justice reveal that "at current levels of incarceration, newborn black males in this country have greater than a 1 in 4 chance of going to prison during their lifetimes, Hispanic males have a 1 in 6 chance and white males have a 1 in 23 chance. See U.S. Department of Justice, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#lifetime> (last visited Mar. 19, 2003).

²⁵ For an analysis of Governor Ryan's perspective that the judicial system had utterly failed to protect those innocent men, see Hans Sherrer, *Illinois Governor George Ryan Pardoned Four Innocent Men Condemned to Death On January 10, 2003, and the Next Day He Cleared Illinois' Death Row*, JUST. DENIED, Vol. 2, Issue 9, 2003 at 25.

²⁶ See SPENCE, *supra* note 8, at 109 (stating that judges serve those who are responsible for their office).

The political and ideological circumstances underlying a judge's position results in the philosophical alignment of his or her decisions with the biases and prejudices that naturally follow from them.²⁷ A judge's loyalty to the roots of his or her power results in their adoption of the amoral attitude of aligning a decision to be consistent with them, and not to the letter or the spirit of the law. Thus when a judge actually exercises the independent judgment one would expect from such a person on a daily basis, it is not only newsworthy, but it can be suicidal for his or her career.²⁸ In *Breaking the Law, Bending the Law*, Michael W. McConnell wrote about what can happen when a federal judge actually exercises independent judgment and makes an unorthodox decision that he or she considers in their mind and heart to be consistent with the dictates of their conscience, and not just politically correct:

Federal Judge John E. Sprizzo will never again be promoted or advanced, for he has committed an unpardonable act of courage in defense of conscience. On January 13, 1997, in the U. S. District Court in Manhattan, Judge Sprizzo acquitted an elderly bishop and a young priest of the crime of "quietly praying with rosary beads" in the driveway of an abortion clinic, in violation of a court injunction and the Federal Access to Clinic Entrances Act. His reasons? That these two offenders did not act with "bad purpose" and, even if they did, he would exercise a judicial version of jury nullification. Because their act was 'purely passive' – meaning nonviolent – and 'so minimally obstructive,' it justified 'the exercise of the prerogative of leniency.' Because the parties waived a jury trial, the judge's decision is equivalent of a jury verdict of acquittal, and cannot be appealed.²⁹

Needless to say, it is only because of the pervasive influence of politics and everything it encompasses in the judiciary of this country that the act of Judge Sprizzo is considered to be courageous, and not something that all judges are expected to do every day.³⁰ All too often the influences on a judge's decision work to give short shrift to the men and women who appear before them, so that the guilty and the innocent are incestuously commingled and not distinguished.³¹

A. Federal Judges

All federal judgeships at the district court, appellate court and Supreme Court level are lifetime political appointments for as long as a person exhibits "good

²⁷ See Hasnas, *supra* note 15, at 215 (observing that judges make rulings based on their own presuppositions that are composed from their backgrounds).

²⁸ See Michael W. McConnell, *Breaking the Law, Bending the Law*, FIRST THINGS, June-July 1997, at 13-15 (detailing the account of Judge Sprizzo in his acquittal of two defendants).

²⁹ *Id.*

³⁰ See SPENCE, *supra* note 8, at 109 (suggesting that judges rule according to political influences rather than to the duty to ensure equal justice).

³¹ See McConnell, *supra* note 28, at 13-15.

behavior,³² which in today's climate translates into politically acceptable behavior. Men and women appointed to the federal bench attain their positions through political patronage, inside connections and behind the scenes maneuvering.³³ Consequently, as a product of the political process, a federal judge is as political a person as any in this country. The lifetime tenure accorded them does not breed judicial independence because they are invisibly tethered to the pole of their roots and their peer group,³⁴ as well as possible ruination by public disclosure of the skeletons in their closet if they get too far out of line.³⁵

The largely overlooked truth that the best of federal judges are first and foremost political actors pretending to be above the political fray is clearly explained in *Injustice For All*, "The robe, in fact, is most usually an item of barter in the political swap-meet: either purchased openly with legal tender, awarded as payoff for personal or political debts, or acknowledged as an IOU toward future favors. 'Political rewards, personal friendships, party service, and even prior judicial experience have been the major qualifications' for appointment to the United States Supreme Court."³⁶ Prominent New York defense attorney Martin Erdman echoed that assessment when he said, "I would like to [be a judge], but the only way you can get it is to be in politics or buy it – and I don't even know the going price."³⁷ Those observations are consistent with the insistence on seating federal and state judges that adhere to the core beliefs of the dominant political party.³⁸ A prime example is that during Ronald Reagan's presidency, 97% of all new federal judges were Republicans.³⁹ In the face of such evidence, only the intellectually dishonest or the unconscious can maintain a straight face while denying the political partisanship of federal judges.

A classic example of the political scheming involved in the seating of a federal judge that goes on undetected by the public's radar, is starkly revealed in the personal diaries of the late Supreme Court Justice Thurgood Marshall.⁴⁰ He

³² U.S. CONST. art. III, § 1 (stating in pertinent part, "The Judges both of the Supreme Court and inferior Courts, shall hold their Offices during good Behaviour . . .").

³³ See STRICK, *supra* note 13, at 160.

³⁴ An example of how those forces are translated into real life, are the remarkably lenient sentences given by federal judges in white-collar cases, the cases most likely to involve people with like-minded values. See *Federal Judges: Measuring Their Sentencing Patterns*, TRAC Reports, (February 4, 2003), at http://trac.syr.edu/tracreports/judge/judge_medtimeG.html (last visited Mar. 4, 2003). During the three year period of fiscal year 2000 to fiscal year 2002, 91 of the 614 District Court Judges handling 50 cases or more – 15 percent - ordered a median sentence in white-collar cases of zero prison time. *Id.* Only 6 judges – less than 1 percent - ordered a median sentence of 24 months or more. *Id.* In contrast, drug cases involving people least likely to involve someone from the judges "class," resulted on the low end of not a single judge not ordering a prison sentence in a single case. *Id.* One hundred eighty-nine judges ordered median sentences of three years or less, and on the high end of 126 judges ordered median sentences of six years or more. *Id.*

³⁵ See, e.g., ALEXANDER CHARNS, CLOAK AND GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT (1992) (describing the FBI-Supreme Court relationship and how the FBI spied on the Supreme Court and its Justices).

³⁶ See STRICK, *supra* note 13, at 160 (footnote omitted).

³⁷ *Id.* at 160 (footnote omitted).

³⁸ See GROSSMAN, *supra* note 11, at 24-39.

³⁹ See BUGLIOSI, *supra* note 3, at 24.

⁴⁰ See Tony Mauro, *Thurgood Marshall helped FBI*, U.S.A. TODAY, Dec. 2, 1996, at A1.

candidly recorded how before becoming a federal circuit court judge in 1961, he was an FBI mole inside the NAACP while employed as one of the organizations attorneys and publicly criticizing the agency.⁴¹ As a transparently duplicitous act, Justice Marshall continued to publicly criticize the FBI *after* his appointment to the federal judiciary.⁴²

Another example is the backroom cronyism underlying Justice William O. Douglas' seating on the Supreme Court in 1939 as detailed in a 2003 biography, *Wild Bill: The Legend and Life of William O. Douglas*.⁴³ William O. Douglas was so well connected that without any prior judicial experience, at the age of 40 he went from being the presidentially appointed Chairman of the Security and Exchange Commission to filling Justice Brandeis' vacated seat on the Court.⁴⁴

The circumstances of the appointments of Justices Marshall and Douglas to the Supreme Court are just two indicators that there is every reason to think a story waits to be discovered and told about the behind the scenes political shenanigans every federal judge in the United States is involved in, both prior to and after they take office.⁴⁵ Particularly since each federal judicial nominee

⁴¹ *Id.*

⁴² *Id.* The author recognizes that during his tenure on the Supreme Court, Justice Marshall was one of the Court's most consistent supporters of positions related to the politically powerless that were contrary to the Court's majority. However, his taking those positions was safe precisely because he was typically in the minority, and thus, he may have unwittingly served the vital function of aiding the appearance that contrary opinions were given a full airing by the Court – when in fact any majority decision, whether 5-4, 6-3 or 8-1 is enforceable as the Court's decision.

⁴³ BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 172-175 (2003). After being seated on the Supreme Court, Justice Douglas maintained his intimate political ties by regularly playing poker at President Roosevelt's poker parties: "Douglas sat at the table with Secretary of the Treasury Henry Morgenthau, Solicitor General Robert Jackson, Press Secretary Stephen Early, and presidential intimate Colonel Edwin M. 'Pa' Watson. ... 'Bill was a terrible poker player,' his friend Clark Clifford recalled. But blessed with what FDR called 'his fund of good dirty stories,' his quirky sense of humor, and his ability to drink with the best of them, Douglas quickly became a favorite at FDR's own table." *Id.* at 185.

⁴⁴ *Id.* at 172-175. Douglas' insider status is reflected in the passing of only sixteen days from the time President Roosevelt told him on March 19, 1939, "I have a new job for you," and the Senate's 62-4 vote confirming him to the Supreme Court on April 4, 1939. *Id.* 173, 175. Justice Douglas aspired to the Presidency, *id.* at 175, and he came within a hairsbreadth of being selected as President Roosevelt's vice-presidential running mate in 1944 instead of Harry Truman. *Id.* at 212-32. If he had been selected his desire would have been fulfilled after FDR's death in 1945, and instead of "Give Em' Hell Harry" it would have been President "Wild Bill." Justice Douglas' involvement with politics while on the Court continued, and in 1948 he turned down Harry Truman's offer to be his vice-presidential running mate, thinking that he could run for President in 1952, since "By then anyone will be able to beat him." *Id.* at 265. Justice Douglas' frustrated Presidential aspirations continued until 1960. *Id.* In fairness to Justice Douglas it should be noted that as his political aspirations receded, he increasingly expressed opinions contrary to political orthodoxy. The Justice Douglas of 1970, e.g., would have been unlikely to vote with the majority in *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the executive order interning Japanese-Americans on the basis of their ethnicity), of which he wrote "[M]y vote to affirm was one of my mistakes." WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 39 (Random House 1980). The political backlash against Justice Douglas' pro-free speech opinions culminated in a resolution by Gerald Ford (R MI) (with over 100 co-sponsors) submitted to the House Judiciary Committee in 1970 to consider his impeachment. *Id.* at 362.

⁴⁵ The release to the public of Justice Thurgood Marshall's personal papers was disturbing to the Court's judges because it tended to strip away the mystique that underpins its authority and

must pass the scrutiny of an FBI investigation that compiles every known scrap of information about their life.⁴⁶

Former L.A. Deputy D.A. Vincent Bugliosi scratched the surface of several such stories about current Supreme Court Justices in *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President*.⁴⁷ In that book, he analyzed some of the political considerations influencing the decision of the five members of the Supreme Court that voted in favor of George Bush's position in *Bush v. Gore*.⁴⁸ The value of Mr. Bugliosi's analysis is to demonstrate that the decisions of Supreme Court justices are as likely to be the result of deep-rooted personal and political prejudices and influences as are those of every federal and state judge in this country.⁴⁹

However, Mr. Bugliosi does not play favorites, since he recognizes appointing ideologically supportive judges is considered to be a political spoil for *whoever* holds the reigns of power at a given time:

legitimacy. See, e.g., Linda Greenhouse, *High Court's Anger Over Marshall Papers Is Fueled by More than Pomp and Privacy*, N.Y. TIMES, May 27, 1993, at 1 ("But there is something else at work here: a belief among the judges that to strip any court of its mystique is also inevitably to strip it of some of its authority and legitimacy."). See also generally EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998) (detailing the inner workings of the Supreme Court as witnessed by a law clerk to Supreme Court Justice Harry Blackmun).

⁴⁶ See, e.g., CHARNS, *supra* note 35 (describing the FBI-Supreme Court relationship and how the FBI spied on the Supreme Court and its justices). This is to be expected considering the FBI has the "dirt" on every federal judge that can be held like a silent but everpresent Sword of Damocles over a judge's head to keep him or her from getting too far out of line. See *id.* The judiciaries subservience at all levels – local, county, state, and federal – to the political interests that enabled them to attain their positions in the first place, is illustrated by the incestuous political relationship between the U. S. Supreme Court and its support of FBI policies. *Id.* Since a favorable FBI report is necessary for anyone to become a federal judge, it is reasonable to consider, for example, that Justice Marshall's appointment as a federal circuit court judge, or at least the FBI's lack of opposition to his appointment, was the political payoff for his loyalty to J. Edgar Hoover and his politically powerful allies. *Id.*

⁴⁷ See generally, BUGLIOSI, *supra* note 3 (discussing the controversial decision of the Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000)).

⁴⁸ *Id.* at 24-29. See also MARTIN GARBUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW 2* (2002) (criticizing the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000)). Garbus stated,

A lawyer's adage is, 'If you can't change the facts and the law, then change the judges.' The wretched *Bush v. Gore* decision ending election 2000, effectively decided by five, played a valuable role in showing us the naked partisanship of this Court. . . . Politics has always gone on in the judiciary, and the shock people expressed reminded me of Claude Raine's quip in *Casablanca* when he says, 'I am shocked, shocked' to see gambling going on in Rick's back room.

Id.

⁴⁹ See BUGLIOSI, *supra* note 3, at 24-29. There is nothing about the political, ideological and economic factors related by Mr. Bugliosi that influence or indicate the direction of a decision by those five Supreme Court justices, that excludes *any* other federal or state judge from being subject to a similar analysis.

As to the political aspect of judges, the appointment of judgeships by governors (or the president in federal courts) has always been part and parcel of the political spoils or patronage system. For example, 97 percent of President Reagan's appointments to the federal bench were Republicans. Thus, in the overwhelming majority of cases there is an umbilical cord between the appointment and politics. Either the appointee has personally labored long and hard in the political vineyards, or he is a favored friend of one who has (oftentimes a generous financial supporter of the party in power). As Roy Mersky, professor at the University of Texas Law School, says: "To be appointed a judge, *to a great extent* is a result of one's political activity."⁵⁰

It is difficult to overstate the corruption involved in a federal judicial appointment, and the process predictably results in the instilling of shady, untoward and marginally, or even wholly, unqualified people at all echelons of the federal judicial system.⁵¹ The relative cushiness of a federal judgeship is one of the job's prime attractions to the type of people that seek it. It has prestige, passable pay to live an upper middle class lifestyle, excellent medical, holiday, vacation and retirement benefits, and an easy work schedule with "much less pressure than is found in practice."⁵² However, as appealing as those conditions may seem, they serve to filter out bright, ambitious, highly motivated men and women with razor sharp minds whose services are most in demand and who have the highest incomes, since becoming a federal judge would involve a dramatic reduction in their compensation and standard of living.⁵³

The near anonymity in which federal judges function tends to exacerbate their ability to rely on overtly political considerations when making decisions.⁵⁴ A recent poll showed two-thirds of Americans cannot name a single Supreme Court Justice, and Diogenes might have a hard time finding anyone other than someone in the legal profession who could name a single federal circuit court judge.⁵⁵

Mr. Bugliosi makes it clear that federal judges are not special people

⁵⁰ *Id.* at 24.

⁵¹ The author was told by a federal law enforcement officer and others speaking from their personal knowledge, that a federal Senior District Court Judge in the District of Oregon is routinely intoxicated during court proceedings and he has expressed his contempt for people of color. Two other District Court Judges in Portland are known to have the prejudice that every indicted person is guilty and should proceed straight to sentencing. Undoubtedly, the District of Oregon is not unique in this regard, and the same or similar sorts of personal conduct and attitudes prevail in federal courts throughout the U.S.

⁵² William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari*, 81 CORNELL L. REV. 273, 337-38 (1996).

⁵³ This is evident to an even greater degree in the people that seek much less prestigious state judicial positions that are typically parceled out to legal hacks whose primary qualification is success at cultivating politically influential friends. See, e.g., STRICK, *supra* note 11, at 159 (quoting one lawyer who referred to judges as hacks and small time lawyers with big time friends).

⁵⁴ See GARBUS, *supra* note 48, at 7.

⁵⁵ *Id.*

possessing wisdom or divinity, but can more likely be described as black-robed, second tier lawyers with extraordinary political connections.⁵⁶ Becoming a judge does not magically bestow admirable qualities on a person where they were lacking beforehand.⁵⁷ So the very process by which a person becomes ensconced as a judge ensures that he or she will be unlikely to rise above their own self-interest and make decisions that fundamentally conflict with their political, ideological and economic background or interests.⁵⁸

Thus, the men and women selected for federal judgeships are as politically partisan and biased in their attitudes as are state judges. However, unlike state judges, once seated a federal judge is virtually assured of being in office until he or she either dies or retires, whichever occurs first.⁵⁹ The one avenue for removing a federal judge involves the same process required for removal of a President, impeachment by the House of Representatives⁶⁰ and conviction after a trial by the Senate.⁶¹ It has been used so rarely that for all practical purposes it is a non-factor as a consideration, or a threat, for ending a federal judge's career before he or she does so either by choice or by nature following its course.⁶² Since 1791, only seven federal judges have been convicted by the Senate, and only three since 1936.⁶³

Federal judges are only slightly less immune to being reprimanded for

⁵⁶ See BUGLIOSI, *supra* note 3, at 23-24.

⁵⁷ *Id.*

⁵⁸ The federal judiciary only superficially hides its loyalty to those factors. In *Payne v. Tennessee*, 501 U.S. 808 (1991), Justice Marshall wrote in the last dissent of his Supreme Court tenure how the Court would protect "property and contract" rights, but would apply a free flowing standard to criminal "procedural and evidentiary rules" that predominantly affect the politically powerless who have much less need to have their "property and contract" rights protected: "Considerations in favor of stare decisis are at their acme" the majority explains, "in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Id.* at 850-51 (Marshall, J. dissenting). Justice Marshall also made the observation that the Court's decision was indicative that, "Power, not reason, is the new currency of this Court's decisionmaking." *Id.* at 844.

⁵⁹ U.S. CONST. art. III, § 1.

⁶⁰ U.S. CONST. art. I, § 2, cl. 5.

⁶¹ U.S. CONST. art. I, § 3, cl. 6.

⁶² The few federal judges that have been removed demonstrate how egregious their behavior must be before any action is taken to remove them. For example, Harry E. Claiborne (D.C. Nev.) was removed in 1986 after he was convicted of intentionally falsifying his income tax returns, stemming from his acceptance in the early 1980's of two bribes of \$55,000 that were paid to influence his rulings. See *Paragons of Corruption*, FREEDOM MAG., Vol. 27, Issue 6, 1995, at 15. In 1989, Walter Nixon (D.C. Miss.) was removed after he was convicted in federal court of two counts of perjury related to lying about his receipt of bribes to influence his decisions in the early 1980's. *Id.* Concluding a saga that began in 1980, Alcee Hastings (S.D. Fla.) was removed as a federal judge after the Senate convicted him of eight impeachable offenses, including conspiring as a federal judge to obtain a \$150,000 bribe to influence a ruling. *Id.* In voting to impeach him by a 413 to 3 vote, the House noted his misconduct struck "at the heart of our democracy." *Id.* Hastings was the last federal judge removed from office. *Id.* In a remarkable twist, Hastings ran for a seat in the U.S. Congress in 1992, won, and continues to represent Florida in that capacity today. *Id.*

⁶³ See Ruth Marcus, *Senate's Quandary: Does a Trial Have to Look Like 'Perry Mason'?*, WASH. POST, January 7, 1999, at A12, available at <http://couponclicker.com/wp-srv/politics/special/clinton/stories/legal010799.htm> (last visited Mar. 3, 2003).

egregious conduct, than they are to being removed from office. In *Judges Escape Ethical Punishment*, reporter Anne Gearan revealed that out of 766 ethics complaints filed against a federal judge in 2001, only one resulted in any punishment.⁶⁴ That judge suffered the mild punishment of a private censure, although neither the judge's name nor details of the conduct were released to the public.⁶⁵ That is confirmation of law professor Paul Rice's observation that judges cover each other's back by ignoring everything possible because they never know when they might be on the hot seat, or as he put it, "We don't like burning brothers in the bond, because you don't know whose ox is going to be gored in the future."⁶⁶

It has also been recognized that the wanton conduct of federal judges is just one indicator that while the breadth of their power is greater than state judges, their character and susceptibility to the allure of financial influences is not.⁶⁷ As noted in *Injustice For All*, a federal judge is,

all too often a person 'whose ignorance, intolerance and impatience are such as to sicken anyone who stops to think about them . . . [the federal judiciary is overloaded with] bias, intolerance, cowardice, impatience, and sometimes graft . . . [t]hat some judges are arbitrary and even sadistic . . . is notoriously a matter of record.'⁶⁸

He neglected to include the small-minded judges who can use their position to express their prejudice towards blacks, Hispanics, Arabs, Asians and other racial or religious groups.⁶⁹

Lord Acton's oft repeated admonition that "power tends to corrupt, and absolute power corrupts absolutely," needs no more proof that it is grounded in reality than the conduct of federal judges nationwide.⁷⁰ The permanence of federal judgeships and the sort of person chosen a judge creates a perfect environment for enabling the basest attitudes of a person so empowered to be exercised. The most dramatic and recent example of what is the norm behind the scenes was the decision of five Supreme Court judges in *Bush v. Gore*,⁷¹ which was an expression of their preference for George Bush to be President.⁷² Such

⁶⁴ See Anne Gearan, *Judges Escape Ethical Punishment*, (August 6, 2002), at <http://www.judicialaccountability.org/articles/judgeescapeethi.htm> (last visited Mar. 3, 2003).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See, e.g., Mark Terry & Tina Terry, *The Best Judges Money Can Buy*, (1997), at http://www.jail4judges.org/JNJ_Library/stak0/corrupt/Bribe.htm (exploring the corruption of federal judges by the carrot of special cash payments made to them by the federal government).

⁶⁸ STRICK, *supra* note at 13, at 159 (citation omitted) (footnotes omitted).

⁶⁹ See Richman & Reynolds, *supra* note 52 (observing that groups with little political power receive lesser treatment than more powerful groups and stating "That justice is dispensed on different tracks . . . although it is not generally known outside judicial circles").

⁷⁰ Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887), in 1 THE LIFE AND LETTERS OF MANDELL CREIGHTON ch. 13 (Louise Creighton ed. 1904), available at <http://www.bartleby.com/66/9/2709.html> (last visited Mar. 5, 2003).

⁷¹ 531 U.S. 98 (2000).

⁷² See BUGLIOSI, *supra* note 3, at 48. Bugliosi states, "If, indeed, the Court, as the critics say, made

unconscionable conduct is a predictable consequence of empowering generally unprincipled mortals with the ability to exercise power that has no effective check or balance. The pervasiveness of such conduct is cause for concern by people of all political persuasions, since there is a constant cycle of reversing political fortunes.

It is reasonable to think Vincent Bugliosi's carefully reasoned conclusion that the five Supreme Court Justices who voted with the majority in *Bush v. Gore*⁷³ are sophisticated criminals of the worst sort who used their privileged position to commit a grave crime, could in different circumstances be said of all federal judges.⁷⁴ The most disturbing aspect of this situation, as Mr. Bugliosi notes, is that "Though the five Justices clearly are criminals, no one is treating them this way."⁷⁵ The same blind-eye is being given to federal judges across the country engaging in untoward conduct that negatively affects "ordinary" Americans.⁷⁶ Given the short-shrift justice the Supreme Court majority accorded the defendant of a contrary political persuasion in a case effectively determining the outcome of a presidential election,⁷⁷ one can just imagine the dismissive attitude those judges hold towards politically powerless defendants.

B. State Judges

The pervasive influence of political considerations on the decisions of trial and appellate judges is not limited to the federal judiciary, but dominates the decisions of state judges as well.⁷⁸ As would be expected, the same dynamics interact to corrupt the rulings of appointed state judges that affect federal judges.⁷⁹ However, rather than short circuiting that process, the alternate

a politically motivated ruling (which it unquestionably did), this is tantamount to saying, and this can *only* mean, that the Court did not base its ruling on the law." *Id.*

⁷³ 531 U.S. 98 (2000).

⁷⁴ BUGLIOSI, *supra* note 3, at 48-49. Bugliosi states,

The stark reality, and I say this with every fiber of my being, is that the institution Americans trust the most to protect its freedoms and principles committed one of the biggest and most serious crimes this nation has ever seen – pure and simple, the theft of the presidency. And by definition, the perpetrators of this crime *have* to be denominated criminals.

Id. at 48. Given their overall lower quality, the same can certainly be said of state judges.

⁷⁵ *Id.* at 49.

⁷⁶ For an illustration of individuals who have been wrongfully convicted, see *Justice Denied, The Innocents Database*, at <http://www.justicedenied.org/wronglyconvicted/innocents.htm> (last visited Mar. 4, 2003).

⁷⁷ See *Bush v. Gore*, 531 U.S. 98 (2000).

⁷⁸ See, e.g., Michael Sherer, *State Judges for Sale*, THE NATION, Sep. 2, 2002, at 20-24 (observing that politicization of the bench is growing among the 39 states that elect appellate judges).

⁷⁹ For related material see *id.* Although it may be more reliably reported on publicly than in the past, the pervasiveness of judicial corruption is as much of a taboo subject within the legal fraternity today as it was in 1949 when Judge Jerome Frank wrote in *Judges on Trial*, "The [law] schools should also concern themselves with the problem of the effect of judicial corruption. Of that problem, law students learn little or nothing. ... What would be thought of a college course in

methods of electing state judges are at best merely deceptive window dressing that conceals the power behind the judicial throne, and at worst, compounds the flaws inherent in appointing judges.⁸⁰ Given the number of judges that run unopposed and the number of incumbents re-elected, the voting process functions more to confirm state judges than to elect them.⁸¹

The corruption of state judges, whether appointed or elected, has been widely exposed in recent years.⁸² In a 1999 PBS Frontline program, *Justice For Sale*, it was reported how the favoritism of Pennsylvania, Louisiana and Texas judges is bought like cattle at an auction.⁸³ The same is true of every other state's judicial elections.⁸⁴ A judge's position on a case can reliably be predicted by an awareness of the nature and source of their campaign contributions, in conjunction with their political ideology.⁸⁵ It was also suggested in a September 2, 2002 cover article in *The Nation*, *State Judges For Sale*, that the corruption rife in state judiciaries can be expected to worsen after a June 2002 decision by the Supreme Court that opens the door for judicial candidates to publicly take politically partisan positions.⁸⁶ In *Republican Party of Minnesota v. White*,⁸⁷ a five-to-four majority ruled that it is an infringement of a judicial candidates free

city government in which no mention was made of 'graft' and 'pull?' How can we afford to have men practice law who have been educated to shut their eyes to the effect of those factors on decisions?" Frank, *supra* note 5, at 240. Judge Frank recognizes the real world dilemma faced by a lawyer that encounters a corrupt judge, and his concerns are as valid today as they were five decades ago: "But lawyers engaged in practice before the courts find that a most perplexing problem: If some particular lawyers try to cause the removal of a judge they suspect of corruption, and if they fail, *that judge probably will, in roundabout ways, visit his wrath on their clients. For that reason, practicing lawyers usually hesitate to initiate such removal proceedings.*" *Id.* at 241 (emphasis added). In other words, the willingness of an amoral judge to stop at nothing to protect their turf is what enables them to continue their activities unabated.

⁸⁰ See, e.g., STRICK, *supra* note 13, at 161-62 (stating that the real electors of judges are the few political leaders who nominate the judge).

⁸¹ For example, of the 57 judicial seats open in Oregon's 2002 primary, 47 were uncontested, and in only one of the races involving an incumbent was there an opponent. See *Measure 21 – Arguments in Favor, Bob Harris*, November 5, 2002, at <http://www.sos.state.or.us/elections/nov52002/guide/measures/m21fav.htm> (Oregon Secretary of State Website) (last visited April 15, 2003). See also Ashbel S. Green, *Oregon's System of Seating Its Judge Under Heavy Fire From Various Sides*, THE OREGONIAN, Jan. 27, 2000, at D4. Another tactic that politicizes the judiciary in Oregon even more than it naturally is, is the practice of judges retiring prior to the expiration of his or her term, which empowers the Governor to then appoint an interim replacement. *Id.* That appointed judge can then run as the incumbent at the next election, which historically has almost guaranteed they will win. *Id.*

⁸² See, e.g., *Frontline: Justice For Sale* (PBS television broadcast, Nov. 1999) (providing an investigation into how campaign cash is corrupting America's courts), available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/> (investigating the corruption of American courts caused by campaign cash) (last visited Mar. 5, 2003) [hereinafter *Frontline*].

⁸³ See *id.*

⁸⁴ See, e.g., Sherer, *supra* note 78, at 20-24 (stating that in the 39 states that elect appellate judges, politicization of the bench is growing). See also Warren Richey, *Justice For Sale? Cash Pours Into Campaigns*, THE CHRISTIAN SCI. MONITOR, October 25, 2000, at 2 (discussing the increased spending and campaigning for state supreme court elections).

⁸⁵ See *Frontline*, *supra* note 82.

⁸⁶ See Sherer, *supra* note 78. That article focused on the 39 states that elect appellate judges, but the same dynamics apply to trial level state judges. *Id.*

⁸⁷ 536 U.S. 765 (2002).

speech rights for a State to restrict the candidate from announcing his or her views on disputed legal or political issues.⁸⁸ The Supreme Court's decision will have less of an impact than The Nation's article presupposes, because it merely permits judicial candidates to publicly express their position on issues that they have previously openly expressed privately.⁸⁹

The open bazaar-like atmosphere of buying judicial favoritism is as much an element of a non-partisan as a partisan election, since a judge's preferences are as important to political and monied interests in the former form of election process as the latter.⁹⁰ For example, the cost of winning a seat on the Oregon Court of Appeals in that state's non-partisan election process was estimated to be over \$500,000 in 2002.⁹¹ That was for an election in which slightly more than one and a quarter million people voted, or about forty cents was spent *per voter* by *both* of the candidates, for what on the surface appears to be a relatively obscure position in a small state.⁹² That highlights how coveted it is to possess influence with appellate judges who set precedents applicable to lower courts.⁹³

There is nothing new about the blatant politization of the judiciary, which is now becoming more evident to the public.⁹⁴ For example, in the 1993 booklet, *Justice For Sale*, it was disclosed that business interests began a concerted effort

⁸⁸ *Id.* at 788.

⁸⁹ The ruling concerned a Minnesota Supreme Court canon of judicial conduct, which prohibited judicial candidates from announcing their views on political or disputed legal issues. *Id.* at 768.

⁹⁰ See, e.g., Garret Epps, *The Price of Partisan Judges*, THE OREGONIAN, May 5, 2002, at C1. (commenting on the increased spending and campaigning in Oregon's non-partisan judicial elections). The degree to which monied interests value the special consideration that contributions to political and judicial candidates provide them with, is indicated by Arianna Huffington's observation in *Pigs At The Trough: How Corporate Greed and Political Corruption Are Undermining America*, (Crown Publishing Group, January 2003), "Over the last 10 years [through 2002], corporations have doled out more than \$1.08 billion in soft-money contributions. This down payment on preferential public policy has extended across party lines, with \$636 million going to Republicans and \$449 million to Democrats." *Id.* at 20. As the previously cited articles suggest, a significant portion of that money was earmarked for state judicial candidates.

⁹¹ See *id.*

⁹² For more information, see Oregon Secretary of State Web Site, *Statistical Summary 2002 General Election*, at <http://www.sos.state.or.us/elections/nov52002/g02stats.pdf>.

⁹³ See CATHERINE CRIER, THE CASE AGAINST LAWYERS 190 (2002). Crier wrote:

In the late 1990s, an organization calling itself Texans for Public Justice began tracking political contributions to the high court to look for any correlation with outcomes. It didn't prove that money purchased results, but it did make a convincing case that it bought access. Only 11 percent of *all* appeals presented to the Court were accepted for review, but your chances *quadrupled* if you were a contributor. In fact, the justices "were *ten times* more likely to accept petitions filed by contributors of more than \$250,000 than petitions filed by non-contributors."

Id. (emphasis added).

⁹⁴ See generally NAN ARON & BARBARA MOULTON, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN (1993) (discussing the efforts of corporations to instill a more conservative approach in legal doctrine and the judiciary in order to benefit their economic interests). A summary of this book is located at

<http://www.ratical.org/corporations/Justice4sale.html> (last visited Mar. 3, 2003).

in 1971 to gain and maintain control of the judicial system in the U.S. to serve their own ends.⁹⁵ The manifesto of that effort was a memorandum written for the U.S. Chamber of Commerce by Virginia attorney and future Supreme Court Justice, Lewis Powell.⁹⁶ Tactics such as those are indicative of how much effort is expended in an effort to ensure that state and federal judges do not function independently. The lack of judicial independence throughout the country is so apparent that the Brennan Center for Justice at the NYU School of Law maintains an ever-expanding website that lists hundreds of news stories, studies and reports on the subject.⁹⁷

A general lack of public awareness, however, does not detract from the impact of judges representing those people and organizations to which they are politically, ideologically and financially beholden.⁹⁸ A judge need only pay lip service to voters and other people in society that lack the muscle to curry special favor with the judge. Judge Samuel Rosenman observed with no hint of cynicism, but simply as a statement of the cold hard facts:

The idea that the voters themselves select their judges is something of a farce. The real electors are a few political leaders who do the nominating. . . . Political leaders nominate practically anybody whom they choose . . . the voters, as a whole, know little more about the candidates than what their campaign pictures may reveal. For example . . . [a poll] showed that not more than one per cent of the voters in New York City could remember the name of the man they had just elected Chief Judge of the Court of Appeals – our highest judicial post. In Buffalo, not a single voter could remember his name.⁹⁹

The fact that most state judges are elected in near anonymity by voters who do not know who they are, compounds the effects of the corrupting nature of the campaign process that ensures their lack of impartiality.¹⁰⁰ Thus, the circumstances under which state judges are elected or nominated and confirmed, creates a situation in which the people who become state and federal judges serve their own interests and those who are responsible to, and not those of society at large.¹⁰¹

An awareness of the sort of people that typically become judges can help one's understanding of the corruption pervading the judicial process.¹⁰² As noted

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Brennan Center for Justice at N.Y.U. School of Law at <http://www.brennancenter.org/index.html> (last visited Mar. 19, 2003).

⁹⁸ See *Frontline*, *supra* note 82.

⁹⁹ STRICK, *supra* note 13, at 161-62.

¹⁰⁰ See, e.g., STRICK, *supra* note 11, at 161-62 (noting that most voters in New York did not remember the name of the elected chief judge on the court of appeals).

¹⁰¹ See generally ARON & MOULTON, *supra* note 94 (discussing the efforts of corporations to instill a more conservative approach in legal doctrine and the judiciary in order to benefit their economic interests rather than society's at large).

¹⁰² See STRICK, *supra* note 13, at 159 (noting that most judges are ex-prosecutors, ex-cops and ex-

in *Injustice For All*,

Most judges . . . are ex-prosecutors, ex-cops, ex-officials who worked on the hard side of government, or ex-party workers. Most of them were hacks – small-time lawyers with big-time friends – and some were crooks the week before they went on the bench . . . Most of those men have no respect for the individual and no interest in his character or his future. And many of them are outright bigots, too.¹⁰³

In the same book another commentator had a similar lament, “Let us face this sad fact: that in many – far too many – instances, the benches of our courts in the United States are occupied by mediocrity’s – men of small talent, undistinguished in performance, technically deficient and inept.”¹⁰⁴ One astute observer of the situation in Oregon, which has a non-partisan election process, recognized, “Our system of judicial selection is nothing more than an “old boys network” of insiders and lawyers.”¹⁰⁵ The same could be said of judges and the judicial selection process in virtually every state in the country.

C. *Legislative Influences*

One indication that judges have a strong tendency to go with the flow of outside pressures is when they succumb to the influence of periodic media and politically inspired hysteria campaigns to get tough on the “bad” people who commit crimes.¹⁰⁶ These campaigns and the judicial pressure they exert can be local as well as national.¹⁰⁷ Furthermore, they typically have no basis in fact, but are opportunistic devices to boost the poll number of politicians and the ratings or readership of television or print media, respectively.

Representative of this process was a U. S. News & World Report cover story published on January 17, 1994 and entitled, *Violence in America*. The article encouraged judicial action to stem the growing tide of violent crime in America.¹⁰⁸ However, the article and others like it made a grossly false call to action because, at the time it was written, violent crime had not risen in 20 years

officials).

¹⁰³ *Id.* (footnote omitted).

¹⁰⁴ *Id.*

¹⁰⁵ Bob Tiernan, *Judging the Judges: Oregon voters denied real democracy because lawyers have fixed the game*, THE OREGONIAN, Feb. 13, 1998, at D13.

¹⁰⁶ One such politically inspired hysteria campaign is the Anti-Terrorism and Effective Death Act of 1996. See Anti-Terrorism and Effective Death Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹⁰⁷ One powerful reason for the success of these campaigns are the large number of former prosecutors on both the federal and state level that are legislators, who write the laws, or judges, who interpret and enforce those laws.

¹⁰⁸ Ted Gest et al., *Violence in America*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 22.

and had, in fact, been in general decline since the early 1970's.¹⁰⁹ As a result of the media-generated hysteria campaign, Congress was able to enact the Violent Crime Control and Law Enforcement Act of 1994,¹¹⁰ without even deliberating the statute's merits.¹¹¹

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) is another example of legislation developed and enacted through the hysteria process.¹¹² It was enacted on the basis of a false public hysteria whipped up by media proclamations of a non-existent wave of terrorism in the United States, and an unfounded belief inculcated in the general public and politicians that criminals were filing large numbers of frivolous federal habeas corpus petitions challenging the legality of their convictions or sentences.¹¹³ The AEDPA places a general one year time limitation on the filing of a federal habeas corpus petition by a convicted person after the exhaustion of their direct appeal, and in federal cases it gives the trial judge both the power to grant or deny that petition, and the power to determine whether the denial can be appealed.¹¹⁴ A glimpse into the inequities built into the AEDPA is provided by considering that even though the judge that presided over a person's wrongful conviction is the judge most likely to be biased towards upholding the conviction, and thus the judge most incapable of making an impartial determination about evidence supporting the person's innocence, the merits of a federal defendant's 28 U.S.C. § 2255 petition filed under the AEDPA is reviewed by the one judge in the world who should *not* do so: the trial judge.¹¹⁵

The AEDPA's limitations on filing a federal habeas corpus petition is an example of how legislation enacted on the basis of an emotional response to media and political rhetoric that has no basis in fact, can compound the wrongful conviction of an innocent person by impairing their ability to pursue, or outright denying, one of the few potential avenues available to correct the error.¹¹⁶ It is also cause for concern that the federal judiciary did not maintain an arm's length distance from the debate underlying the AEDPA's restrictive provisions, since they were a reflection of Supreme Court Chief Justice William Rehnquist's longstanding support for

¹⁰⁹ The rate of violent crime was significantly lower in 1994, and it still is today, than it was in 1973 when the National Crime Victimization Survey was begun. See U. S. Department of Justice, Bureau of Justice Statistics, *Criminal Victimization 1996*, available at <http://www.ojp.usdoj.gov/bjs/abstract/cv96.htm> (last visited Mar. 5, 2003).

¹¹⁰ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

¹¹¹ For an analysis of how Congress shirked its duty to debate the merits of the Crime Bill, particularly considering that it was estimated to involve an expenditure of \$33 billion and increased the number of crimes for which the death penalty could be imposed, see Dave Ketchum, *Bad Procedure Gets Bad Law*, 1998, at <http://www.people.clarityconnect.com/webpages3/davek/docs/CRIME.html> (last visited Mar. 5, 2003).

¹¹² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 735, 110 Stat. 1214, 1214.

¹¹³ According to a report by the Department of State, there was not a single confirmed act of terrorism in the United States in 1995. See Terrorist Research and Analytical Center, *Terrorism in the United States 1995* (Counterterrorism Threat Assessment and Warning Unit, National Security Division, Washington D.C.), 1995, at 1. The one *possible* terrorist incident, the Oklahoma City Federal Building bombing, does not meet the FBI's definition of a terrorist act and this one possible terrorist act was described as a dramatic increase over the number that occurred in 1994. *Id.*

¹¹⁴ A state prisoner files a petition under 28 U.S.C. § 2254, and a federal prisoner files a petition under 28 U.S.C. § 2255.

¹¹⁵ See 28 U.S.C. § 2255 (2000).

¹¹⁶ *Id.*

restrictions on the filing and consideration of habeas corpus petitions.¹¹⁷ However, there is no apparent concern by politicians, judges and prosecutors that an innocent defendant is likely to be harmed by an ill-advised law that results from a public hysteria campaign, imposes procedural bars to their vindication and empowers the judge most biased against him or her to rule on the merits of a legal challenge to their conviction.¹¹⁸

III. THE VIOLENCE OF JUDGES

An extreme danger inherent in the political nature of federal and state judges is the awesome violence available at their beck and call.¹¹⁹ In his essay, *Violence and the Word*, Yale Law Professor Robert Cover explained that every word a judge utters takes place on a field of pain, violence, and even death.¹²⁰ Judges are, in fact, among the most violent of all federal and state government employees.¹²¹ The violence judges routinely engage in makes the carnage of serial killers seem insignificant in comparison. Attorney Gerry Spence echoed Professor Cover's observation when he wrote, "Courtrooms are frightening places. Nothing grows in a courtroom – no pretty pansies, no little children laughing and playing. A courtroom is a deadly place. People die in courtrooms, killed by words."¹²²

The very position of being a judge is literally defined by their ability to engender violence by the utterance of words from their lofty perch.¹²³ Furthermore, the more violence a judge can command, or the more people they can elicit obedience from in carrying out their orders, the more respected judges are considered to be. State Supreme Court justices can direct more people to carry out the violence implicit in their directives than a county judge can, and they are consequently accorded more deference and respect. Similarly, U.S. Supreme Court justices can direct and countenance the commission of more violence than a federal circuit court judge, a federal district court judge, or any state judge, and they also have a more exalted public persona.

¹¹⁷ See, e.g., Stephen Bright, *Does the Bill of Rights Apply Here Any More? Evisceration of Habeas Corpus and Denial of Counsel to Those Under Sentence of Death*, THE CHAMPION, Nov. 1996, at 25 (relating the Court's erosion of habeas corpus over a period of years during Justice Rehnquist's tenure as Chief Justice, and prior to the passage of the AEDPA).

¹¹⁸ See 28 U.S.C. § 2255 (2000).

¹¹⁹ For a more detailed discussion, see Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1607 (1986).

¹²⁰ See *id.*

¹²¹ *Id.* (discussing a judge's power to impose punishment on defendants and their authority to have that punishment carried out).

¹²² SPENCE, *supra* note 7, at 170.

¹²³ A judge who issued orders that were not given heed, would be one in name but not effect, since he or she would merely be engaging in endless mental masturbation. The lowliest traffic court judge does not do that, since a person that refuses to pay a levied fine of \$10 can have the might and power of the state brought to bear against them for their recalcitrance. See Cover, *supra* note 119, at 1619 (observing that a judge's sentence is carried out through a system of social cooperation between the judge, the police and jailers).

The violence under the control of judges takes many forms.¹²⁴ In one of its more innocuous expressions, a state judge can direct a person convicted of driving while intoxicated to spend a certain number of weekends in jail and pay a fine.¹²⁵ The police or sheriffs under the direction of the judge will physically seize and drag the defendant to jail if he or she declines to comply with either judicial command.¹²⁶ In much the same way, a federal judge can issue a command that federal law enforcement officers will physically force compliance with, if it isn't voluntarily complied with.¹²⁷ As Gerry Spence noted in *From Freedom To Slavery*, "One judge has more power than all the people put together, for no matter how the people weep and wail, no matter how desperate, how deprecated and deprived, a single judge wielding only the law, can stand them off. Judges are keenly aware of their power, and power . . . longs to be exercised."¹²⁸

Yet, in spite of the regularity with which the violence of judges is exercised, their "iron fist in the velvet glove" is effectively hidden by the shield of having *others* actually commit the violence embodied in their oral and written words.¹²⁹ Judge Patricia Wald recognized this phenomena in *Violence under the Law*, in which she noted how the relationship between judges and the violence they are a part of is obscured by paperwork and procedures: "Often by the time the most controversial and violence-fraught disputes reach the courts, they have been sanitized into doctrinal debates, dry legal arguments, discussions of precedents and constitutional or statutory texts, arcane questions of whether the right procedural route has been followed so that we can get to the merits at all."¹³⁰ Hence, the violence inflicted on a defendant by a judge is masked as just another detail amidst the legalese that dominates every aspect of a criminal case.

The public veneer of civility concealing the inner workings of the judicial process serves vital deceptive purposes. Two of the most important of those are: (1) hiding the political nature of all judicial decisions, and (2) masking the inherent violence seething underneath the pomp and ceremony of judicial proceedings and a judge's officious pronouncements.¹³¹ Diversion of the public's attention away from the violence carried out under the direction of a judge also provides a self-serving illusion of dignity for the judge's themselves, by presenting a façade of scholarliness that conceals the violent dirty work they are intimately involved in.¹³²

¹²⁴ *Id.*

¹²⁵ *Id.* at 1607 n.16 (explaining that his use of criminal law is the most persuasive example for the purposes of discussion, but suggesting that property law also has violence).

¹²⁶ *Id.* at 1619.

¹²⁷ *Id.*

¹²⁸ SPENCE, *supra* note 8, at 113.

¹²⁹ See, e.g., Patricia M. Wald, *Violence under the Law: A Judge's Perspective*, in *LAW'S VIOLENCE* 77, 77 (Austin Sarat & Thomas R. Kearns eds.1992) (exploring the use of violence to enforce the law from a judge's perspective).

¹³⁰ *Id.*

¹³¹ See *id.* (explaining that the violence is obscured through doctrinal and legal debates as well as discussion of constitutional and statutory texts).

¹³² An example of this was provided by Vincent Bugliosi throughout *The Betrayal of America* in which he analyzed aspects of the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). See BUGLIOSI, *supra* note 3, at 46-50 (noting that at most, the justices of the Court lost the respect

The finely honed skill of a judge in the art of creating false images that is evident by their concealment of the violence permeating everything they do, is further displayed by their manner of recording the controversies they are involved in.¹³³ That was implied by Judge Wald in *Violence Under the Law*, “A historian would do poorly to gauge the flavor of our society by reading its legal tomes.”¹³⁴ The sanitized version of the passionate life and death struggles presided over by judges and the violence they trigger with a flick of their pen or a stroke of their gavel is not accurately represented in the bureaucratic paperwork they produce.¹³⁵ This is by design. U.S. Supreme Court Justice Hugo Black, for example, told his fellow Justice Harry Blackmun to “never show the agony” he felt about a case in his written decisions.¹³⁶ That attitude exemplifies one way judges are complicit in concealing from the public’s view or conscious awareness, the awful life-destroying violence inflicted on people by their written and oral words.

The aura of officialdom surrounding judicial proceedings is a primary reason why the attention of the general public has successfully been diverted for so long from the true nature of the horrific violence occurring every minute of every day in state and federal courthouses nationwide.¹³⁷ There is no greater expression of that violence than when it is committed against a person that has his/her life utterly destroyed by being wrongly branded as a criminal and then is treated as such while imprisoned as well as after his/her release. The magnitude of that violence is hinted at by the human toll manufactured by an average of *at least one innocent man or woman being sentenced to prison every minute that courts are in regular session in the United States*.¹³⁸ That amounts to well over 100,000 innocent people

of observers even though their politically motivated ruling was “tantamount to a crime”). On one level he revealed how the dignity associated with the Supreme Court was used to direct the federal government to effectuate the imposition of George Bush as President under circumstances that would have perhaps caused the violence inherent in enforcing their decision to have been expressed openly without the authority of the Court backing the decision – however transparently unfounded the basis of the Court’s decision was. *Id.* at 47 (noting the weakness of the criticism offered by observers). In other words, if the Court’s identical decision had been made in a less stable country – such as Venezuela is today – the federal government may have needed to use troops to quell the rioting that might have been triggered by what was in effect the Supreme Court’s installation of George Bush as President based on the ability of the Court to direct the might and power of the federal government to enforce their will when it is necessary to do so.

¹³³ Wald, *supra* note 129, at 77.

¹³⁴ *Id.*

¹³⁵ *See, e.g., id.* (noting that “[a] historian would do poorly to gauge the flavor of our society by reading its legal tomes”).

¹³⁶ MICHAEL MELLO, *DEAD WRONG* 38 (1997). Toward the end of his Supreme Court tenure Justice Blackmun disregarded that advice in writing several passionate and clearly heartfelt dissents. *See, e.g.,* *Herrera v. Collins*, 506 U.S. 390, 446 (1993) (Blackmun J. dissenting) (describing the Court’s majority as endorsing the “simple murder” of an evidently innocent man).

¹³⁷ *See* Wald, *supra* note 129, at 77.

¹³⁸ This is derived from the estimate that at any given time in this country there are over 1.3 million innocent people immersed within the law enforcement system. *See* Hans Sherrer, *The Innocents: the Prosecution, Conviction, and Imprisonment of the Innocent*, Introduction (Part One), *JUSTICE DENIED*, Vol. 1, Issue 2, 1999, at 32, 32. That estimate is supported by a detailed analysis that over 14 percent of all convictions in state and federal courts are of innocent people. *See* Hans Sherrer, *How Many Innocents Are There?* 43 (Feb. 8, 2003) (unpublished manuscript, on file with the

sentenced to prison every year for something they did not do.¹³⁹ The blood of that nearly incomprehensible wave of violence is on the hands of every judge that presides over the proceedings that falsely condemn any one of those innocent people, and it further stains the hands of every judge reviewing those proceedings who does not do everything in his or her power to rectify the wrong.

IV. THE JUDICIAL IRRELEVANCE OF INNOCENCE

Americans are taught to think that the awesome, latent physical violence at the beck-and-call of judges is restrained by strict controls that prevent their abusive use of it.¹⁴⁰ This is particularly important for people to believe because one of the most heinous and tragic ways a judge's power can be used is to contribute to the prosecution, conviction, imprisonment, and possible execution of an innocent person.

However, the over 1.3 million men and women enmeshed at any given time in the law enforcement system that are not guilty provides ample proof that the internal checks restraining the exercise of judicially instigated violence against the innocent are inadequate.¹⁴¹ This is not an accidental or happenstantial occurrence. On the contrary, it is a predictable consequence of the manner in which judges preside over the law enforcement process. In *Dead Wrong*, lawyer and law professor Michael Mello pointed out to lay readers what is well known in legal circles: "In federal court, innocence is irrelevant. The Supreme Court says so, and the lower [courts] listen – as they're required to do."¹⁴² Not only do lower federal courts listen to Supreme Court decisions such as *Herrera v. Collins*, in which the Court downplayed the relevance of a defendant's innocence,¹⁴³ but state courts do as well. In a subsequent book, *The Wrong Man*, Professor Mello documented how federal and Florida state courts ignored the relevance of death row prisoner Joe Spaziano's innocence for over 20 years.¹⁴⁴

Of course, the ultimate injustice that can be committed by a judge is to countenance the execution of an innocent person.¹⁴⁵

author). See also *supra* note 145 and accompanying text.

¹³⁹ See Sherrer, *supra* note 138, at 43.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² MELLO, *supra* note 136, at 238.

¹⁴³ 506 U.S. 390 (1993).

¹⁴⁴ See MELLO, *supra* note 136, at 219–47 (detailing the story of death row inmate "Crazy Joe" Spaziano and how his conviction was the product of among other things, "formulaic judges"). Convicted in 1976, Spaziano's murder conviction was vacated in 1996 after the state's witness recanted. Re-indicted in 1997, Spaziano agreed in 1998 to plead no-contest to second-degree murder after prosecutors pressured him with threats of seeking the death penalty if he was convicted after a retrial. MICHAEL MELLO, *THE WRONG MAN* (2001).

¹⁴⁵ The extent of wrongful convictions in capital crimes is hinted at by the finding of a study that included all 4,578 capital appeals finalized in the U.S. between 1973 and 1995. James Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases*, June 12, 2000, report available in its entirety from The Justice Project: <http://justice.policy.net/jpreport/>. A summary of the report is: Hans Sherrer, *Landmark Study Shows the Unreliability of Capital Trial Verdicts*, Justice Denied, Vol. 2, Issue 2, at <http://www.justicedenied.org/landmarkstudy.htm> (last visited April 15, 2003). Overseen by Columbia University School of Law Professor James Liebman, the study stated that, "7% of capital cases nationwide are reversed because the

Make no mistake about it, even though their role is protected from the glare of the spotlight, as surely as if they were doing it in person, the velvet-gloved fist of the trial and appellate judges involved is on the switch, lever, trigger, or syringe plunger used to snuff out the life of someone that is innocent. Considering the large number of judges involved in any given case, it is reasonable to think that cumulatively more than a thousand state and federal judges may have been involved in the dozens of known executions of innocent people in this century alone.¹⁴⁶

A person's innocence is discounted by judges for the simple reason that it is not a constitutional issue.¹⁴⁷ The Constitution has been judicially interpreted to provide the innocent no more procedural protection than the guilty.¹⁴⁸ This is consistent with the Supreme Court's holding in *Herrera v. Collins* that "a claim of 'actual innocence' is not itself a constitutional claim."¹⁴⁹ The Constitution only guarantees that procedural formalities are to be followed, it does not guarantee that the outcome of those procedures will be correct or fair.¹⁵⁰ As the Supreme Court has made crystal clear in *Herrera* and its progeny, neither does the Constitution assure that a defendant's innocence will be considered any more relevant to the outcome than his/her sex, age or the city of birth.¹⁵¹

The shock to a person who first learns of the irrelevance of his/her innocence *after* being wrongly convicted *and* then losing on appeal(s) is compounded when he/she files a federal habeas corpus petition.¹⁵² Although it may be common for

condemned person was found to be innocent." That figure doesn't include the innocent capital defendant's who fell through the cracks of the appellate process by being unable to produce evidence of either a recognized constitutional error in the record of their case, or compelling new evidence of their innocence. *Id.* It was also found that reversible error was found in 68 percent of all capital cases finalized during the 23-year study period. *Id.* Considering that capital cases are investigated more thoroughly than other cases, and procedures are adhered to more faithfully at the trial and appellate stages than in non-capital cases, it is reasonable to assume that under the same level of scrutiny a comparable number of all criminal convictions in the country would be reversed. *Id.* This indicates the magnitude of the negative impact that the use of non-citable unpublished opinions or one line orders (which in federal cases is over 85 percent of all cases, FAS Project *supra* note 205) is having on causing the wrongful conviction of an untold numbers of innocent men and women to forever remain undetected. *Id.*

¹⁴⁶ The author created and maintains the world's largest database of wrongly convicted people. Included are over 40 innocent men and women that were executed. See *Justice Denied, The Innocents Database*, at <http://www.justicedenied.org/wronglyconvicted/innocents.htm> (last visited Mar. 5, 2003).

¹⁴⁷ See *Herrera*, 506 U.S. at 404 (holding that a claim of actual innocence is not a constitutional claim in a habeas corpus petition).

¹⁴⁸ For a more in-depth discussion of this with many citations, see JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.5 (3d ed. 1998).

¹⁴⁹ *Herrera*, 506 U.S. at 404.

¹⁵⁰ See *id.* at 400. In *Herrera v. Collins*, the Court stated that newly discovered evidence of innocence alone was not sufficient for habeas corpus relief unless a constitutional violation occurred in the underlying criminal proceeding. *Id.*

¹⁵¹ *Id.* See also LIEBMAN & HERTZ, *supra* note 148, at § 2.5 (stating that "innocence is indeed irrelevant").

¹⁵² See, e.g., *Herrera*, 506 U.S. at 400 (stating that it is a "principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact"). The Court was responding to the petitioner's claim that newly discovered evidence

people to think that a federal judge will intervene to protect an apparently innocent person when no one else will – such a thought is far more of a romantic fantasy than a belief grounded in reality.¹⁵³ That fantasy is fed by movies such as *The Hurricane*, in which Federal District Court Judge Lee Sarokin is shown granting Rubin “Hurricane” Carter’s habeas corpus petition in 1985 after he had been imprisoned for almost 20 years for a triple murder he did not commit.¹⁵⁴ What is not revealed is that Judge Sarokin may have been the only federal judge in the country that would have granted that writ under the circumstances of Carter’s case, and to this day he is castigated for having done so.¹⁵⁵ So it is only by sheer luck that “Hurricane” Carter and his co-defendant John Artis are free men today instead of still caged in a New Jersey prison.¹⁵⁶ But people see and believe the Hollywood myth instead of the reality facing innocent people squarely in the face.

Professors James S. Liebman and Randy Hertz, authors of the authoritative *Federal Habeas Corpus Practice and Procedure*, explain the legal predicament that hamstringing factually innocent people such as “Hurricane” Carter: “Habeas corpus is not a means of curing factually erroneous convictions.”¹⁵⁷ Yet, a habeas corpus petition is the only way a state prisoner can challenge his/her conviction in federal court and it is one of only two ways a federal prisoner can challenge his/her conviction.¹⁵⁸ In the absence of a defendant’s demonstrable claim of being denied a recognized constitutional protection, the mere allegation of innocence is, quite literally, irrelevant to judges in this country.¹⁵⁹

demonstrated that he was factually innocent. *See id.*

¹⁵³ *See, e.g., id.* at 400 (holding that a claim of factual innocence has never been held to state a ground for federal habeas corpus relief).

¹⁵⁴ *Carter v. Rafferty*, 621 F. Supp. 533 (D.N.J. 1985), *aff’d*, 826 F.2d 1299 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (granting the petition on the basis that the prosecution had withheld critical exculpatory evidence and improperly argued racial hatred as the motive for the crime).

¹⁵⁵ *See, e.g., Hurricane Carter: the other side of the story*, at <http://www.graphicwitness.com/carter/sarokin.html> (last visited Mar. 19, 2003).

¹⁵⁶ *Id.*

¹⁵⁷ *See* LIEBMAN & HERTZ, *supra* note 148, at § 2.5.

¹⁵⁸ A state prisoner files a petition under 28 U.S.C. § 2254 (2000), and a federal prisoner files a petition under 28 U.S.C. § 2255.

¹⁵⁹ This principle is embodied in the AEDPA of 1996 and that Act’s requirements for the filing of federal habeas corpus petitions by both state and federal prisoners. *See* 28 U.S.C. § 2255. *See supra* note 114 and accompanying text. There does seem to be a very small number of state judges who have expressed the opinion that innocence *does* matter. *Id.* For example, based on a petition for a stay filed hours before Freddie Lee Wright’s scheduled execution in March 2000, Alabama Supreme Court Justice Johnstone was joined by one other justice in his dissent from its denial, because “...his petition recites persuasive facts that support the conclusion that he is innocent and that his conviction results from lack of a fair trial.... Whether Wright is electrocuted or injected seems insignificant compared to the likelihood that we are sending an innocent man to his death.” *Ex parte Wright*, 766 S.2d 215, 216 (Ala. 2002). Mr. Wright was executed hours after the court majority rejected Justice Johnstone’s argument that compelling evidence of his innocence was relevant. In contrast, the Alabama Court of Appeals in August 2002, vacated the “best interest” guilty plea of Medell Banks, Jr. to manslaughter, related to the death of a baby that was scientifically proven to have never existed. *Banks v. State*, No. CR-01-0310, 2002 WL 1822104 (Ala. Crim. App. Aug. 9, 2002). A majority of the three-judge panel agreed that Mr. Banks’ case was a “classic example of a manifest injustice.” *Id.* However, there does not seem to be a corresponding number of federal judges that have done so. *See supra* note 28 and accompanying

V. CONTROL OF DEFENSE LAWYERS BY JUDGES

There is one possible crink that can interfere with the smooth operation of the law enforcement process presided over by state and federal judges: defense lawyers. It is not unusual for a conscientious and knowledgeable defense lawyer to find him or herself in the position of having to choose whether to appear unruly and disrespectful in an effort to get a biased judge to observe the most meager standards of civilized fairness in conducting a trial.¹⁶⁰ However, when that path is chosen it is rarely successful, because it is easy for a biased judge to cast a defendant in a bad light with the jury by reprimanding and rebuking a vigorous and conscientious defense lawyer.¹⁶¹

Ironically, lawyers who believe their clients to be innocent are the most vulnerable to being smeared by a judge in front of a jury. This is because they are most likely to be intolerant and outraged by the way the proceedings determining their client's fate are being conducted by the judge. Yet, despite such frustrations, for all practical purposes there is little a defense lawyer can do in the courtroom about the velvet black jack wielded by a judge. *The Appearance of Justice* explained this dilemma in the following way:

What alternatives are open to counsel? He must know his judge and be sure that registering an objection will not put him or his client at a disadvantage in the case before His Honor - and the next case, and the case after that. On paper, each judge is subject to some higher court review; but as a practical matter, the judge who acquires an aversion to certain counsel can destroy the lawyer's effectiveness in countless unreviewable ways. Simple matters such as continuances, the privilege of filing a slightly late brief, such courtesies of the courtroom as a full oral hearing - all these and many more amenities are sometimes unavailable to the attorney who is in disfavor with the court. The dilemma for the lawyer from out of town is no less acute though he may never have to face the same judge again. More likely than not he is able to appear at all only by the court's indulgence and must associate himself with local counsel whose own relationship with the judge could be jeopardized by any excessive zeal on the part of the visiting lawyer. Counsel must of course weigh the advantages and disadvantages of further delay in his case caused by a reassignment to another judge and also the imponderables

text. New York District Judge Sprizzo's acquittal of the two defendants he thought were innocent was definitely an anomaly. *Id.*

¹⁶⁰ As author John P. MacKenzie notes, "judges have been much more forthcoming with public criticism of defendants and lawyers, particularly defense counsel." See JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 22 n.86 (1974).

¹⁶¹ *Id.*

of who that successor judge might be. Counsel must consider all this very rapidly and respond without hesitation, for the magistrate is there calling for an immediate answer on the suggested or implied waiver of his technical disqualification. . . . John P. Frank, one of the few longtime students of judicial ethics, described the waiver phenomenon as “nothing more than a *Velvet Blackjack*.” Essentially, the *Velvet Blackjack* is a game based on assumed relationships of mutual confidence; it is, in other words, a species of confidence game. In the typical confidence game, the perpetrator engages his victim in a joint venture that requires the brief loan of the victim’s treasure; the critical point in the transaction is when the intended victim has to decide – usually quickly, in a fluid situation – whether to surrender his valuables ever so briefly in the interest of acquiring something more valuable. The victim must decide not only whether to repose his trust in the individual, but more humanly wrenching, he must weigh the consequences of betraying apparent distrust and the risks of offending the other party. When the other party is a black-robed judge and the decision falls upon the lawyer, there is an extra dimension of human difficulty. . . . But the ordinary lawyer with the ordinary judge, while he is anything but happy to be governed by such a practice, may have no choice.¹⁶²

Consequently, a lawyer forced to settle for a judge known to be biased against his or her client is an integral part of the judicial process.¹⁶³ This occurs even when a lawyer genuinely wants to help a defendant, but is precluded from doing so by settling for a judge that, at best, will project the illusory appearance to the jury of being fair to the defendant.

When defense lawyers challenge judges on the grounds of their impartiality, it is unlikely to result in their removal.¹⁶⁴ This is true even in cases where there is overwhelming evidence of a blatant conflict of interest or egregious prejudicial behavior by a judge.¹⁶⁵ The offending judge is typically protected by his or her fellow judges from being removed to maintain the illusion of judicial impartiality and decorum.¹⁶⁶

¹⁶² MACKENZIE, *supra* note 160, at 95-97 (emphasis added).

¹⁶³ *Id.* at 97 (observing that lawyers often have to accept the fact that the judge is biased or has a conflict of interest and that challenging the judge shows distrust).

¹⁶⁴ In fact, a judge’s impartiality may be upheld so long as his actions are not clearly prejudicial to the rights of the defendant. *See, e.g., United States v. Burt*, 765 F.2d 1364 (9th Cir. 1985) (holding that defendant’s right to effective counsel was not interfered with even though the court disapproved the judge’s treatment of the defendant’s counsel).

¹⁶⁵ *See, e.g., United States v. Elder*, 309 F.3d 519 (9th Cir. 2002) (making an exception to the judge’s disparaging remarks to defendant’s counsel and for having the attorney shackled and removed from court in front of the jury).

¹⁶⁶ *See* Dave Reinhard, *Junk and Judgment*, THE OREGONIAN, Feb. 20, 1997, at E12 (documenting how Oregon U. S. District Court Judge Robert E. Jones, whose wife had a mastectomy and silicon breast implants, refused to excuse himself from a suit involving breast implants). In discarding a

Appeals courts also aid in the effective control of diligent defense lawyers.¹⁶⁷ The Ninth Circuit Court of Appeals has gone so far as to rule that it is not reversible error for a judge to make inaccurate and insupportable vitriolic remarks about a defense attorney's competence and "patriotism" in front of a jury.¹⁶⁸ The Ninth Circuit further held that it is not reversible error for a judge to order the same attorney handcuffed and removed from the courtroom by the U.S. Marshalls in front of the jury after the attorney persisted in trying to get the judge to correct what was, in fact, an erroneous ruling contradictory to a previous ruling by the judge.¹⁶⁹

The protection of a prejudicial trial judge by his or her brethren is encouraged by the legal doctrine of "the presumption of regularity," which presumes "that duly qualified officials always do right."¹⁷⁰ This idea seems similar to the monarchical doctrine that "The King can do no wrong." Thus, individually and as member of the good old boys network, judges can effectively function to control any defense lawyer that becomes too contentious in his or her efforts to defend a client – and those vigorous efforts are most likely to occur when that client's innocence is apparent from the evidence.

IV. APPELLATE COURTS COVER UP THE ERRORS OF TRIAL JUDGES

There are two significant and complementary ways the political nature of judges contributes to victimization of the innocent. The first method is the use of the harmless error rule to dismiss the grounds upon which a wrongful conviction or prosecution is challenged.¹⁷¹ The second method is the use of unpublished opinions to minimize attention given to an appeal and to conceal the details of the appeal's resolution.¹⁷²

A. *The Harmless Error Rule*

The harmless error rule is a relatively recent development in this country, having been adopted federally in 1919.¹⁷³ It is codified in the Federal Rules of Criminal Procedure as Rule 52 and it states that a harmless error is, "[a]ny error,

challenge to have Judge Jones removed from the case, one of his fellow federal judges in Portland said that there was "no basis for the claim that Jones' impartiality could be reasonably questioned." *Id.*

¹⁶⁷ See, e.g., *Elder*, 309 F.3d at 520 (upholding the district judge's conduct in what would normally have been held to be prejudicial).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ MACKENZIE, *supra* note 160, at 97.

¹⁷¹ See 28 U.S.C. § 2111 (2000) (enumerating the harmless error rule). The statute provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *Id.*

¹⁷² See Richman & Reynolds, *supra* note 52, at 275-76 (noting that cases involving weaker litigants get less judicial attention and involve a draft opinion rather than a published opinion).

¹⁷³ Act of Feb. 26, 1919, Pub. L. No. 281, 40 Stat. 1181.

defect, irregularity or variance which does not affect substantial rights shall be disregarded."¹⁷⁴ The states followed the federal government's lead and adopted a variation of the harmless error rule applicable in their courts.¹⁷⁵

Prior to adoption of the harmless error rule, structural omissions or errors in an indictment, search warrant or jury instructions, and a trial judge's judgmental errors in such matters as evidentiary rulings, limiting witness testimony, or motions for a judgment of acquittal that were related to essential facts of a case, were presumed to prejudice a defendant, and thus constituted grounds for automatic reversal of a conviction and a retrial or possible dismissal of the charges.¹⁷⁶ That was consistent with the common law rule that review of a conviction did not involve any re-examination of the facts, which was the sole province of the jury; *and* that was the law applied to Americans at the time the Constitution was written and the federal judiciary was created.¹⁷⁷

Before codification of the harmless error doctrine, it was recognized that structural errors in documents such as an indictment or search warrant could be due to the possible inability of the prosecution to correct them, and defects that *could* be cured by the prosecution would be.¹⁷⁸ Trial and appellate judges did not interpose their opinion about the relative strength or weakness of the government's pleadings, but merely ascertained if it met the legal standard for sufficiency and summarily rejected those that did not. The harmless error rule turned that common sense standard on its head by allowing a judge to determine if errors or omissions that made a pleading, document, or jury instructions insufficient were irrelevant, if in the judge's opinion it had no effect on the

¹⁷⁴ FED. R. CRIM. P. 52(a). The harmless error is codified for appeals in 28 U.S.C. § 2111.

¹⁷⁵ For example, North Dakota has codified the harmless error rule as N.D. SCT. R. 52. See *North Dakota Supreme Court, Supreme Court Rules*, at <http://www.court.state.nk.us/Court/Rules/Criminal/Rule52.htm> (last visited Mar. 1, 2003).

¹⁷⁶ John H. King, Jr., *Prosecutorial Misconduct: The Limitation Upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U. L. REV. 1095, 1108 (1980). The article states: "The harmless error legislation effectively eliminated the common law practice mandating automatic reversal." *Id.* at 1109.

¹⁷⁷ Brutus, Anti-Federalist Paper #81, *The Power of the Judiciary*, available at http://www.geocities.com/CapitolHill/Senate/1389/antifeds/afed_p81.html. The Anti-Federalists warned prior to adoption of the Constitution that the door to creation of what is today known as the 'harmless error rule,' and the discarding of the Common Law rule of appellate review was embedded in the Constitution:

They will therefore have the same authority to determine the fact as they will have to determine the law, and no room is left for a jury on appeals . . . If we understand the appellate jurisdiction in any other way, we shall be left utterly at a loss to give it a meaning. The common law is a stranger to any such jurisdiction: no appeals can lie from any of our common law courts, upon the merits of the case. The only way in which they can go up from an inferior to a superior tribunal is by habeas corpus before a hearing, or by certiorari, or writ of error, after they are determined in the subordinate courts. But in no case, when they are carried up, are the facts re-examined, but they are always taken as established in the inferior court.

Id. (emphasis added).

¹⁷⁸ This is implicit in the aftermath of a reversal, when a prosecutor cures defects that are not fatal to a case, so there is no need for a judge to interpose his or her judgment into the process.

proceedings.¹⁷⁹ In other words, the harmless error rule elevated the expression 'good enough for government work,' which means conduct and work that is third-rate, shoddy, and not worthy of praise, to *the sub-standard* by which all legal pleadings in a criminal case affecting a person's life and liberty are judged.¹⁸⁰

Before the harmless error rule, the jury was considered to be the sole arbiter of a case's facts and any failure by jurors to consider essential facts of a case or to consider the impact of facts on essential elements of an offense, was assumed to have impaired their judgment, and thus, constituted the deprivation of a fair trial to a defendant and warranted reversal of the conviction.¹⁸¹ Prior to 1919, there was effectively a presumption that trial level errors could prejudice a defendant to a judge and jurors exposed to them, since the State's painting of a person as a criminal carries with it a strong *de facto* presumption of guilt.¹⁸² Thus, the State must be bound to follow the proper procedures to ensure that an innocent person is not erroneously colored by that *de facto* presumption of guilt.¹⁸³ Consequently, trial level errors embody the presumption that they are prejudicial, some in ways that may remain unseen to anyone outside of the jury: so recognition of their prejudicial effect on a defendant's right to a fair trial and their possible contribution to an adverse verdict is essential to preserve not just the integrity of the judicial process, but the appearance of the system's integrity.¹⁸⁴

The automatic reversal of a conviction acted as an important shield of protection for innocent defendants from the structural and judgmental errors of a judge, prosecutors and police.¹⁸⁵ Its obliteration began in 1919, and nine decades later is virtually complete: only a hollow pretense of judicial concern for determining the soundness of any conviction remains.¹⁸⁶

The harmless error rule is defended in a criminal context as contributing to judicial economy by allowing a judge to avoid ruling in a defendant's favor when reasonable grounds can be stated that in the judge's opinion, an error by the police, prosecutors or a judge in a case did not alter the outcome of the issue

¹⁷⁹ See FED. R. CRIM. PRO. 52(a).

¹⁸⁰ Stephen Bright, Director of the Southern Center for Human Rights, has used the phrase "close enough for government work" to describe the minimal standard of competence federal judges apply to judge the competence of a death penalty lawyer. Stephen Bright, Speech at the University of Washington School of Law (Feb. 28, 2002).

¹⁸¹ Under the harmless error rule, the appellate court reviews the trial record to determine if an error affected a substantial right of one of the parties. See WAYNE R. LAFAVE, JAROLD H. ISREAL & NANCY J. KING, CRIMINAL PROCEDURE § 27.6 (3d ed. 2000).

¹⁸² *Id.*

¹⁸³ See King, *supra* note 176, at 1108-09.

¹⁸⁴ See LAFAVE, ISREAL & KING, *supra* note 181, at § 27.6 (stating that "the presumption of prejudice was designed to ensure that the appellate court did not encroach upon the jury's fact-finding function by discounting the improperly admitted evidence and sustaining the verdict on its belief that the remaining evidence established guilt").

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., *Neder v. United States*, 527 U.S. 1, 7 (1999) (observing that the harmless error rule applies to all errors, but a limited class of fundamental constitutional errors defy harmless error analysis and require automatic reversal, all other errors are subject to rule).

being considered.¹⁸⁷ The Supreme Court has extended that rationale to encompass the most serious violations of a defendant's express protections under the Bill of Rights.¹⁸⁸ The end result of that rationale was expressed in *Arizona v. Fulminate*, a case involving a confession obtained in violation of the defendant's Fifth Amendment right against self-incrimination.¹⁸⁹ The Court has not only continued to apply the rationale that a constitutional violation does not mandate a conviction's automatic reversal, but it has extended it in subsequent cases to encompass indictments and jury instructions that fail to include essential elements of a defendant's alleged criminal offense.¹⁹⁰ Thus, the assessment of a case's facts and deficient prosecution documents and pleadings by a judge who owes his position to the same political establishment to which the prosecutor belongs, has effectively replaced the jury that symbolically represents the community, as the final arbiter of the weight to be given to those facts that the judge cannot possibly view from a disinterested perspective.¹⁹¹

It was predictable in 1919 that the 'harmless error rule' would result in less attention to critical details at every stage of a criminal investigation, prosecution and review of a conviction, given the overtly political nature of the state and federal judiciaries, and the panoply of political considerations that are the overriding criteria used to fill those positions and that affect the decisions of judges.¹⁹² So even though details are the life blood of a criminal prosecution and the protection of all criminal defendants is shielded by the presumption of innocence, the liberal application of the 'harmless error rule' has enshrined 'close

¹⁸⁷ Prior to the adoption of the harmless error rule, appellate courts were criticized for allowing retrials on even the most insignificant errors. See LAFAYE, ISREAL & KING, *supra* note 181, at § 27.6.

¹⁸⁸ See, e.g., *Arizona v. Fulminate*, 499 U.S. 279, 309 (1991) (noting that a total deprivation to counsel at trial is a violation that is not subject to the rule).

¹⁸⁹ *Id.*

¹⁹⁰ See, e.g., *Neder*, 527 U.S. at 5 (holding harmless error rule applies to refusals to submit the issue of materiality to the jury regarding charges of tax fraud).

¹⁹¹ By interposing the judgment of judges for that of a jury in regard to the weight to be given a case's facts, the effect of the 'harmless error rule' has been to significantly alter the manner in which the Bill of Rights' guarantees of due process and trial by jury apply to a criminal defendant. It has long been recognized that the jury is intended to stand as a protective shield between an accused and the government's representatives in the form of the judge, the prosecutor and the police. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (recognizing a right to a jury trial in a criminal case was designed to prevent government oppression). The court stated,

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action.

Id. Yet the 'harmless error rule' empowers a judge, a government actor that the trial by jury was intended to protect an accused against, to be the final arbiter of the one aspect of a case that for this country's first 120 years (1789-1919) was the sole province of the jury - the weight to be given the facts of a case.

¹⁹² See Act of Feb. 26, 1919, Pub. L. No. 281, 40 Stat. 1181.

enough for government work' as the motto that most accurately expresses the standard applicable to misdeeds, errors and constitutional violations committed during the course of a case by judges, prosecutors and the police.¹⁹³

The grave danger posed to the innocent by the Supreme Court's extension of the 'harmless error' principle to an every increasing panoply of prosecution related errors was conclusively proven by the aftermath of its ruling in *Arizona v. Youngblood*.¹⁹⁴ Convicted of the 1983 kidnapping and sexual assault of a 10 year old boy based solely on the victims testimony, the Arizona Court of Appeals reversed Larry Youngblood's conviction in 1986 on the ground that the failure of the police to preserve semen samples from the victim's body and clothing that there was substantive reason to believe could have exonerated him, violated his Due Process right to a fair trial.¹⁹⁵ In 1988 the Supreme Court reversed, holding that such destruction of material evidence by the prosecution must be done in "bad faith" to constitute a Due Process violation.¹⁹⁶ The Court's majority acknowledged that although the actions of the police in Youngblood's case could be "described as negligent," they didn't act in "bad faith."¹⁹⁷

However, in 2000 a preserved rectal swab sample taken from the victim containing the attackers semen was discovered.¹⁹⁸ When subjected to state of the art DNA testing unavailable at the time of his trial, Mr. Youngblood was excluded as the assailant.¹⁹⁹ Mr. Youngblood's exoneration, *after* he had served his prison term, vindicated Justice Blackmun's concern that the Court was using his case to erroneously expand when destruction of material evidence by the prosecution was constitutionally permissible:

The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law.

...

The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law.²⁰⁰

Yet in spite of Mr. Youngblood's actual innocence being later proven and

¹⁹³ See *supra* note 180 and accompanying text.

¹⁹⁴ 488 U.S. 51 (1988).

¹⁹⁵ *Arizona v. Youngblood*, 734 P. 2d 592 (1986).

¹⁹⁶ *Youngblood*, 488 U.S. at 58.

¹⁹⁷ *Id.*

¹⁹⁸ Barry Scheck, Peter Neufeld & Jim Dwyer, ACTUAL INNOCENCE 334-36 (Penguin Putnam 2001).

¹⁹⁹ *Id.*

²⁰⁰ *Youngblood*, 488 U.S. at 61-62 (J. Blackmun dissenting).

Justice Blackmun's correct analysis of why the Court should have affirmed the Arizona Court's reversal, the Court's decision continues to be the controlling authority insofar as whether the prosecution's destruction of material evidence violates Due Process or is merely 'harmless.' It is reasonable to surmise that the Court erred as egregiously in other applications of the harmless error principle to possible Constitutional violations as it did in its as yet uncorrected *Youngblood* ruling.²⁰¹

One logical consequence of the ever more liberal use the 'harmless error rule' is the two pronged evil of a nationwide acceptance of wrongful convictions as the norm, and the failure of appellate courts to reverse convictions that it would have unhesitatingly declared as unsafe mere decades ago.²⁰² Thus, adoption of the 'harmless error rule' is a largely unseen factor that has evolved into being one of the keys necessary to trigger and sustain what has become nothing less than a tsunami of wrongful convictions in the United States.

B. *Unpublished Opinions and the Creation of an Unprecedented Body of Law*

The replacement of a written opinion explaining the rationale underlying an appellate court decision, with an unpublished opinion or one line or one word orders has become a pervasive phenomenon in the last three decades.²⁰³ As recently as 1950, a written opinion was issued in all federal appeals as a right.²⁰⁴ Today, however, over .85% of all federal circuit court opinions are unpublished.²⁰⁵ The increased use of unpublished opinions since the late 1960's and early 1970's somewhat parallels the growth in the number of people imprisoned since then.²⁰⁶ It is common for both federal and state appellate courts to use an unpublished opinion to dismiss a defendant's challenges to a conviction based on misconduct, errors and omissions by a judge, prosecutor and the police, as constituting 'harmless error.'²⁰⁷

²⁰¹ See, e.g., *Neder*, 527 U.S. 1, 5 (1999) (holding harmless error rule applies to refusals to submit the issue of materiality to the jury regarding charges of tax fraud).

²⁰² The dramatic reduction in published opinions has significantly contributed to this trend. See Richman & Reynolds, *supra* note 52, at 274 n.15. It is in the past few decades that the use of unpublished opinions has become so commonplace as to have a decisive negative impact on the system as a whole, and reduced the quality of the decision in any particular case. *Id.* It is also notable in this regard that the harmless error rule has been aided by the time and procedural limits imposed by 1996's Anti-terrorism and Effective Death Penalty Act on the filing of federal habeas corpus petitions by state and federal prisoners challenging their convictions. See 28 U.S.C. § 2255 (2000).

²⁰³ See Richman & Reynolds, *supra* note 52 at 274 ("The federal circuit courts, responding to a dramatic increase in caseload, have transformed themselves radically in the last quarter century.") The casual dismissal of appeals by an unwritten opinion is often accompanied by the denial of oral argument. *Id.* at 274 n.15.

²⁰⁴ *Id.* at nn.13, 17.

²⁰⁵ FAS Project on Government Secrecy, *Unpublished Court Decisions Challenged*, (May 15, 2001), at <http://www.fas.org/sgp/news/secrecy/2001/05/051501.html> (last visited Mar. 1, 2003).

²⁰⁶ See Richman & Reynolds, *supra* note 52, at n.3. There has been a more than 10 fold growth in the jail and prison population in the U.S. during the past 30 years. See U.S. Department of Justice, *Bureau of Justice Statistics*, at <http://www.ojp.usdoj.gov/bjs/> (last visited Mar. 1, 2003).

²⁰⁷ See, e.g., Richman & Reynolds, *supra* note 52, at 282 (noting that decisions that do not "make law" or are not novel often do not get published).

The authors of *Elitism, Expediency, and the New Certiorari*, recognize the negative consequences of the trend toward less public disclosure of the reasons underlying a judicial decision:

The implications of these changes are enormous. Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant's ability to mobilize substantial private legal assistance. As a result, judicial procedures no longer permit judges to fulfill their oath of office and 'administer justice without respect to persons, and do equal right to the poor and to the rich.' In short, those without power receive *less (and different)* justice.²⁰⁸

Given the political nature of the judiciary, it is to be expected that the expanded use of unpublished opinions is disproportionate in cases involving people that are politically powerless and who do not have substantial financial resources.²⁰⁹ Their deficient political and financial circumstances have a significant impact on the outcome of their case by putting them on a "different track" than more well-heeled and connected defendants.²¹⁰

Even less well known to all but legal insiders is the minimal amount of first hand knowledge an appellate judge has about the merits of the majority of the cases he or she makes a decision about.²¹¹ That lack of attention to the details of an appeal is disproportionately weighted towards cases involving defendant's from the lower strata of society.²¹² Such defendants are not only involved in the majority of criminal appeals, but they are the ones most likely to have been the subject of a shoddy police investigation, coercive questioning, threatening or intimidation of witnesses, prosecutorial misconduct, or judicial inattention to crucial details involving witnesses, procedures and evidence.²¹³ Those are the cases that *require* the most intense scrutiny on appeal because they involve the greatest human cost and the greatest likelihood of an injustice, yet in an Alice in Wonderland type twist of reality, they receive the least personal attention by an appellate judge.²¹⁴

²⁰⁸ *Id.* at 277 (emphasis added).

²⁰⁹ *Id.* at 286 (observing that the poor and weak litigants suffer because they do not have the influence to ask for publication of favorable precedent).

²¹⁰ As Professors Richman and Reynolds describe the situation, "That justice is dispensed on different tracks is not really a secret, although it is not generally known outside judicial circles." *Id.* at 276.

²¹¹ *Id.* at 276 (quoting U.S. Supreme Court Chief Justice William Rehnquist).

²¹² *Id.* at 289 (noting that clerks of a judge often review and write the opinions of less important cases).

²¹³ This author created and maintains the world's largest database of wrongly convicted people, and it is apparent from the plethora of cases it documents, that those are among the factors contributing singly or in concert to a significant number of the wrongful convictions in this and other countries. See Forejustice, *The Innocents Database*, at http://forejustice.org/search_idb.htm (last visited Mar. 19, 2003).

²¹⁴ This attitude is reflected in the U.S. Supreme Court's noticeable reduction in hearing criminal appeals. See Richman & Reynolds, *supra* note 52, at 284 n.51.

It is unsurprising that the politically and financially powerless, rather than the powerful, suffer the harmful effects of judicial shortcuts exemplified by the issuing of an unpublished decision, given that judges owe their position to the latter and not the former.²¹⁵ There are at least four significant ways the different judicial tracks of justice are manifested.

First, the issuance of an unpublished decision by a state or federal circuit court panel is the kiss of death to a defendant, because it effectively ends the appeal process in all but name.²¹⁶ An unpublished decision sends a powerful signal to any further reviewing court that the issues involved are too insignificant to bother with explaining, and thus they are not important enough to warrant careful review by any other court.²¹⁷ A one line or one word order sends the same message even more powerfully.²¹⁸

Second, an unpublished opinion typically goes hand-in-hand with non-citability of the decision.²¹⁹ In *Anastasoff v. U.S.*, Circuit Judge Richard S. Arnold clearly explained that since the days of Blackstone over 200 years ago, the doctrine of precedent has been recognized as one of the few checks on the arbitrary exercise of judicial power, and that all judicial opinions are precedential, not just those that are published.²²⁰ Consequently, the ability of a court to ignore a previous court's opinion regarding a factually and legally similar case removes the only bar preventing judges from substituting their

²¹⁵ See *id.* at 292 (discussing judicial shortcuts and noting that they most often injure the poor – the group in most need of judicial services).

²¹⁶ *Id.* at 295 (noting that judicial shortcuts effectively transform the courts of appeal into certiorari courts).

²¹⁷ *Id.* at 283-84. Stating:

Non-publication also diminishes the possibility of additional review. For all practical purposes, the courts of appeals are the courts of last resort in the federal system; fewer than one percent of their decisions receive plenary review by the Supreme Court. The limited appellate capacity of the Supreme Court makes it extremely unlikely that it will review an unpublished opinion. After all, a cogent explanation also makes it possible for a reviewing court to understand the case. Without that explanation, the likelihood of discretionary review by an en banc court or by the Supreme Court decreases to the vanishing point. Moreover, a reviewing court is far less likely to spend its own resources on a case already determined to be without precedential value. Although review is very unlikely anyway, a litigant should not have the chances of review further reduced merely because a panel did not think the case worthy of an opinion.

Id.

²¹⁸ *Id.* at 285 (“However poor the quality of unpublished opinions, they are Cardozo-esque in comparison to the practice of issuing mere “Orders” – dispositions that contain no explanation at all. Orders fail any quality test.”).

²¹⁹ *Id.* at 282.

²²⁰ *Anastasoff v. United States*, 223 F.3d 895, 901 (8th Cir. 2000). The court stated: “If judges had the legislative power to “depart from” established legal principles, “the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions.” *Id.* In other words, the non-citability of opinions effectively turns every judge into a de facto dictator who can exercise their prerogative in accordance with Lord Acton’s observation about the corrupting nature of power. As Judge Arnold explained, historically all judicial opinions have precedential value, whether or not they were recorded in writing. *Id.* at 903.

personal opinions for what the law has been declared to be in those circumstances.²²¹ Thus, the non-citability of an opinion breeds and ensconces judicial lawlessness by allowing judges to avoid any accountability to abide by any precedents applicable to a case.²²² It allows imposition of de facto judicial ex post facto pronouncements.²²³ That underscores the all too likely possibility that a person whose case is resolved by an unpublished opinion did not have it determined according to established precedents, but by the personal preferences of the judges involved.²²⁴ Those preferences are likely to be different than those for a defendant from a different social and economic place in society than the judges.²²⁵

The Supreme Court recognized in *Hutto v. Davis*, that judicial anarchy is the result of lower courts choosing which precedents they want to follow.²²⁶ The Court stated, "Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."²²⁷

The danger posed to a defendant by an unpublished opinion's non-citability is compounded by the fact that few people other than lawyers have ready access to unpublished opinions.²²⁸ Whatever check on judicial lawlessness that may exist from the public notice of a precedentially *contrary* opinion is, therefore, effectively eliminated.²²⁹ The injustice embodied in the non-cited opinion is not buried in legal books sitting on dusty shelves – it is as if the opinion never existed in the first place – other than its effect on the hapless appellant victimized by it.²³⁰

In an uncommon display of judicial courage, an Eighth Circuit three judge panel ruled in *Anastasoff* that the circuit rule on the non-citability of an unpublished opinion is unconstitutional.²³¹ The panel declared the non-citability rule "expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decision will bind us and

²²¹ *Id.* at 904.

²²² *See, e.g.,* *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

²²³ *See, e.g.,* Frank *supra* note 5, at 268 (quoting attorney John Chipman Gray).

²²⁴ *See* Richman & Reynolds, *supra* note 52, at 283 (stating that unpublished opinions rarely have authors and often are designated as Per Curiam, which has the consequence of diffusing the accountability or responsibility of judges).

²²⁵ *See* Hasnas, *supra* note 15, at 215 (observing that judges tend to come from middle to upper-middle class backgrounds, having politically moderate views with good connections and until recently, they were overwhelmingly white males).

²²⁶ *Hutto*, 454 U.S. at 375.

²²⁷ *Id.* The same sentiment was recently expressed by a federal circuit judge: "As an inferior court, we may not tell the Supreme Court it was out to lunch when it last visited a constitutional provision." *Silveira v. Lockyer*, ___ F.3d ___, 2003 WL 21004622 (9th Cir. May 6, 2003) (Circuit Judge Kozinski dissenting from denial of rehearing en banc).

²²⁸ *See* Richman & Reynolds, *supra* note 52, at 285 (noting that "circuit courts limit public access to unpublished opinions by restricting their distribution").

²²⁹ *Id.* at 283 (observing that unpublished opinions reduce the incentive for judges to get it right because judges are not held accountable for their reasoning and logic).

²³⁰ *Id.* (pointing out that an absence of explanation for the judge's decision makes the likelihood of discretionary review practically vanish).

²³¹ *Anastasoff*, 223 F.3d at 901, 905.

which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional."²³² All of the federal circuits and most, if not all, of the states have rules resembling the one declared unconstitutional in *Anastasoff*.²³³

Third, a case resolved by an unpublished decision typically receives little or no personal attention from the judges involved.²³⁴ The judges only invest the minimal amount of time and energy necessary to process the final order or decision that is prepared, which may in fact have been determined to be the appropriate resolution by the judge's support staff.²³⁵ In such cases the judge functions as more of an administrative bureaucrat removed from dealing with a case's details.²³⁶ That is in sharp contrast to what is traditionally thought of as a judge's hands-on role in all aspects of deciding a case. This routine hands-off role by judges raises serious Constitutional issues about the administration of justice in this country, because unseen and unknown bureaucratic functionaries are surreptitiously making judicial decisions that affect litigants and the public without any constitutional authority to do so, and without the litigants or the public being informed of their shadow participation as de facto judges.²³⁷

Fourth, the quality of unpublished decisions is of significantly lower quality than published decisions.²³⁸ As Professors Richman and Reynolds noted, "The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference."²³⁹ There has been fourteen additional years for the quality of unpublished decisions to deteriorate since Fourth Circuit Chief Judge Markey described them in 1989 as "junk" opinions.²⁴⁰

The serious deficiencies inherent in unpublished decisions are indicative of the presumption that exists in every case resolved by an unpublished opinion that consideration of the defendant's issues was given short shrift.²⁴¹ Implicit in that

²³² *Id.* In *Anastasoff v United States*, 235 F.3d 1054 (8th Cir. 2000), the Eighth Circuit en banc vacated the panel's decision on technical grounds unrelated to the precedential value of non-published opinions, and consequently the issue of their precedential value reverted to the unresolved state that existed prior to the panel's decision. *Id.*

²³³ *Id.* at 899. The rule provided that unpublished opinions were not precedent and should not be cited. *Id.*

²³⁴ See Richman & Reynolds, *supra* note 52, at 341.

²³⁵ *Id.* at 276.

²³⁶ *Id.* at 286-94 (discussing how the use of para-judicial personnel removes a judge from working personally with the details of a case).

²³⁷ At the very least, the rampant practice of using non-judges to perform judicial functions behind closed doors undermines the legitimacy of the judiciary. See Richman & Reynolds, *supra* note 52, at 291-92. Federal judicial power is vested by Article 3, Section 1 of the United States Constitution, and it does not refer to the exercise of any "judicial" function by anyone other than a constitutionally empowered "judge." Given the corresponding increase in state caseloads, it is possible that bureaucratic support staffs are likewise performing judicial functions without state constitutional authority. The performance of federal and state judges as public mouthpieces for decisions made behind the scenes by career bureaucrats also reveals the transparency of their incestuous link to the political process. See e.g., Hans Sherrer, *The Inhumanity of Government Bureaucracies*, INDEP. REV., Fall 2000, at 256 ("bureaucracies reflect the image of the political institutions empowering them to act.")

²³⁸ *Id.* at 284-85.

²³⁹ *Id.* at 284.

²⁴⁰ *Id.* at 284 n.53.

²⁴¹ *Id.* at 283 (stating that without explanation, no one knows if the judge treated the case seriously).

presumption is that the decision may have, in fact, been incorrectly decided.²⁴² In a criminal case it means the possibility that an innocent person was victimized by a wrongful affirmation and forced to suffer an unjust punishment, up to and including execution.

VII. WHY THE JUDICIARY IS DANGEROUS FOR INNOCENT PEOPLE

The pervasiveness of outside influences dominates and even controls the decisions of judges at all levels from the lowliest city traffic court magistrate to the justices of the U.S. Supreme Court.²⁴³ The infection of politics throughout the judicial process helps one to understand how it can be that the U.S. Supreme Court found that it is constitutionally permissible for a person to be denied the opportunity to have proof of their actual innocence duly considered before they are carted off to be executed like an abandoned dog or cat in an animal shelter.²⁴⁴ In *Herrera v. Collins*, Leonel Herrera's four affidavits attesting to his innocence, including one from a person who attested to knowing who the real killer was, were dismissed as constitutionally insufficient to prevent his execution for a murder that he evidently did not commit.²⁴⁵ In his dissent, Justice Blackmun valiantly rallied against the virtual lawlessness the Court's majority was endorsing: "Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to *simple murder*."²⁴⁶

Mr. Herrera's case is symbolic in that the foremost duty of a judge is to ensure the conveyor belt of the law enforcement system is kept moving, and if the receipt of justice by innocent men and women is sacrificed, that is just too bad for them.²⁴⁷ As one lawyer put it, "judges are conductors whose job is to ensure trainfuls of defendants continue to be processed in a timely and uninterrupted manner."²⁴⁸ Perhaps more disturbing is that state and federal judges do not necessarily engage in rubber stamp justice to satisfy political needs, but because they are as integral a part of the political process as are state and federal representatives, senators and other elected and appointed public officials.²⁴⁹

One need look no further for confirmation than the overwhelming percentage of rulings that a trial judge makes in favor of the government during a

²⁴² *Id.* at 291-92.

²⁴³ See SPENCE, *supra* note 8, at 109 (suggesting that judges rule according to political influences rather than according to duty to ensure their equal justice).

²⁴⁴ *Herrera*, 506 U.S. at 400.

²⁴⁵ *Id.* at 417.

²⁴⁶ *Id.* at 446 (emphasis added).

²⁴⁷ BLUMBERG, *supra* note 23, at 21.

²⁴⁸ This is a paraphrase of an observation made to the author in 1996 by a prominent defense attorney.

²⁴⁹ See Richman & Reynolds, *supra* note 52, 286-94 (discussing various judicial shortcuts used by courts in order to handle the increasing caseloads).

prosecution. All things being equal, the law of averages would dictate that the defense and the government would be *expected* to be considered “right” on a roughly equal number of issues during the course of a case. In reality that is a Polyanna pipedream. It is inconceivable that a single judge in this country rules in favor of the defense on average anywhere close to half the time. It is irrelevant whether the prejudicial attitude of judges that stacks the deck heavily against a defendant from the beginning is conscious or unconscious, since its impact is the same either way.

That emphasizes the great danger posed to defendants by how amazingly easy it is for a judge to fix the outcome of a trial. Judges do this by such methods as: manipulating the jury selection process; deciding which witnesses can testify and what testimony they are allowed to be give; determining the physical and documentary items that can be introduced as evidence; deciding which objections are sustained or overruled; conveying to the jurors how the judge perceives the defendant by the tone and inflections in his voice and his body language toward the defendant and his or her lawyer(s); and by the instructions that are given to the jury as to the law and how it should be applied to the facts the judge permitted the jurors to see and hear.

The entire process makes it remarkably easy for the outcome to be rigged against a defendant disfavored by the judge, who all the while can make the proceedings have the superficial appearance of being fair towards the defendant being judicially sandbagged.²⁵⁰ As sociologist and legal commentator Abraham Blumberg noted, “A resourceful judge can, through his subtle domination of the proceedings, impose his will on the final outcome of a trial.”²⁵¹ Thus, in a very real sense, any criminal trial in the U.S. is potentially what is called a show trial in other countries, since the judge’s opinion of a person’s guilt or innocence can be the primary determinate of a trial’s outcome, and not whether the person is actually innocent or guilty.

Playing an important role in a judge’s subtle manipulation of the proceedings in his/her courtroom is the judge’s use of mind control techniques on jurors – the same techniques that are known to be used by law enforcement interrogators to extract false confessions from innocent men and women.²⁵² The use of these insidious techniques is a virtually unexplored aspect of how judges operate in courtrooms today, and it is a significant contributor to wrongful convictions.²⁵³ That is to be expected given the known role of those techniques in generating false confessions.²⁵⁴ Needless to say, this power is often used to the detriment of innocent men and women, because a judge can use all the methods and nuances

²⁵⁰ For further reading on this concept, see Abraham S. Blumberg, *The Practice of Law As Confidence Game*, 1 LAW & SOC’Y REV. 15, 23 (1967) (describing the court and defense lawyers as an institution that is geared toward obtaining plea bargains and guilty pleas).

²⁵¹ See, e.g., *id.* at 23 (discussing devices used “to collapse the resistance of an accused person” as well as other shortcuts to combat increased caseloads).

²⁵² For details on the plethora of psychological techniques used to extract false confessions, see Hans Sherrer, *The Great Plague*, Ch. 7 (unpublished manuscript) (2002), available at http://forejustice.org/write/the_scourge_of_false_confessions.pdf (last visited Mar. 1, 2003).

²⁵³ *Id.* at 2.

²⁵⁴ See generally Sherrer, *supra* note 252 (discussing techniques of psychological coercion in order to illicit false confessions).

of his craft to steer a trial in the direction of concluding in the way he or she has pre-determined it should end.²⁵⁵

One of the mind control techniques in a judge's arsenal is to use the "light of truth" throughout a trial – from voir dire through the issuing of jury instructions – to influence jurors to arrive at a conclusion consistent with what the judge desires. The "light of truth" works when the judge uses his position as the purveyor of truth and goodness to influence the jurors to make a "false confession" about what they believe when they return their verdict.²⁵⁶ It is not uncommon for jurors, after the artificial influences they were subjected to in a courtroom have worn off, to say they would vote differently if they had it to do over again. In some cases one or more jurors have publicly proclaimed the innocence of the person they voted to convict.²⁵⁷ A recent well known example of this is that at least two jurors who voted to convict former Ohio State Representative James Traficant publicly stated after his trial that they thought he was innocent and had been wrongly convicted. There are also accounts of jurors aiding in the overturning of a conviction of someone they voted to convict, but who they became convinced was innocent.²⁵⁸

In a similar vein, jurors have been known to comment after a trial that they thought the defendant was not guilty, but based on what the judge told them to do, or perhaps only implied they must do (through his tone of voice and body language), they felt like they had to vote guilty, if for no other reason than to make the judge happy.²⁵⁹ A well known example of a jury convicting someone they did not think was guilty, was when baby doctor and author Benjamin Spock was convicted for aiding draft resisters during the Vietnam War.²⁶⁰ In Jessica Mitford's book about his case, *The Trial of Dr. Spock*, jurors are quoted as saying he was not guilty, but they thought the judge's jury instructions gave them no choice but to convict him.²⁶¹ This is an indicator of the effectiveness of the psychological manipulation techniques used on jurors by judges: they are able to induce jurors to vote someone guilty that the jurors believe at the time to be innocent. It is a real life confirmation of how lay people acted in Professor Stanley Milgram's famous Yale University experiments, when they applied what they thought was life threatening voltage to an innocent person strapped to a chair simply because they were instructed to do so by an authority figure in a white coat.²⁶² Judges wearing a black robe instead of a white technician's smock

²⁵⁵ See BLUMBERG, *supra* note 23, at 23.

²⁵⁶ *Id.*

²⁵⁷ See Hans Sherrer, *Seven Jurors Revolt After Learning A Federal Judge and Federal Prosecutors Duped Them into Convicting an Innocent Man* (Feb. 28, 2003) (unpublished manuscript), available at http://forejustice.org/wc/seven_jurors_tricked.htm (last visited Mar. 19, 2003).

²⁵⁸ See generally JESSICA MITFORD, *THE TRIAL OF DR. SPOCK* (1969) (discussing a case in which jurors felt they had convicted an innocent man).

²⁵⁹ This same psychological technique, slightly different than the "light of truth," is used on criminal suspects to induce a confession, which are often found to be false.

²⁶⁰ See generally MITFORD, *supra* note 258 (discussing the Benjamin Spock case).

²⁶¹ *Id.* at 232.

²⁶² See Sherrer, *supra* note 237, at 251-52. See generally, STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1975).

confirm the validity of Professor Milgram's experiments every day in courtrooms all across the country. So what has subtly gone on in courtrooms for over a hundred years, since the Supreme Court's decision in *Sparf v. United States*,²⁶³ is nothing less than a sophisticated form of psychological manipulation of the jurors to produce the judge's desired verdict.²⁶⁴

Of course, once a conviction is obtained, whether solely by psychologically torturing the jurors or a combination of multiple juror manipulation techniques, it is extraordinarily difficult for a defendant's conviction to be reversed on appeal to a higher court.²⁶⁵ Even when a higher court rebukes a trial judge, it often has no effect on the judge's conduct or rulings.²⁶⁶ In some cases a judge will simply ignore the order of the higher court that has no real power to force compliance with their edict.²⁶⁷

The fact based documentary-drama, *Without Evidence*, about the trial and conviction of Frank Gable for the 1989 murder of Oregon Department of Corrections Director Michael Franke, graphically demonstrates how blatantly a trial judge can, to all appearances, successfully fix the conviction of what may be an innocent man, and how difficult it is for a defendant to have those prejudicial actions undone on appeal.²⁶⁸ Judges are literally able to do this with near

²⁶³ 156 U.S. 51 (1895). *Sparf v. United States* gave the Supreme Court's approval to the proposition that the judge may instruct the jury about the law they should apply to a particular case. *Id.* at 106. In other words, the law applicable to the person in the street is what the government's representative in the form of the judge, says it is. *Id.* Various commentators have opined about various aspects of how *Sparf*'s underlying premise is that the government is an entity in and of itself and the laws it creates should not be subject to outside review by the people in the form of a jury. See, e.g., Jon Roland, *Commentary on Sparf v. United States*, available at <http://www.constitution.org/ussc/156-051jr.htm> (last visited Mar. 19, 2003) (noting the controversy involved in the doctrine mandating that judges are to decide the applicable law in a case as opposed to a jury).

²⁶⁴ There are a number of books that deal extensively with the techniques of mind control and propaganda, which is one of the ways it is commonly used in society as a whole, not just the courtroom. See generally EDWARD HUNTER, *BRAIN-WASHING IN RED CHINA* (1951) (describing techniques of brain washing and propaganda used by the government of communist China to indoctrinate resentment of the United States among its citizens); WILLIAM WALTERS SARGANT, *BATTLE FOR THE MIND* (Edgar H. Schein, Inge Schneier & Curtis H. Barker eds., W. W. Norton 1971) (studying the methods of influencing the brain and the physiological aspects of religious and political conversion that are used by religious and political groups); J. MICHAEL SPROULE, *CHANNELS OF PROPAGANDA* (1994) (discussing the various areas where propaganda is used and the issues particular to those areas); ANTHONY PRATKANIS & ELLIOT ARONSON, *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* (1991) (detailing how propaganda is used and in what forms and how to be critical of propaganda without becoming completely cynical); JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES* (Konrad Kellen and Jean Lerner trans. 1973) (presenting a comprehensive analysis of propaganda, from its characteristics to its effects both psychological and socio-political and evaluating the effectiveness of propaganda).

²⁶⁵ See MACKENZIE, *supra* note 160, at 119-20.

²⁶⁶ *Id.* (stating that judges enjoy vast discretion and are given the benefit of a doubt by higher courts).

²⁶⁷ See, e.g., *id.* at 119-20 (observing that many trial judges do not have the ability to match the control and deference that they are given).

²⁶⁸ Kevin Francke, the brother of the slain Michael Francke actively participated in the making of the film, which presents the possibility that Francke's 1989 murder was an inside job by people working in Oregon's criminal justice system who framed Frank Gable for the murder. Michael Francke is thought to have been getting close to revealing that Oregon State Police and Oregon

impunity because of the discretion they are given to determine the ebb and flow of a trial by appellate courts reluctant to reverse lower court rulings.²⁶⁹ A skilled judge can use the latitude they are granted to express their preferences about a defendant while superficially appearing to the casual observer to be primarily concerned with protecting the dignity of the proceedings.²⁷⁰ It is also important to consider that even when a judge does not have a pre-judgment about a defendant, his/her typical prosecutorial bias can express itself in the form of a conscious or unconscious leaning toward the defendant's guilt.²⁷¹ Although judges vary in the obviousness of expressing their preference for a defendant's conviction, they are all able to effectively do so whenever it suits them.

VIII. UNACCOUNTABILITY OF JUDGES

The judiciary has a central role in the immersion of enormous numbers of men and women in the depths of the law enforcement system. As thinly veiled political functionaries who are not first tier legal thinkers,²⁷² it is predictable that judges in this country would actively participate in the criminal proceedings that result in the conviction of innocent people. However, all manners of protection cloak the judges involved in these cases from accountability for the egregious harm they inflict. The most fundamental of these is the blanket of absolute immunity protecting judges from being sued by anyone for anything they do in their capacity as a judge.²⁷³ In *Pierson v. Ray* the U. S. Supreme Court stated:

This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to

Department of Corrections officials were funneling drugs into Oregon state prisons. Gable was a smalltime hood who was a convenient patsy, and the case against him was based on speculation and innuendo. Apparently it was thought that no one would care about Frank Gable if he was framed. However, in a strange twist, Kevin Francke, convinced of Gable's innocence, relocated to Oregon and continues the investigation on his own to find his brother's killer. The screenwriter of the movie, Phil Stanford, a former columnist for *The Oregonian* newspaper, continues to believe that Gable was framed. WITHOUT EVIDENCE (Eric R. Epperson, producer, 1995). For general information about the documentary, see <http://www.hollywood.com/movies/detail/movie/176389>.

²⁶⁹ See, e.g., MACKENZIE, *supra* note 160, at 119-20 (observing that many trial judges do not have the ability to match the control and deference that they are given).

²⁷⁰ See *id.* at 119-20 (noting the broad discretion and deference granted to trial judges).

²⁷¹ See STRICK, *supra* note 13, at 165. This author has never heard of any state or federal judge described as having a general bias towards defendants. Any judge that exhibited such an attitude would soon be facing a media onslaught of negative publicity – because the prosecutor's office would likely direct the state or federal government's well-honed public relations machinery to paint the judge as "soft on crime" in the print and television media, when all the judge might want is for a defendant in his or her courtroom get a fair shake.

²⁷² See BUGLIOSI, *supra* note 3, at 23-24 (suggesting judges are disguised politicians).

²⁷³ The common-law granted absolute immunity to judges for "acts committed within their judicial jurisdiction." See *Bradley v. Fisher*, 13 Wall. 335 (1872). This immunity was ruled to extend to suits under 42 U.S.C. § 1983 in *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

exercise their functions with independence and without fear of consequences.’²⁷⁴

In other words, an innocent man or woman convicted as a result of the deliberate and malicious actions of a judge – even when it is known that the judge knew the person was innocent – has no civil recourse against that judge for the harm he/she caused. Beyond that, it is unknown if a single judge has been disciplined for his participatory role in the conviction of an innocent person. This emphasizes that there is simply no cost to a judge for presiding over the wrongful conviction of an actually innocent person.

The shield of immunity judges have granted to themselves from being civilly responsible for the damage they inflict on people who appear before them highlights that, for all intents and purposes, judges have no real accountability to the general population in the United States.²⁷⁵ This is true whether they are a political appointee or elected to their position. For an elected state judge to be voted out of office for outrageous conduct is no punishment when that judge then gets to retire and take life easy on a comfortable pension paid by the very people that voted the judge out of office. Appointed federal judges do not even have the check of being removable when “the people” get upset with them, since they cannot be removed for anything less than committing a serious crime.²⁷⁶

The disturbing reality of total judicial unaccountability was recognized by former U. S. Supreme Court Chief Justice Harlan Fiske Stone when he wrote, “While unconstitutional exercise of power by the executive or legislative branches of the Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of restraint.”²⁷⁷ In a similar vein, lawyer and social commentator Gerry Spence wrote in *From Freedom To Slavery*:

Judges can commit nearly every variety of injustice that satisfies their whim of the moment. ... Worse is the intellectual and moral lethargy judges demonstrate year after year with empty droning opinions – opinions without meat or bone that leave the people starving for justice. Judges can go crazy – indeed many seem mad – but unless they are foaming at the mouth and tearing their robes into small pieces, they are permitted to send men to prison, to deny the helpless their just dues, and to interpret the laws of the land.²⁷⁸

Operating under conditions of personal non-accountability that effectively make them independent from censure by the people, judges are safe to perform their role as the conductors who keep the assembly-line of the law enforcement

²⁷⁴ *Pierson*, 386 U.S. at 553-54.

²⁷⁵ There is no bar in the Constitution relieving judges from being as personally accountable civilly for what would be actionable harm, if caused by any non-governmentally employed person.

²⁷⁶ See U.S. CONST. art. I, § 1.

²⁷⁷ Richard J. Neuhaus, *The Judicial Usurpation of Politics*, FIRST THINGS, Nov., 1997, at 19.

²⁷⁸ SPENCE, *supra* note 8, at 113.

system humming smoothly along.²⁷⁹ The huge numbers of innocent men and women who are thrown on the conveyor belt and crushed as the gears grind away are treated as if they are unknown, faceless, and their sole value as a human being is being used as fuel to keep the “law enforcement” machine running. If a judge ever has a pang of conscience about his or her complicity in this process for which they have no accountability, they can console themselves by engaging in the same flight of fantasy that Federal Judge Learned Hand did when he wrote: “Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream.”²⁸⁰

IX. CONCLUSION

In 1804 Judge William Cranch wrote: “In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge.”²⁸¹ Based on that standard it is reasonable to conclude that insofar as the criminal law is concerned, there is no longer any such thing as the “rule of law” in the United States.²⁸² In criminal cases there is the rule of the subjective personal opinions of the trial judge and the judges considering the appeal of a conviction.²⁸³ Although rulings reflect the subjective

²⁷⁹ BLUMBERG, *supra* note 23, at 23.

²⁸⁰ *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

²⁸¹ WILLIAM CRANCH, Preface, 1 Cranch iii (1804), available at The Founders' Constitution, http://press-pubs.uchicago.edu/founders/documents/a3_1s28.html (last visited Mar. 19, 2003).

²⁸² John Paul Stevens expressed this sentiment in his dissent in *Bush*, 531 U.S. at 128-29 (Stevens, J. dissenting). He stated, “Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.” *Id.*

²⁸³ In *Judges on Trial*, Judge Jerome Frank devoted a number of pages to explaining that every step of the judicial process is inherently fraught with the judge's subjective evaluation and emotional responses to the case. Frank, *supra* note 5, at 167-178. Even such outwardly objective aspects of a case, such as “‘finding’ of ‘facts’ ... is inherently subjective.” *Id.* at 169. Judge Frank cites Tourtoulon's observation that an experienced judge can make rulings based on the length of the opposing party's noses and no one would be any the wiser. *Id.* at 169. Judge Hutcheson made it clear the dominant role of emotions in a judge's decisions is only unknown to those outside the judicial loop, when he noted judges “really decide by feeling, by hunching, and not by ratiocination.” *Id.* at 170 (quoting from Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929)). Judge Frank quantifies the subjectivism of judicial decision making in the formula RxSF=D:

R (A judge's interpretation of the legal rules and laws applying to a case)

x

SF (The judge's subjective evaluation of a case's facts)

D (The judge's decision)

Id. at 326.

Judge Frank also offers a formula for explaining the inner works of how the judge arrives at his subjective interpretations and evaluations, SxP=D:

S (Stimuli that influence the judge)

x

P (Personality of the judge)

D (Decision of the judge)

opinion of the judge(s) involved and any outside influences on them, a veneer of objectivity must be maintained:

“Of course, the motives of a judge’s opinion may be almost anything – a bribe, a woman’s blandishments, the desire to favor the administration or his party, or to gain popular favor or influence; but those are not sources which jurisprudence can recognize as legitimate.”²⁸⁴

The overtly subjective evaluation inherent in the ‘harmless error rule’ is symbolic of the degree to which a judge’s personal assessment of a case is the primary factor determining its outcome at the trial level, and then on appeal.²⁸⁵ Another indicator of that subjectivity is the prevalence of one or two vote majority decisions in appellate courts that reflect the political alignment of the judges.²⁸⁶ These subjective evaluations are most freely expressed in unpublished decisions in which precedents interfering with a desired resolution can effectively be disregarded.

Far from condemning the blatant judicial disregard for the rule of law, the Supreme Court majority is driving it. In his last Supreme Court dissent, Justice Thurgood Marshall recognized that “Power, not reason, is the new currency of this Court’s decisionmaking.”²⁸⁷ That condition can have particularly far reaching consequences for the politically powerless, one of which is the de facto third-world treatment of those people by state and federal judges. As the gatekeeper of the law enforcement system, the conduct and attitude of judges is at the forefront of the reasons contributing to the entrapment of unconscionable numbers of innocent, but powerless, people within that system, up to and including the strapping of them to gurneys carried into death chambers.²⁸⁸

The many widely publicized cases of innocent men being released after years

Id. at 182. Judge Frank observes the real world effect of the subjective decision making process is, “The uniformity and stability which the rules may seem to supply are therefore often illusory, chimerical.” *Id.* at 328.

²⁸⁴ *Id.* at 178 (quoting attorney John Chipman Gray).

²⁸⁵ See LAFAYE, ISRAEL & KING, *supra* note 181.

²⁸⁶ Although no one will dispute that two plus two equals four regardless of any contrary opinion, there is nothing to prevent a judge seeking to support a personal or political agenda from subjectively voting in a case the equivalent that two plus two equals five. A judge’s subjective opinions are not constrained by the rigors of mathematical logic or scientific facts. Judges do not limit basing case decisions on subjective personal considerations, but extend it to their interpretation of constitutional provisions. See, e.g., *Silveira*, 2003 WL21004622 (demonstrating Judge Kozinski’s admonishment to his colleagues against “using our power as federal judges to constitutionalize our personal preferences.”) (dissenting from denial of rehearing en banc).

²⁸⁷ *Payne*, 501 U.S. at 844. Justice Marshall also noted the Court’s pattern of ignoring its own precedents in cases involving “procedural and evidentiary rules” while adhering to them in “property and contract” rights cases. *Id.* at 850-51. The former types of “rules” predominately affect the politically impotent, while the latter predominately affect the politically powerful. *Id.*

²⁸⁸ See *supra* note 145 and accompanying text (“7% of capital cases nationwide are reversed because the condemned person was found to be innocent.”). However the many erroneous capital convictions that are not rectified is indicated by the execution of over 40 people that have convincing cases they were innocent, and the many more that remain imprisoned. See *Forejustice, The Innocents Database*, at http://forejustice.org/search_idb.htm (last visited Mar. 19, 2003).

on death row represent only a minute fraction of the innocent men and women entrenched at any given time within the state and federal law enforcement system.²⁸⁹ The ongoing generation of wrongful convictions indicates that they are not an aberration, but result from the system functioning as it is intended to.²⁹⁰ As the overseers of that system, judges perform an essential role in the assembly line production of those illegitimate convictions.²⁹¹ Furthermore, the complicity of judges in the generation of those wrongful convictions underscores how out of touch they are with the human cost of the violence they participate in.²⁹²

The reality of today is that the law enforcement process presided over by judges has blurred its distinguishment of the guilty from the innocent to the point that they routinely appear to those in that system to be one and the same. Given that skewered thinking, it is apropos to paraphrase a comment Aleksandr Solzhnitsyn made about the Soviet system in his essay *The Smitterers*, ‘judges stand crookedly from which position the vertical seems a ridiculous posture.’²⁹³

This brief essay has only scratched the surface of exploring the multitude of factors and their nuances related to the state and federal judiciaries contribution to wrongful convictions. However, it can confidently be said that until state and federal judgeships are depoliticized and judges are held personally, directly and openly accountable for the violence they initiate with the words they speak and write, they will continue to inflict egregious harm on multitudes of innocent people with scant regard for the human consequences of their actions.

²⁸⁹ See, e.g., Sherrer, *supra* note 138, at 43 (estimating that there are over 1.3 million people at any given time within the custody of the law enforcement system in this country).

²⁹⁰ See Forejustice, *The Innocents Database*, at http://forejustice.org/search_idb.htm (last visited Mar. 19, 2003). Included are a minimum of 33, and a maximum of 269 wrongful convictions for the decades from 1900 through the present time. *Id.* The two decades with the least cases are 1900 and 1910, which would be expected given that the harmless error rule wasn’t adopted in this country until 1919. *Id.*

²⁹¹ See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, A STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 8 (1971) (“Urban courts dispense ‘discount’ justice by methods that are openly contemptuous of individual liberty, mass-producing both illegitimate convictions and disrespect for the law.”).

²⁹² Accepting the veracity of Lord Acton’s adage about the corrupting nature of power leads to the logical conclusion that since this is the wealthiest and most powerful country in the world, that the state and federal judiciaries integrally involved in protecting that system of money and power are the most corrupt of any country in the world. See Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887), in 1 THE LIFE AND LETTERS OF MANDELL CREIGHTON, at ch. 13 (Louise Creighton ed. 1904), available at <http://www.bartleby.com/66/9/2709.html> (“Power tends to corrupt, and absolute power corrupts absolutely.”).

²⁹³ This is a paraphrase from an observation of Aleksandr Solzhenitsyn, in which he “describes the intelligentsia’s position as *standing crookedly* - from which position the vertical seems a ridiculous posture.” ALEKSANDR SOLZHENITSYN, FROM UNDER THE RUBLE 249 (Aleksandr Solzhenitsyn ed. 1975).

GUILTY UNTIL PROVEN INNOCENT: THE CASE OF HERMAN DOUGLAS MAY

by *Beth Albright** and *Debbie Davis†*

I. INTRODUCTION

On September 18, 2002, Herman Douglas May was released from the Kentucky State Penitentiary in Eddyville after DNA tests showed that he did not commit the crime he had been convicted of 13 years earlier at the age of 17.¹ This article serves to retrospectively analyze the facts and tribulations of Herman May's erroneous conviction and also, discusses how the latest in DNA technology and diligent representation led to Mr. May's sudden release.

II. THE CASE HISTORY²

On May 22, 1988, at approximately 3:00 a.m., a woman went to the home of a friend.³ She testified that the front porch and front room lights were on at the friend's house, so she went to the door and knocked.⁴ As she was doing this, she observed a man walking from behind the friend's house.⁵ She made eye contact with him as he walked away toward some trees.⁶

In addition to the house lights, an operable streetlight was located on the far end of each of the yards adjoining the friend's.⁷ When no one answered the door, the victim returned to her car, wrote a note and placed it on her friend's car windshield.⁸ As she returned to her car, she saw the previously observed man running toward her from the trees.⁹ When he reached her, he hit her in the eye, knocked her against the car and tried to cover her mouth.¹⁰ Dragging her into the

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¹ Commonwealth v. Herman May, No. 88-CR-0098 (Dist. Ct. Ky. Oct. 13, 1988), *vacated*, No. 88-CR-0098 (Dist. Ct. Ky. Sept. 18, 2002).

² All of the following information regarding Herman May's case comes from the trial records, case files and the authors' knowledge through discussions with Herman Douglas May and his family.

³ Trial Video, Commonwealth v. Herman May, No. 88-CR-0098 (Dist. Ct. Ky. Oct. 13, 1988).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Trial Video, *May* (No. 88-CR-0098).

dark area between two houses, he pulled off her clothes and then raped and sodomized her.¹¹

At this point, a police car summoned by a neighbor, who heard the victim's cries arrived.¹² The attacker fled on foot before the police reached the victim and the police were unable to apprehend him.¹³ The police testified that the victim was naked and claimed she had been beaten, raped, and sodomized.¹⁴

At the hospital, the staff examined the victim and prepared a rape kit using swab samples from her hair, nails and vagina.¹⁵ A photograph was taken of the victim documenting the injuries to her face and eye.¹⁶

According to the testimony of witnesses, the victim described her assailant as a white male in his early 20's, of thin build, with "really mean eyes," and long hair clumped together as though it was dirty or greasy.¹⁷ Additionally, the victim allegedly described the color of the assailant's hair to various witnesses as light colored, chocolate brown, and black or brown.¹⁸ Based on the victim's description, a composite of the assailant was made and put on the front page of the local paper in an effort to identify the assailant.¹⁹ Shortly after the attack, the victim was shown videotape and photographs of potential suspects but she did not recognize any of them as her assailant.²⁰

Mr. May became a suspect approximately two weeks after the rape when police learned he possessed a guitar, which had been stolen around the time of the rape from a location nearby.²¹ At trial, there was testimony that Mr. May had possessed the guitar for approximately two weeks before asking a friend to pawn it for him.²² Thereafter, Mr. May was identified by the victim from a photo lineup and, pursuant to a search warrant, a male rape kit was performed.²³ The evidence suggested that one of the hairs found in the victim's pubic hair matched the pubic hair of the defendant.²⁴ However, all DNA testing was inconclusive.²⁵

Mr. May, convicted of first-degree rape and first-degree sodomy, received a sentence of 20 years' imprisonment.²⁶ His family and attorneys spent the next several years trying to prove his innocence through numerous appeals but were unsuccessful.²⁷ It was not until 12 years later that the Kentucky Innocence Project and two law students from Chase College of Law offered Herman

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* There was no mention in the trial testimony that the individual who fled on foot was carrying anything and the only property found at the scene was a hat.

¹⁴ Trial Video, *May* (No. 88-CR-0098).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* The victim denied ever saying her assailant's hair could have been chocolate brown or black.

¹⁹ Gayle Coulter, *New Trial Sought in Sex Crime*, St. J.(Ky.), June 12, 2002, at 1.

²⁰ Trial Video, *May* (No. 88-CR-0098).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See, e.g., *May v. Commonwealth*, No. 90-SC-232-MR (Ky. 1991).

May one last ray of hope.²⁸

III. THE PATH TO A WRONGFUL CONVICTION

Many people ask what could possibly go so wrong in our justice system that would allow an innocent person to spend years in prison for a crime they did not commit. According to statistics gathered by Barry Scheck, of the National Innocence Project, the most common factors leading to wrongful convictions include: false confessions, informants/snitches, false witness testimony, bad defense lawyering, police misconduct, junk or defective science, prosecutorial misconduct, and mistaken identifications.²⁹ Two factors played a dominant role in Mr. May's erroneous conviction: police misconduct related to the victim's mistaken identification of Mr. May, and defective science.

A. *Police Misconduct Causes False Identification*

The most common factor leading to wrongful convictions is mistaken or false identification of the alleged attacker by the victim.³⁰ Police misconduct ranks third in the most common factors leading to wrongful conviction.³¹ Police misconduct played a major role in the mistaken eyewitness identification of Mr. May and the faulty identification provided key evidence leading to Mr. May's conviction.

1. The Identification Process

At the age of 17, Herman May had already committed several minor incidents as a juvenile.³² He was not a favorite with some of the city police.³³ Around the time that the rape occurred, a guitar and amplifier were stolen from a

²⁸ The Kentucky Innocence Project team that worked on the Herman May case consisted of two attorneys from the Kentucky Department of Public Advocacy and two law students, the authors, from Northern Kentucky University, Salmon P. Chase College of Law. The students from Salmon P. Chase worked on the case from November 2001 until Herman May's release. Prior to November 2001, a student from University of Kentucky School of Law worked on the case for a semester. The Kentucky Innocence Project is a program of the Kentucky Department of Public Advocacy. The Kentucky Department of Public Advocacy partners with Salmon P. Chase College of Law to offer the classroom component and clinical opportunity to the students. The Kentucky Department of Public Advocacy offers professionals to the class including an investigator. Professor Mark Stavsky is the professor in charge of the project at Salmon P. Chase College of Law.

²⁹ BARRY SCHECK, ACTUAL INNOCENCE, RAISING THE BAR 4 (Ky. Bar Ass'n Ann. Convention, June 2002). See also Innocence Project, at <http://www.innocenceproject.org> (last visited June 2, 2003). See generally Shelia Martin Berry, *Bad Lawyering: How Defense Attorneys Help Convict the Innocent*, 34 N. KY. L. REV. 487 (2003).

³⁰ *Id.*

³¹ *Id.*

³² This information became public record when Mr. May was tried as an adult for the alleged rape. Trial Video, *May* (No. 88-CR-0098).

³³ This information was supplied by family and others in the community.

truck in the same neighborhood.³⁴ Two weeks later, May was questioned by the police about the theft.³⁵ After he admitted taking the guitar, because its owner allegedly owed him money, the police began to question him about the rape.³⁶ May told them that he knew nothing about the rape other than what he had read in the local newspaper.³⁷

In the week after the rape, the victim had been shown two lineups of possible assailants but she was not able to identify her attacker.³⁸ The police artist prepared a sketch of the attacker based on her description.³⁹ This sketch appeared in the local paper for almost a month.⁴⁰ During this time, the victim never changed her description of the attacker.⁴¹

Approximately a month after the rape, the victim left on a two-week vacation to California.⁴² After the police interrogated May regarding the rape, a detective flew to California with a photo line-up of seven young men with red or light-hair, one of which was May.⁴³ Before viewing the line-up, the victim asked to see the composite she had made several weeks earlier.⁴⁴ The detective told her that he had forgotten to bring it with him.⁴⁵

Erroneously, the detective had the victim sign the back of the photo line-up prior to the identification, where the names of the non-suspects were listed and the only unnamed photo was that of Mr. May.⁴⁶ After several minutes, the victim identified three of the seven men as possible attackers.⁴⁷ Finally, she narrowed her identification of her attacker to May saying that she would never forget the "mean look in his eyes."⁴⁸

Although he did not match the sketch of the attacker that ran in the paper,⁴⁹ based on the victim's identification, May was charged with the rape and sodomy. At the time, there were several other suspects in the case but they were never interviewed.⁵⁰

³⁴ The complaint filed with the court stated that on June 6, and June 14, 1988 Herman May committed the offence of receiving stolen property over \$100 (two counts) in violation of K.R.S. § 514.110 because he was in possession of a Gibson bass guitar that had been reported stolen. Trial Video, *May* (No. 88-CR-0098).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* The police never charged Herman May with the theft even though he possessed the stolen item and confessed to its theft.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Trial Video, *May* (No. 88-CR-0098).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Trial Video, *May* (No. 88-CR-0098).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* Instead of being the 20-something year-old male with long chocolate brown hair that she originally described in her composite, Herman May was a 17-year-old boy with short red hair.

⁵⁰ *Id.*

2. Suggestive Identification Procedures

Thirty-three percent of wrongful conviction cases involve allegations of police misconduct including allegations of undue suggestiveness in pre-trial identification procedures.⁵¹ Of the first 60 wrongful convictions revealed by new DNA technology, 53 were based, to some extent, on confident but mistaken eyewitness identifications.⁵² The Associated Press reported that 110 wrongly convicted people were convicted of rape, 24 were found guilty of rape and murder, while six were convicted of murder only.⁵³ These convictions follow the same pattern of the first 60 cases: "Nearly two-thirds were convicted with mistaken eyewitness testimony from victims and bystanders."⁵⁴

Most individuals believe that they could identify a perpetrator of a crime if it happened right in front of them.⁵⁵ However, when given a computer test to identify the perpetrator of a crime watched on video, most people identify the wrong person.⁵⁶ "The reason for this is because our retrospective certainty is inflated when an external source (the lineup administrator [or person providing the test]) provides confirming feedback."⁵⁷

The United States Supreme Court addressed this issue in *Neil v. Biggers*.⁵⁸ In that case, the Court held that in reviewing whether pretrial identification procedures were so impermissibly suggestive as to require disallowance of identification testimony at trial, the totality of the circumstances would be viewed.⁵⁹ Five years later, in the case of *Manson v. Brathwaite*, the Supreme Court set forth several considerations to be followed in viewing the totality of the circumstances.⁶⁰

First, courts must examine the opportunity of the witness to view their assailant at the time of the crime.⁶¹ In the *May* case, the victim was struck in the face by the attacker within seconds of the attack.⁶² The attack happened in the dark at 3:00 a.m.⁶³ The opportunity of the victim to view her attacker was less

⁵¹ SCHECK, *supra* note 29, at 12.

⁵² James M. Doyle, et al., *The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures*, 16 CRIM. JUST. 12, 12 (2001).

⁵³ Gary L. Wells, et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, J. APPLIED PSYCHOL. 87, 112-120 (2002) available at <http://www.psych-server.iastate.edu/faculty/gwells/> (last visited June 1, 2003).

⁵⁴ *Id.*

⁵⁵ *Id.* Both authors have taken the online test to eyewitness identification. Both were unable to identify the true perpetrator of the crime when presented with an online photo lineup of potential perpetrators.

⁵⁶ *Id.*

⁵⁷ Wells, *supra* note 53.

⁵⁸ See Pat Priest, Article, *Eyewitness Identification and the Scientific Method*, 65 TEX. B.J. 974, 976 (2002) (citing elements established in *Neil v. Biggers*, 409 U.S. 188 (1972) and *Manson v. Brathwaite*, 432 U.S. 98 (1977)).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Priest, *supra* note 58, at 976.

⁶² Trial Video, *May* (No. 88-CR-0098).

⁶³ *Id.*

than one minute and happened in the dark.⁶⁴

Second, courts should consider the degree of the witness's attention at that time of the event.⁶⁵ The victim in the *May* case, according to the trial tapes, had less than 30 seconds to view her attacker before he hit her in the face⁶⁶ and just prior to raping her, the assailant dragged her behind a house and thus diminished any effect of the street lighting.⁶⁷

Third, the accuracy of the victim's initial description of the assailant is examined.⁶⁸ Turning to the facts: instead of being the 20-something year-old male with long, chocolate brown hair that the victim originally described in her composite, Herman May was a 17-year-old boy with short, red hair.⁶⁹

Fourth, the victim's level of certainty concerning the identification plays a role.⁷⁰ Here, the victim did not initially identify Mr. May and it took several minutes for her to pick out three of the suspects in the third line-up she was shown.⁷¹ After 20 minutes of looking at the pictures, she picked out Mr. May while stating, in contrast, that "she would never forget the mean look in his eyes."⁷²

Finally, the amount of time that elapsed between the event and the identification can affect the accuracy of the process.⁷³ In the *May* case, approximately one month passed between the event and the eventual identification.⁷⁴ The victim had asked the detective to refresh her memory from the composite she made at the time of the rape but the detective had forgotten to bring it with him.⁷⁵ This suggests some memory loss or uncertainty as to her attacker's features.

If these considerations by the United States Supreme Court were followed in the *May* case, it seems that the eyewitness identification testimony should have been suppressed at trial. However, the Kentucky Supreme Court did not agree on appeal.⁷⁶ After applying the same standards, the Kentucky Supreme Court held that there was no reversible error in the *May* identification procedures.⁷⁷

3. Needed Reforms

"[R]esearchers believe that the rate of wrongful conviction is unnecessarily high and can be reduced dramatically by changing the procedures used to obtain

⁶⁴ *Id.*

⁶⁵ Priest, *supra* note 58, at 976.

⁶⁶ Trial Video, *May* (No. 88-CR-0098).

⁶⁷ *Id.*

⁶⁸ Priest, *supra* note 58, at 976.

⁶⁹ Trial Video, *May* (No. 88-CR-0098).

⁷⁰ Priest, *supra* note 58, at 976.

⁷¹ Trial Video, *May* (No. 88-CR-0098).

⁷² *Id.*

⁷³ Priest, *supra* note 82, at 976.

⁷⁴ Trial Video, *May* (No. 88-CR-0098).

⁷⁵ *Id.*

⁷⁶ *May v. Commonwealth*, No. 90-SC-232-MR (Ky. 1991).

⁷⁷ *Id.* But see *Christie v. Commonwealth of Kentucky*, 98 S.W.3d 485 (Ky. 2003) (ruling that expert testimony is admissible to explain the potential to misidentify a defendant if employing identification methods that increase the chances of erroneous identifications).

identification evidence.”⁷⁸ Further, “[f]alse identifications are also less likely if the witness is shown the photographs one at a time. . . before moving on to the next photograph.”⁷⁹ Recommendations to correct the problems with false eyewitness identification are:

- (a) The person who conducts the lineup should not be aware of which member of the lineup is the suspect (also referred to as *blind* or *double-blind* testing) . . . the witness should be told that the person administering the lineup does not know which person is the suspect . . .
- (b) Eyewitnesses should be told explicitly that the criminal may not be in the lineup to prevent witnesses from feeling that they must make an identification.
- (c) The suspect should not stand out in the lineup as being different from the fillers based on the eyewitness’s previous description . . .
- (d) A clear statement as to the eyewitness’s confidence that the identified person is the actual culprit should be taken from the eyewitness at the time of the identification and prior to any feedback from the police that would inform the witness of whether the suspect had been selected . . . switching to sequential lineups and videotaping lineups.⁸⁰

Certainly, there is need for reform in tactics used by law enforcement agencies regarding eyewitness identification. If the singular goal is to catch the true perpetrator of the crime, logic would suggest that these reforms would come quickly. Hopefully, as the public who serve as jurors become more cognizant of the problems surrounding eyewitness identification, law enforcement will change its procedures to align more closely with the recommendations put forth by leaders in psychology and experts in eyewitness misidentification.⁸¹

⁷⁸ Avraham M. Levi & R.C. L. Lindsay, Article, *Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations*, 7 PSYCHOL. PUB. POL. & L. 776, 776 (2001).

⁷⁹ See Priest, *supra* note 58, at 976.

⁸⁰ Levi & Lindsay, *supra* note 78, at 777-78. See also Edmund L. Higgins, M.D. and Bruce L. Skinner, M.D., *Establishing the Relevance of Expert Testimony Regarding Eyewitness Identification: Comparing Forty Recent Actual Cases with the Psychological Studies*, 30 N. Ky. L. Rev. 471, 473(2003) (explaining that courts should allow the use of expert testimony to explain to jurors the inherent problems associated with eyewitness identifications).

⁸¹ Levi & Lindsay, *supra* note 78, at 778. See also U.S. Dept. of Justice, Office of Justice Programs, *Eyewitness Evidence: A Guide for Law Enforcement*, Oct. 1999, at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf> (last visited June 12, 2003) (instructing that the manner in which an identification procedure is conducted can affect the reliability, fairness, and objectivity of the identification).

B. *Microscopic Hair Comparison Matches As Junk Science*

Of the first 70 cases involving those who were found wrongfully convicted, 21 of the cases involved microscopic hair comparison matches that turned out to be wrong.⁸² Microscopic hair analysis has been coined as junk science because it involves “scientific testimony or evidence based upon unreliable methodology.”⁸³ Researchers of forensic methodologies claim that:

[f]orensic hair examiners using traditional microscopic comparison techniques cannot state with certainty, except in extremely rare cases, that a found hair originated from a particular individual There is no data available regarding the frequency of a specific microscopic hair characteristic . . . or trait in a particular population.⁸⁴

Dr. Edward Blake, a leading DNA authority in California, argues that law enforcement agencies are to blame for the misuse of hair analysis.⁸⁵ “They’ve made it [microscopic hair analysis] into a corrupt tool.”⁸⁶ Further, “[i]f people over the last 30 years had followed the guidelines and principles of hair comparison and adequately explained and understood what they mean, we wouldn’t be in this mess.”⁸⁷

In the *May* case, the prosecution at the original trial presented evidence that the human hair found at the scene of the crime was “similar in characteristic” to those of Mr. May and “could have” originated from him.⁸⁸ This was the only scientific evidence presented at the trial because DNA tests performed from evidence contained in the rape kit came back inconclusive due to the small size of the samples.⁸⁹

The admissibility of the evidence regarding hair analysis was not challenged during Mr. May’s trial.⁹⁰ However, such evidence has been previously admitted in Kentucky courts⁹¹ and, therefore, the Kentucky Supreme Court found no

⁸² See SCHECK, *supra* note 29, at 4.

⁸³ Michael P. O’Conner, *Actual Innocence: Five Days to Execution and Other Dispatches of the Wrongfully Convicted*, 42 JURIM. J. 221, 226 (2002) (reviewing BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES OF THE WRONGFULLY CONVICTED* (Doubleday 2000)).

⁸⁴ S.L. Smith & C.A. Linch, *A Review of Major Factors Contributing to Errors in Human Hair Association by Microscopy*, 20 AM. J. FORENSIC MED. PATHOL. 269, 273 (1999).

⁸⁵ Mark Wrolstad, *Hair Matching Flawed as a Forensic Science – DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide*, DALLAS MORNING NEWS, March 31, 2002, Second Edition, at 1A.

⁸⁶ *Id.*

⁸⁷ *Id.* According to Dick Bisbing, the top trace evidence authority with McCrone Associates in Chicago, there is loosing confidence within the industry in standard hair analysis and that junk science has degraded the trial process.

⁸⁸ Trial Video, *May* (No. 88-CR-0098).

⁸⁹ *Id.*

⁹⁰ *May*, No. 90-SC-232-MR.

⁹¹ *Acrey v. Commonwealth*, 299 S.W.2d 748 (1950). See also *Murphy v. Commonwealth*, 652 S.W.2d 69 (1983).

reversible error in admitting the microscopic hair analysis testimony at trial.⁹² Today, with the advent of new scientific technology since 1996, microscopic hair analysis would not be enough to sustain a conviction.⁹³ “[I]n most courtrooms, conventional hair-comparison evidence is no longer allowed without corroborating evidence and hair analysts’ testimony has lost its luster.”⁹⁴

Mr. May’s conviction was based on the use of this “junk science” [microscopic hair analysis] and the mistaken identification of a victim who had been shown a very suggestive line-up by police who may have had a reason to dislike Mr. May.⁹⁵ Clearly, police misconduct by using suggestive identification procedures, mistaken eyewitness identification, and the use of junk science led the jury to convict Herman May of a crime that he did not commit and for which he spent 13 and a half years of his young life in prison.

IV. PATH TO RELEASE⁹⁶

Herman May’s path to freedom was a long and rocky road. Mr. May had served 12 years of his 20-year sentence when contacted by the Kentucky Innocence Project.⁹⁷ After preliminary research on Herman May’s files, the Kentucky Innocence Project team determined that the evidence from the first trial would need to be tested before any conclusion as to Mr. May’s possible innocence could be made. The first step was to find the evidence.

The Franklin County Courthouse had sustained a fire since May’s first trial was held there. The original area housing the evidence had also been flooded and all evidence had been relocated. Some of the evidence from May’s case was found in different boxes and bags, some of which were unmarked on the

⁹² See *May*, No. 90-SC-232-MR.

⁹³ See Wrolstad, *supra* note 85, at 1A.

⁹⁴ *Id.*

⁹⁵ *May* (No. 88-CR-0098).

⁹⁶ For a more detailed explanation of the technical aspects of standard DNA testing, see any of the DNA referenced articles contained herein. Y-Chromosome DNA testing is on the cutting edge of DNA analysis. See generally U.S. DEPT. OF JUSTICE, *infra* note 105.

⁹⁷ The Kentucky Innocence Project sent 20-page information packets to Kentucky inmates requesting information about their cases, whether DNA evidence was involved and if there were witnesses to the original crime. To explain DNA evidence to inmates, author Debbie Davis used construction paper and wet her hands; demonstrating how fingerprints may be subject to disfiguration at the scene and may not be reliable. Then Davis used colored candies to describe to the inmate what DNA was. She gave each person sitting at the table a different colored candy. Davis explained that the inside of the candy is made up of generally the same components: sugar, water, chocolate etc. What made the particular piece of candy unique was the outer coating or color. Davis correlated the color to what was specific and individual about each one of us - our DNA. After the inmate received this explanation, and had a thorough understanding, Davis took the candies and mixed them in a bag. The candies were then poured upon the table and each participant was given their particular colored candy. Davis explained that the DNA testing would show they were at the crime scene if they were indeed there. If they were the true perpetrator of the crime, the chance was slim to none that the results would come back exonerating them of the crime even if there were multiple perpetrators.

outside.⁹⁸ The trial tapes were missing as were the victim's jeans and panties. After the authors searched, recorded and catalogued all of the found evidence, the county clerk finally found the singed, but viewable, trial tapes in the back of an old filing cabinet.⁹⁹

In March 2002, the Kentucky Innocence Project team filed a motion for new trial based on new scientific evidence and requested DNA testing.¹⁰⁰ The defense team asserted that new scientific technology in DNA analysis, unavailable at the time of the original trial, might provide conclusive results and evidence as to the true attacker's identity.¹⁰¹ The prosecution objected, arguing that Herman May had been found guilty in the prior trial by a jury and, in the alternative, that if the motion was granted, that all the evidence should be re-tested.¹⁰² Because of limited funds, the Kentucky Innocence Project requested that just the slides from the female rape kit be re-tested using new DNA testing called Polymerase Chain Reaction (PCR).¹⁰³ Franklin Circuit Court Judge, Roger Crittenden, ordered that slides from the female rape kit be sent to Orchid Cellmark in Maryland for DNA testing.¹⁰⁴

A. DNA Evidence

What sets us apart from each other and gives us our individual characteristics is our DNA (Deoxyribonucleic acid).¹⁰⁵ These individual characteristics are referred to as genetic traits.¹⁰⁶ These "[g]enetic traits are determined by the precise sequence of four different base pairs found on DNA segments known as alleles."¹⁰⁷ DNA uses these alleles to determine genetic code.¹⁰⁸ What creates

⁹⁸ Evidence from the fire and flood had been repackaged into large brown banker's boxes. These boxes contained evidence from different trials. Although some of the bags were unmarked, the evidence inside the bags was clearly marked as to the case that particular evidence belonged. The victim's jeans and panties from Herman May's original trial were never located.

⁹⁹ Based on the authors' participation in finding the evidence.

¹⁰⁰ Kentucky does not have a statute that allows for post-conviction DNA testing. In states that do not have post-conviction DNA statutes, the only way to petition the court to access DNA testing is a motion for a new trial or a petition for writ of habeas corpus. See Holly Schaffter, Note, *Post-Conviction DNA Evidence: A 500-Pound Gorilla in State Courts*, 50 *DRAKE L. REV.* 695, 705 (2002). See also Ky. RCr 10.06 (1) (establishing that the time for motion for new trial based on new evidence shall be made within one year of judgment or later if for good cause). See, e.g., *Mullins v. Commonwealth*, 375 S.W.2d 832, 834 (Ky. 1964); *Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Orchid Cellmark is a leader in DNA testing. Orchid Biosciences, Inc., *Orchid Cellmark*, at <http://www.cellmark-labs.com>. Orchid Cellmark uses the most sensitive method of DNA testing, PCR, available in the scientific community today.

¹⁰⁴ Two days after the judge issued his order, the Kentucky Innocence Project coordinator was notified that the female rape kit could not be located. The Franklin County Court clerk ultimately found it in a brown paper bag contained in an unmarked box and separate from the other evidence.

¹⁰⁵ U.S. DEPT. OF JUSTICE, *POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 1* (A Report from Nat'l Comm'n on the Future of DNA Evidence) (Sept. 1999).

¹⁰⁶ See Diana L. Kanon, Note, *Will the Truth Set Them Free? No, But the Lab Might: Statutory Responses to Advancements in DNA Technology*, 44 *ARIZ. L. REV.* 467, 468 (2002) (stating that DNA is present in every cell that contains a nucleus).

¹⁰⁷ *Id.*

differences between individuals is how our DNA, or genetic code, is written at conception.¹⁰⁹ Unless we are part of identical twins, our DNA is specific only to us.¹¹⁰

The science of DNA has revolutionized medicine and scientific research.¹¹¹ A swipe from inside the cheek on a cotton tip applicator can determine if you carry a gene for Alzheimer's or other genetic diseases.¹¹² Amniotic fluid can be tested to predetermine the sex of the unborn child or to determine paternity.¹¹³ Any cell or fluid from the body can be tested and the result will be a DNA fingerprint of that individual.¹¹⁴

DNA has become of critical importance in criminal cases¹¹⁵ but is of particular importance in rape cases¹¹⁶ where bodily fluids and cellular evidence collected from the scene and the victim can be submitted to the crime lab for DNA analysis.¹¹⁷ The crime of rape consists of close bodily contact between the victim and the rapist. Bodily fluids can be exchanged in the vagina, anus, and mouth and other cells may also be present in these same areas as well as under the victim's fingernails or in cuts on the victim.¹¹⁸ Using DNA analysis, these bodily fluids and other cellular matter contain the unique genetic markers that

¹⁰⁸ *Id.*

¹⁰⁹ David DeFoore, Comment, *Post-conviction DNA Testing: A Cry for Justice from the Wrongly Convicted*, 33 TEX. TECH L. REV. 491, 494 (2002).

¹¹⁰ See Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. CIV. RTS. L. J. 233, 238 (2002).

¹¹¹ See generally Jerilyn Stanley, *Review of Selected 2000 California Legislation: DNA: Law Enforcements Miracle of Technology: The Missing Link to Truth and Justice*, 32 McGeorge L. Rev. 601, 612-13 (2001) (describing ways to identify a person's disposition to disease or future developmental problems).

¹¹² *Id.* at 612 ("A cocktail napkin used by President Reagan . . . could have predicted and reported on the President's propensity for Alzheimer's disease . . .").

¹¹³ See generally U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, *GENETIC WITNESS: FORENSIC USES OF DNA TESTS OTA-BA-438* at 7 (Washington DC: U.S. Gov't Printing. Off. July 1990) (discussing applications of DNA techniques).

¹¹⁴ *Id.* at 4.

¹¹⁵ DNA has been used in criminal cases since 1986. National Institute of Justice, *The DNA "Wars" Are Over*, (1996), at <http://www.pbs.org/wgbh/pages/frontline/shows/case/revolution/wars.html>. Dr. Alec J. Jeffreys, of Leicester University, England, was asked by police to verify if the individual who had confessed to two rape / murder cases was in fact guilty. *Id.* Dr. Jeffrey's tests proved that the suspect did not commit the crimes. *Id.* The police then began to collect blood samples from several thousand male individuals in the surrounding area to identify a new suspect. *Id.* Dr. Jeffreys is responsible for coining the term "DNA fingerprints." *Id.* Robert Melias of England became the first person convicted of rape on the basis of DNA evidence in 1987. *Id.*

¹¹⁷ One of the first cases where DNA was used to convict an alleged rapist was in November of 1987. See *State v. Andrews*, 533 So.2d 841 (Fla. Dist. Ct. App. 1989). The circuit court in Florida convicted Tommy Lee Andrews of rape after DNA tests were conducted that matched his DNA from a blood sample to the semen specimen from the victim. National Institute of Justice, *The DNA "Wars" Are Over*, (1996), at <http://www.pbs.org/wgbh/pages/frontline/shows/case/revolution/wars.html>.

¹¹⁷ See U.S. CONGRESS, *supra* note 113, at 6.

¹¹⁸ See generally Reliagene Tech. Inc., *Case Studies*, at http://www.reliagene.com/index.asp?content_id=y_case&menu_id=rd (last visited June 1, 2003) (describing where evidentiary DNA analysis can be obtained).

can reveal the rapist's identity.¹¹⁹

In Kentucky, as in most states, DNA evidence is admissible at trial.¹²⁰ However, in May's trial, the DNA analysis used could not determine his guilt or innocence.¹²¹ His parents exhausted their life savings on the testing during the original trial, but all the tests returned with inconclusive results.¹²² Today's technology has advanced the precision of DNA analysis.¹²³ Older testing methods required a large sample to determine the identity of the attacker.¹²⁴ Furthermore, if the sample did not have enough of the male attacker's DNA, the DNA analysis would result in inconclusive results.¹²⁵ This may explain the inconclusive results presented at May's first trial.

Today, DNA testing is sophisticated and precise.¹²⁶ Scientists can reach from the cell into the mitochondria to perform the DNA analysis¹²⁷ and because of these new technological advancements; tests that would have been inconclusive in the past may provide conclusive evidence of the perpetrator's identity or the non-guilt of the accused.¹²⁸

B. *Using the New Y-Chromosome Test in Male-Rapist / Female-Victim Cases*

During a rape there is a mixture of bodily fluids.¹²⁹ Sometimes the attacker does not ejaculate or withdraws just before ejaculation.¹³⁰ This creates an environment where there may be male cells or spermatozoa present after the rape

¹¹⁹ *Id.*

¹²⁰ See generally *Fugate v. Commonwealth*, 993 S.W2d 931, 938 (Ky. 1999). See also *Johnson v. Kentucky*, 125 S.W3d 258, 261 (Ky. 1999) (holding that DNA evidence is admissible in Kentucky); *State v. Woodall*, 385 S.E.2d 253 (W.Va. 1989). West Virginia was the first state to rule on the admissibility of DNA evidence. National Institute of Justice, *The DNA "Wars" Are Over*, (1996), at <http://www.pbs.org/wgbh/pges/frontline/shows/case/revoltion/wars.html>. Ironically, the DNA evidence in the case was inconclusive and Woodall was convicted of rape based on the inconclusive tests. However, later DNA testing determined that Woodall was innocent.

¹²¹ Trial Video, *May* (No. 88-CR-0098).

¹²² *Id.*

¹²³ See generally DeFoore, *supra* note 109, at 495-98 (citing various improvements in DNA analysis).

¹²⁴ *Id.* at 495.

¹²⁵ Trial Video, *May* (No. 88-CR-0098) (information discussed at trial).

¹²⁶ See Holly Schaffter, Note, *Post-Conviction DNA Evidence: A 500-Pound Gorilla in State Courts*, 50 *DRAKE L. REV.* 695, 699-701 (2001) (establishing that odds of two Caucasian Americans sharing the same profile as being less than 1 in 100 billion).

¹²⁷ See generally Alice Isenberg & Jodi M. Ore, *FORENSIC SCIENCE COMMUNICATIONS* (FBI Crime Lab July 1999).

¹²⁸ See U.S. DEPT. OF JUSTICE, *supra* note 105, at 2 (stating that DNA evidence that was inconclusive before, may provide conclusive evidence with new improved DNA testing capabilities).

¹²⁹ See generally Trial Video, *May* (No. 88-CR-0098). During the trial several DNA tests were described including how DNA testing can be done from several different types of specimens. *Id.* Buccal Swab specimens are collected by swiping a soft cotton swab inside the cheek. *Id.* Blood, amniotic fluids, old blood tubes, biopsy specimens, bone, teeth, tissue, and semen (with and without sperm) can be used for DNA testing. *Id.*

¹³⁰ See M. Prinz et al., *DNA Commission of the International Society of Forensic Genetics: Recommendations on Forensic Analysis Using Y-Chromosome STRs*, 124 *FORENSIC SCIENCE INT'L* 5, 6 (2001) (discussing the entire procedure of test and usefulness in forensic investigations).

but not equal to the female components in the resulting fluid mixture.¹³¹ This situation makes it difficult to obtain a conclusive result using standard DNA testing because the female DNA overpowers the reading of the male DNA in the analysis.¹³²

At conception we receive genetic information from our father and our mother and a male child will have a Y-Chromosome as part of his genetic makeup.¹³³ Y-Chromosome DNA testing allows the Y-Chromosome to be isolated apart from the female X-Chromosome to determine the male attacker's identity.¹³⁴ The Y-Chromosome test is the perfect solution when previous, traditional DNA tests are inconclusive because there is more female DNA in the bodily fluid mixture than male DNA.¹³⁵ Therefore, the Y-Chromosome test is of particular importance in a rape case where the female victim is known but what is unknown is the victim's attacker.¹³⁶

The female rape kit from Mr. May's first trial contained three slides.¹³⁷ After the judge ruled on the motion for a new trial and the slides were located, they were analyzed for traditional DNA pursuant to the court's order. The first two slides were sent to Cellmark with no result.¹³⁸ The last slide was sent to the lab and underwent DNA analysis but the result was inconclusive.¹³⁹ In mid-June, 2002, subsequent Y-Chromosome testing came back excluding Herman May as the source of the cells in the rape kit.¹⁴⁰

At the next hearing in the Franklin County Courthouse, on June 21, 2002, the prosecutor argued that the reason the Y-Chromosome DNA evidence came back excluding Herman May was because the victim's attacker did not ejaculate on the night of the rape.¹⁴¹ Further, the prosecution requested that the DNA of a second man, who had allegedly had sex with the victim some 48 hours before the rape, be tested and that all of the samples and any evidence, including the hat left behind by the attacker,¹⁴² also be subject to DNA analysis.¹⁴³ Judge Crittenden

¹³¹ *Id.*

¹³² *Id.*

¹³³ See generally Carol A. Cassell, *Sexuality* (World Book Online Americas Edition), at <http://www.aolsvc.worldbook.aol.com/ar/?na/ar/co/ar503930.htm> (discussing the basic DNA make-up of individuals when they are born).

¹³⁴ *Id.*

¹³⁵ See Prinz, *supra* note 130 (citing another example where, in a situation when a victim was strangled to death, fingernail scrapings can also be used to determine the attacker's identity through Y-chromosomal DNA testing).

¹³⁶ See Reliagene, *supra* note 118 (describing an example where, in a criminal paternity case involving the mother and alleged father, the Y-Plex 6 [Y-chromosome] kit was used to determine if the man that was tested was the father of the unborn male child).

¹³⁷ Trial Video, *May* (No. 88-CR-0098).

¹³⁸ See Gayle Coulter, *DNA Test on Hair Crucial in Bid for New Rape Trial*, ST. J. (Ky.), July 26, 2002, at 1.

¹³⁹ *Id.*

¹⁴⁰ Gayle Coulter, *Man Freed by DNA Says He's Ready for Privacy Now*, ST. J. (Ky.), Sep. 22, 2002, at 1.

¹⁴¹ See Courtney Kinney, *DNA Tests Ordered in Rape Case*, KY. POST, June 22, 2002, at 2K. Prosecution stating that, "It's like somebody arguing 'My client's innocent because his fingerprints weren't found at the scene of the crime.'" *Id.*

¹⁴² The authors spoke with Cellmark at length in the spring of 2002 concerning the evidence that

granted the request and ordered the testing.¹⁴⁴

The Kentucky Innocence Project team had done their homework and researched in-depth about the latest in DNA analysis and specifically Y-Chromosome DNA testing.¹⁴⁵ In most rape cases, the scientific procedure used is to identify semen present at the scene by microscopic identification of spermatozoa, acid phosphate activity, or the detection of Prostate Specific Antigen (PSA).¹⁴⁶ Sometimes in a sexual assault there is no deposit of semen, however, scientists have developed new technology to identify Y-Chromosomes from male cells, such as skin, found in specimens prepared from the female rape kit.¹⁴⁷ Scientists use fluorescent in situ hybridization (FISH) to detect the Y-chromosome from the male cells to identify the victim's attacker.¹⁴⁸

Further studies have revealed that even if the victim's attacker was clinically sterile as the result of a vasectomy, scientists can still isolate the Y-chromosome from samples prepared from the rape kit.¹⁴⁹ In a study conducted by Dr. Shewale:

[p]ost-vasectomized azoospermic semen samples were analyzed for short tandem repeats (STR) on the Y-chromosome by using Y-PLEX 6 and the 310 Genetic Analyzer . . . [there were] a number of epithelial and/or white blood cells . . . present in these azoospermic samples. DNA profiles of these vasectomized males [was successfully] obtained for all six Y-STR loci . . .¹⁵⁰

Therefore, because scientists can determine the identity of an alleged attacker even though he was clinically sterile and did not deposit sperm or semen at the scene, the prosecutor's argument against a new trial for Mr. May was without merit and was not upheld by scientific facts.¹⁵¹

In July, Orchid Cellmark returned the DNA test results requested by the

was available for testing. At that time, Cellmark told them exactly what would produce positive results and what would not due to the age of the evidence.

¹⁴³ During the first trial the victim testified she had never had sex before the rape. After the Y-Chromosome test came back excluding Herman May the victim changed her story and identified an African American male that she had intercourse with two days prior to the rape. It was the prosecutor's argument that the test came back excluding Herman May because the attacker did not ejaculate and that new DNA analysis would show that the DNA from the rape kit belonged to this consensual sexual partner of the victim from two days prior.

¹⁴⁴ Trial Video, *May* (No. 88-CR-0098).

¹⁴⁵ See Reliagene, *supra* note 118.

¹⁴⁶ See generally M. Dziegielewski et al., *Use of a Y Chromosome Probe As an Aid in the Forensic Proof of Sexual Assault*, 47 J. OF FORENSIC SCI., 601, 604 (2002) (describing the different procedures available to identify semen at a crime scene).

¹⁴⁷ *Id.* (describing how scientists in the study were able to detect Y-Chromosomal DNA from vaginal swabs taken from the victim and contained in the female rape kit).

¹⁴⁸ *Id.*

¹⁴⁹ J. G. Shewale et al., Abstract, *DNA Profiling of Azoospermic Semen Samples From Vasectomized Males By Using Y-Plex 6-amplification Kit*, 48 J. OF FORENSIC SCI., 127, 127-29 (2003) (describing test results obtained from post-vasectomized semen samples).

¹⁵⁰ *Id.*

¹⁵¹ Kinney, *supra* note 141.

prosecutor.¹⁵² Although this round of DNA testing was also favorable to Mr. May, the prosecutor submitted yet another motion asking the court to send hairs from the scene for mitochondrial DNA testing¹⁵³ and again, the court granted the motion.¹⁵⁴ With mitochondrial testing there is only one marker so “the probability of a random match is much higher between mt DNA [mitochondrial DNA] samples than between nuclear DNA samples.”¹⁵⁵ Thus, “mt DNA [mitochondrial DNA] is significantly less probative of identity than is nuclear DNA.”¹⁵⁶

The mitochondrial DNA results from Reliagene were delivered to Judge Roger Crittenden on the morning of September 18, 2002. After spending considerable time on the telephone with the lab regarding the results of the test, Judge Crittenden faxed an order to the Kentucky State Penitentiary in Eddyville.¹⁵⁷ Stating that, “his decision was based on results of DNA tests which constituted newly discovered evidence of ‘such decisive value or force . . . that it would probably change the result if a new trial should be granted.’” The Judge ordered the immediate release of Herman May.¹⁵⁸ At 3:05 p.m., Herman May walked out of the Kentucky State Penitentiary a free man.¹⁵⁹

¹⁵² Coulter, *supra* note 140.

¹⁵³ The mitochondria lies within the human cell and is referred to as the powerhouse of the cell and its testing takes much longer than the standard DNA cellular testing. Mitochondrial DNA testing was ordered because it is the only type of DNA testing that can be done on human hair but it is not as discriminating as standard nuclear DNA testing.

¹⁵⁴ This time the DNA was sent to Reliagene in New Orleans because Cellmark does not do mitochondrial DNA testing. In addition to performing traditional DNA testing Reliagene is a leading manufacturer of Y-Chromosome testing kits. *See generally* Reliagene, *supra* note 118.

¹⁵⁵ M.M. Holland & T.J. Parsons, *Mitochondrial DNA Sequence Analysis: Validation and Use for Forensic Casework*, 11 FORENSIC SCIENCE REV. 25, 25-51 (1991).

¹⁵⁶ *See* Innocence Project, *New Technology in the Pipeline*, at <http://www.innocenceproject.org/dnanews/index.php> (last visited June 2, 2003).

¹⁵⁷ *See* Coulter, *supra* note 19, at 1.

¹⁵⁸ *Id.*

¹⁵⁹ Herman May is not the first person to be released based on Y-chromosomal DNA evidence. *See generally* Peter J. McQuillan, *Innocence Project, DNA News*, at http://www.innocenceproject.org/case/display_profile.php?id=72 (last visited on Jan. 12, 2003). In May 2000, then Governor, George W. Bush, pardoned A. B. Butler who was convicted in 1983 for rape. *Id.* In 1999 Cellmark performed DNA testing on the slides prepared from the female rape kit. *Id.* The initial testing was inconclusive. *Id.* The evidence was then sent to the Medical Examiner’s office in New York. *Id.* The New York Medical Examiner performed the new Y-Chromosome testing. *Id.* A. B. Butler was excluded as the source of the semen from the female rape kit. *Id.* Unlike the Herman May case, “the prosecution joined with Butler’s attorney to file for clemency.” *Id.* Butler was released in January of 2000, but the pardon did not come until May of that year. *See generally* U.S. DEPT. OF JUSTICE, *supra* note 128, at 2. The FBI maintains a DNA database called the Combined DNA Index System (CODIS). *Id.* DNA from unidentified individuals can be entered into the database to see if the database contains a match from a known offender. *Id.* The database is based on standard DNA testing. *Id.* Therefore, the Y-Chromosome testing done in the *May* case cannot be entered into CODIS to see if a known offender actually perpetrated the crime against the victim. *Id.* There is a movement to maintain a Y-Chromosome database, but the data maintained in this database is not as encompassing as the CODIS system is to date. *Id.*

V. THE SEARCH FOR FREEDOM

Freedom, it is a simple word to an American, but for the innocent people that languish in American prisons, dreams of it are a cruel nightmare. For Herman May that nightmare ended on September 18, 2002.¹⁶⁰ He celebrated his freedom with \$25, the clothes on his back, and a small white trash bag of personal effects.¹⁶¹

When Mr. May walked out of the prison that afternoon, he was outside on the front steps alone, un-cuffed and unshackled, for the first time in 13 years. The criminal justice system that had wrongly incarcerated him for 13 years threw him out with the same force that was used to incarcerate him. He sat in the warm afternoon sun waiting for someone to come and take him home.

Emotionally and psychologically, Mr. May is a teenager with no work skills, no job training or life skills, no understanding of computers, few social skills, and no money or other resources to address his future.¹⁶² In addition, he has a chronic and recurring medical condition that can create debilitating pain. He has no medical insurance and, even if he could work, his medical condition would certainly exclude him from coverage under the pre-existing medical conditions of most insurance policies.¹⁶³ While many programs exist to reestablish the lives of released convicted criminals,¹⁶⁴ there are little or no services provided for persons

¹⁶⁰ See Coulter, *supra* note 140, at 1. This is the date that Judge Roger Crittenden, of the Franklin County Circuit Court, released Herman May from Eddyville.

¹⁶¹ The clothes on his back consisted of sweat shorts that had been cut from long sweat pants and a sweatshirt cut around the neck and sleeves for the summer weather.

¹⁶² Although Mr. May is partially disabled and cannot work, the state has no monetary assistance to offer him. He was, however, able to apply for emergency food aid and receive food stamps. However, both the Kentucky Senate and the House have introduced bills to provide compensation to those wrongly convicted. See 2003 Ky. Acts, ch. 44; S.B. 21 and H.B. 525 at <http://www.lrc.state.ky.us/record/03rs/hb525/bill.doc>. The Senate version provides:

on presentation of requisite proof to the Board of Claims or the Circuit Court, a wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts: 1. The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining discharge from confinement in the state correctional institution; and 2. An amount as the proof may determine appropriate as to allow for recovery of those economic and noneconomic damages ordinarily recoverable in ordinary civil actions, except that a claim brought before the Board of Claims may not be for more than the maximum jurisdictional limit of the Board of Claims as set out in KRS 44.070.

The House version allows for a claim of \$25,000 for each year wrongly incarcerated.

¹⁶³ Mr. May does not qualify under the State of Kentucky Medicaid system guidelines for a medical card. See David Goldfarb, *Medicaid FAQ - Who is covered by Medicaid*, at <http://www.seniorlaw.com/medicaidfaq.htm+who> (Feb. 13, 2003) (detailing the requirements needed in order to qualify for Medicaid).

¹⁶⁴ See Kentucky State Corrections, *Probation & Parole*, at <http://www.cor.st.ky.us/p&p.htm> (last visited Feb. 15, 2003) (describing programs such as rehabilitation, employment, and housing, which are available to those convicted criminals who have been released.).

who are released from prison due to their wrongful conviction.¹⁶⁵ Disenfranchised and abandoned, individuals like Mr. May, are left to succeed or fail on their own. As a society, however, we have a vested interest in helping Mr. May and others like him to successfully resettle and to hopefully become self-sufficient for the cost of failing the wrongfully convicted is high indeed.¹⁶⁶ It cost the Commonwealth of Kentucky approximately \$260,000 to wrongfully incarcerate Herman May and we may never know of the true cost to society for failing to bring the real perpetrator to justice.¹⁶⁷

VI. THE SEARCH FOR JUSTICE IN TRUTH

Justice is coming to more and more wrongly convicted innocent people everyday.¹⁶⁸ To date, 130 innocents have been released through the efforts of the Innocence Project alone.¹⁶⁹ Herman May is not yet officially among those numbers because until June 2003, he had not been exonerated of his crime. The order releasing Mr. May in September of 2002, vacated his sentence and conviction but the charges against him remained.¹⁷⁰ After Judge Crittenden ordered Mr. May's release, the Kentucky Commonwealth Attorney had two

¹⁶⁵ *But see* CAL. PENAL CODE §1400 (2000) (providing for post-release compensation of \$100 per day of incarceration after conviction); 2001 MD. LAWS 418 (2001) (providing for compensation); NY CT. CLMS. ACT § 8-B (1994) (providing for compensation for wrongful conviction to be decided by the Court of Claims with no limit on maximum awards); TEX CODE ANN. § 103.001 (2001) (entitles a person who is granted a pardon or granted relief based on actual innocence to compensation; Chapter 103.052 entitles claimant to \$25,000 multiplied by the number of years imprisoned if under 20 years and a maximum of \$500,000 if the sentence served was 20 years or more). For a complete list of legislation by state see *Innocence Project*, at <http://www.innocenceproject.org> (last visited June 2, 2003).

¹⁶⁶ *See* Kentucky State Corrections, *Facts & Figures*, at <http://www.cor.state.ky.us/facts-n-figures/default.htm> (last visited Jan. 12, 2003). According to the Kentucky Department of Corrections, the cost to incarcerate an individual in the Kentucky state penitentiary is \$60.22 per day (based on the fiscal year 2000-01). *Id.* This figure does not include the monies expended by the Commonwealth for the original trial, recent attorney fees, or recent DNA testing. *Id.* If the true perpetrator is still at large and committing more crimes, the cost to the citizens is well over this figure. If the wrongly incarcerated are released with no help and no support system, they may return to the system with a true charge on their head.

¹⁶⁷ *Id.*

¹⁶⁸ Radical Media Inc, *Innocence Project*, at <http://www.innocenceproject.org> (Jan. 16, 2003). *See also* Don Babwin, *Illinois Governor Clears Out Death Row*, KY. ENQUIRER, January 12, 2003, at A1. (quoting Governor George Ryan: "commuted the sentences of 167 condemned inmates . . . , clearing Illinois' death row in a move unprecedented in scale in U.S. history." Governor Ryan states that he "[was] not prepared to take the risk that we may execute an innocent person.").

¹⁶⁹ *Innocence Project*, at <http://www.innocenceproject.org> (last visited June 2, 2003). This figure does not include those released through the efforts of private attorneys or other organizations devoted to justice for the wrongly imprisoned. According to the Justice Project, in 1998, death row inmate Anthony Porter came within two days of being executed before his volunteer lawyer, Daniel Sanders, persuaded the Illinois Supreme Court to stay his execution. Thereafter, Mr. Porter was exonerated through the efforts of Sanders, a volunteer investigator and a student. *See* the Justice Project, at <http://justice.policy.net/proactive/newsroom/release> (last visited June 13, 2003).

¹⁷⁰ Trial Video, *May* (No. 88-CR-0098).

choices: dismiss the case or go forward with a new trial. It took 10 months for a decision to be reached by the Commonwealth's Attorney.¹⁷¹

Thankfully, the issue of resettlement has finally come to the forefront of the innocence movement with new programs being developed to address the needs of those wrongly convicted.¹⁷² The ultimate goal of resettlement programs is to provide housing, social services, basic job skills, education or training and other aid based on the needs of the particular individual.¹⁷³ According to Shelia Berry, of Truth in Justice Organization, a website devoted to freeing the wrongly convicted and to exposing injustices:

only 16 states provide for the payment of reparations to innocent people convicted of crimes they did not commit and subsequently exonerated. Only New York and West Virginia have no limit. California caps reparations at \$10,000, and the federal government is stingiest of all, granting a maximum of \$5,000. The other 36 states provide no compensation at all.¹⁷⁴

At this time, many roadblocks are in place to keep the individual imprisoned. First, only 26 states allow access to DNA testing after conviction and most of these have restrictions, such as unrealistic deadlines for completing the testing or

¹⁷¹ In an agreement with the prosecution, Herman May pled guilty to a recent charge of receiving stolen property and in exchange, Franklin County Circuit Judge Roger Crittenden set aside a five-year prison sentence, giving May credit for time served under his wrongful conviction. However, Commonwealth Attorney Larry Cleveland has said he would seek new charges against May if any additional information is developed linking him to the crime.

¹⁷² Truth in Justice Foundation, *Truth in Justice*, at <http://www.truthinjustice.com> (June 2, 2003). The first step to a successful transition would be a psychosocial evaluation to be completed by the wrongly incarcerated. *Id.* Information from this evaluation will be reviewed to determine a plan at release for the individual and services needed for their success. *Id.* Optimally, this process would begin many months before the individuals' expected release. *Id.*

¹⁷³ Jennifer Friedlin, *New Project Aims to Assist Exonerated Prisoners*, NEW YORK TIMES, May 8, 2003. The Cardozo Innocence Project and the DNA Identification Technology and Human Rights Center of Berkley, California have formed The Life After Exoneration Project. The Project will coordinate a national network of resettlement programs to assist the wrongfully convicted in restarting their lives.

Lola Vollen, director of the DNA Identification Technology and Human Rights Center, which will design the services for the exonerated, said many people who are wrongly imprisoned leave prison emotionally and financially broken. An initial evaluation of 50 of the 230 people in America who have been exonerated showed that all of those found innocent suffered profound losses during incarceration. 'At the end of the process, they are in a situation that is far worse than when they went in,' said Vollen, who will direct the new program.

Id.

¹⁷⁴ *Truth in Justice*, at <http://www.truthinjustice.org/tjf.htm> (last visited June 11, 2003). See also The Innocence Project, at <http://www.innocenceproject.org/legislation/index.php> (last visited June 11, 2003) (providing a detailed list of state legislation, enacted and pending, affecting the right to DNA testing, preservation of evidence, and compensation for the wrongful convicted.). See *supra* note 162 and accompanying text.

limiting testing in other ways.¹⁷⁵ Second, our system is reluctant to allow those incarcerated to have the DNA evidence from their case tested.¹⁷⁶ Many times the prosecutorial view is that a jury convicted the individual and that is a good enough reason for the individual to remain incarcerated.¹⁷⁷ Third, it is expensive to have DNA tested and to afford counsel to work on cases.¹⁷⁸ Currently, the state of Kentucky has one piece of legislation on the books.¹⁷⁹ House Bill 4 was passed last year that guarantees preservation of DNA evidence but gives only death row inmates access to DNA testing and only when there is a “reasonable probability” that the evidence might alter their cases.¹⁸⁰

VII. CONCLUSION

Many Americans take their freedom for granted and most of us rarely, if ever, think about the issues contained within this article unless we, or one of our family members, are somehow affected. The National Innocence Project, co-founded by Barry Scheck and Peter Neufeld,¹⁸¹ the Kentucky Innocence Project, and the other

¹⁷⁵ See, e.g., FED. R. CRIM. P. 33 (2003) (“Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty.”).

¹⁷⁶ See generally, Karen Saunders, *Harvey v. Horan: Prisoners Should Have a Post-Conviction Constitutional Right Under 42 U.S.C. § 1983 To Access Evidence for DNA Testing*, 30 N. Ky. L. Rev. 625 (2003).

¹⁷⁷ *Id.*

¹⁷⁸ The 107th Congress ended its term without adopting H.R. 912, *The Innocence Protection Act of 2001*, which would provide that the cost of DNA testing ordered shall be paid by the government or the applicant, as courts may order in the interests of justice, but an applicant shall not be denied testing because of an inability to pay the cost of testing. See <http://capwiz.com/jp/issues/bills/?bill=36899> (last visited June 9, 2003).

¹⁷⁹ Referring to H.R. 4, 2002 (Ky. 2002) (last action Apr. 2, 2002) describing process of permitting death row inmates DNA testing, procedures for storage, and payment procedures).

¹⁸⁰ *Id.* See also Innocence Project, at http://www.innocenceproject.org/legislation/display_description.php?id=hb273&sort=jurisdiction&filterStatus=all&filterJurisdiction=Kentucky&filterCategory=all. The law:

only covers capital cases. In order to gain approval for testing: a) identity must have been an issue at trial, b) the biological evidence must not have been previously subjected to DNA testing or, if previously subjected to DNA testing, the type of testing requested in the motion must be capable of resolving an issue not resolved in the previous test, c) applicant must show by a preponderance of evidence that ‘it is possible to subject the biological evidence to forensic DNA testing or retesting, and an exclusionary result would necessarily exonerate the applicant.’ Statute of limitations of 2 years (testing is unavailable to an offender sentenced before Sept. 1, 2001 when technology was not available at the time of trial but was available before Sept. 1, 2001, unless a motion is made before Sept. 1, 2003.) Provision to preserve evidence once a motion is filed.

¹⁸¹ See Peter J. McQuillan, *Innocence Project, DNA News*, at <http://www.innocenceproject.org>.

numerous Innocence Projects around the United States,¹⁸² the Truth in Justice Foundation, and others like it,¹⁸³ have one common goal - to help the wrongly convicted receive the justice due them, not only by helping them be released from prison and exonerated, but also by helping them regain their hopes and their lives.

¹⁸² See Innocence Project, *Primary Resources*, at <http://www.innocenceproject.org/links/index.php> and Innocent Project, *Network Board of Directors*, at http://www.innocenceproject.org/about/other_projects.php (last visited Jan. 13, 2003) (listing other innocence projects across the country).

¹⁸³ See Truth in Justice Foundation, *Truth in Justice*, at <http://www.truthinjustice.com> and Spiritlink, *Truth in Justice*, at <http://www.truthinjustice.org> (last visited June 10, 2003).

WHETHER A TRIAL COURT'S FAILURE TO ANALYZE THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY UNDER *DAUBERT* CONSTITUTES GROUNDS FOR OVERTURNING A CONVICTION IN: *UNITED STATES V. SMITHERS*

by Matt Benson*

I. INTRODUCTION

In *United States v. Smithers*,¹ the Sixth Circuit Court of Appeals considered the issue of whether the analysis implemented by the district court in excluding expert testimony regarding the reliability of eyewitness identification, constituted an abuse of discretion, thus warranting the reversal of a defendant's bank robbery conviction.² The court considered an appeal by the defendant Smithers in which he advanced three separate grounds for overturning his district court bank robbery conviction.³ However, the court felt it necessary to address only one issue on appeal: whether the district court properly considered the admissibility of the testimony of the defendant's expert witness, Dr. Fulero, as it pertained to eyewitness identification.⁴ Smithers argued that the district court's denial of his motion to introduce testimony by an eyewitness identification expert warrants the reversal of his conviction, while the government maintained that the district court judge was well within his discretion in excluding the testimony.⁵ The Sixth Circuit Court of Appeals concluded that the district court should have conducted a hearing under *Daubert v. Merrell Dow Pharmaceuticals*,⁶ and analyzed the evidence to determine whether the proffered testimony reflects scientific knowledge, and whether the testimony was relevant and would have aided the jury.⁷ The court held that the district court's failure to perform the correct legal analysis as well as the district court's "experiment" rationale for excluding the testimony constituted an abuse of discretion, resulting in the reversal of defendant's bank robbery conviction.⁸

This note focuses on the applicable law concerning the admissibility of expert witness testimony, in particular as it pertains to scientific evidence, such

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¹ *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000).

² *Id.* at 310.

³ *Id.* at 308.

⁴ *Id.* at 310.

⁵ *Id.* at 311.

⁶ 509 U.S. 579 (1993).

⁷ See *Smithers*, 212 F.3d at 318.

⁸ *Id.*

as eyewitness identification procedures. It analyzes whether the Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals*⁹ mandates a particular analysis that must be performed whenever a trial court is presented with a decision regarding the admissibility of scientific expert witness testimony or whether a trial court has broad discretion in the procedures it utilizes to determine whether or not to admit such evidence.¹⁰ Specifically, this note explores whether the Sixth Circuit's decision in *United States v. Smithers*,¹¹ which overturned a bank robbery conviction based on the district court's failure to implement the analysis set forth in *Daubert*, was proper.¹² Section II of this note explores the background of the law as it pertains to scientific expert witness testimony, with particular focus on the impact *Daubert* had on the law of evidence. The facts of *Smithers* are also detailed in Section II. Section III describes the holding and reasoning implemented by the Sixth Circuit Court of Appeals in *Smithers*. Section IV analyzes the court's decision and proposes that although a trial court judge retains wide discretion in making evidentiary determinations, the United States Supreme Court mandates a basic inquiry into the relevancy and reliability of expert witness testimony, which was lacking in *Smithers*. In addition, Section IV proposes that the comments made by the trial court judge alone warranted the reversal of *Smithers* conviction, as they acted to deprive him of his right to a fair trial. Section V provides a brief summary of the analysis implemented within this note and the conclusions that were generated.

II. BACKGROUND AND FACTS

A. *The Use of Expert Witness Testimony*

While the reliability of expert testimony is often questioned, its use has been prevalent in American courts for several centuries.¹³ In the 1923 case of *Frye v. United States*,¹⁴ the United States Court of Appeals for the District of Columbia Circuit formulated a test for the admissibility of scientific testimony, which would be the dominant standard in federal courts for nearly the next seventy years.¹⁵ The *Frye* court determined that for scientific expert testimony to be admitted, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."¹⁶ From this somewhat muddled statement a "general acceptance test" was derived, which consisted of a two-part analysis, in which a court posed with such an evidentiary issue must: (1) identify the field in which the underlying

⁹ 509 U.S. 579 (1993).

¹⁰ *Id.*

¹¹ 212 F.3d 306 (6th Cir. 2000).

¹² *Id.* at 318.

¹³ See Jay P. Kesan, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 GEO. L.J. 1985, 1988 (1996) (discussing the historical treatment of expert witness testimony by English and American courts).

¹⁴ 293 F. 1013 (D.C. Cir. 1923).

¹⁵ 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 203 (4th ed. 1992).

¹⁶ See *Frye*, 293 F. at 1014.

scientific principle or methodology falls, and (2) determine whether that principle has been generally accepted by members of that field.¹⁷ However, despite its predominant use in a majority of the federal courts for the next seventy years, the *Frye* test received much criticism.¹⁸

Nonetheless, when the Federal Rules of Evidence went into effect on July 1, 1975,¹⁹ the *Frye* test was clearly the majority rule in federal courts.²⁰ However, the next eighteen years provided for much debate among courts and commentators as to whether the *Frye* test had survived or had been superseded by Rule 702 and Rule 703.²¹ Rule 702 suggests that a court should admit expert scientific testimony if it will assist the trier of fact in understanding certain evidence or in determining a particular issue.²² Rule 703 limits the scope to which an expert can testify to and gives the judge power to exclude certain evidence if it is unduly prejudicial.²³

B. *The Daubert*²⁴ *Opinion*

In 1993, the United States Supreme Court attempted to end much of the confusion regarding what impact, if any, the Federal Rules of Evidence had on the *Frye* general acceptance test, with its decision in *Daubert v. Merrell Dow Pharmaceuticals*.²⁵ In *Daubert*, two minor children, Jason Daubert and Eric Schuller, and their parents, William and Joyce Daubert, Michael Schuller, and Anita de Young, brought suit in California state court against Merrell Dow, alleging that the children's birth defects had been caused by the mothers' prenatal ingestion of Bendectin, a prescription antinausea drug marketed by Merrell Dow.²⁶ After the case was removed to federal court on diversity grounds, Merrell Dow moved for summary judgment, contending that Bendectin does not cause birth defects and that the Dauberts and Schullers would be unable to produce any admissible evidence to the contrary.²⁷ In support of its motion, Merrell Dow presented epidemiological evidence from an expert who concluded

¹⁷ See *Kesan*, *supra* note 13, at 1990 (describing the two-part general acceptance test formulated by most courts after the *Frye* decision).

¹⁸ *Id.* at 1991 (discussing the difficulty many courts had in applying the test, as it provided no guidance on how to categorize the relevant scientific field or how general acceptance in that particular field was to be defined).

¹⁹ *Id.* at 1993 (citing Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926).

²⁰ *Id.*

²¹ *Id.*

²² FED. R. EVID. 702. This Rule provides: "If scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

²³ FED. R. EVID. 703. This Rule provides: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." *Id.*

²⁴ *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

²⁵ 509 U.S. 579 (1993).

²⁶ *Id.* at 582.

²⁷ *Id.*

that the use of Bendectin during the first trimester of pregnancy has not been shown to be a risk factor for human birth defects.²⁸ In response to the motion, the Dauberts and Schullers sought to introduce scientific evidence from eight experts, who conducted their own experiments in reaching the conclusion that Bendectin can cause birth defects.²⁹ Ultimately, the district court granted Merrell Dow's summary judgment motion, concluding that while the evidence presented by Merrell Dow's expert was admissible, contradictory evidence presented by the Dauberts and Schullers' expert witness was not, as it failed to meet the *Frye* general acceptance test.³⁰ The United States Court of Appeals for the Ninth Circuit affirmed,³¹ also relying primarily on the *Frye* general acceptance test in excluding the evidence of the Plaintiffs' expert witness testimony.³² The United States Supreme Court granted certiorari "in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony."³³

A unanimous United States Supreme Court, speaking through Justice Blackmun,³⁴ agreed that *Frye's* general acceptance test for the admission of scientific evidence was indeed superseded by the enactment of the Federal Rules of Evidence.³⁵ After analyzing the language of Rule 702, a majority³⁶ of the Court assigned a screening or gatekeeping role to trial court judges, in which they must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."³⁷ Also, relying on the language of Rule 702, the Court formulated a two-prong test that a trial court should undergo when faced with a determination as to the admissibility of expert scientific testimony.³⁸ First, the trial court must determine whether the expert is proposing to testify to "scientific knowledge."³⁹ Second, the trial court must assess whether the proposed testimony "will assist the trier of fact to understand or determine a fact in issue."⁴⁰ With respect to the first requirement, the Court stated, "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."⁴¹ According to the Court, a trial judge in making this initial determination must assess "whether the reasoning or

²⁸ *Id.*

²⁹ *Id.* at 583.

³⁰ *Id.* at 583-84 (citing *Daubert Inc. v. Merrell Dow Pharm.*, 727 F. Supp. 570 (S.D. Cal. 1989) (quoting *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978)).

³¹ See *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 584 (1993) (citing *Daubert Inc. v. Merrell Dow Pharm.*, 951 F.2d 1128 (9th Cir. 1991)).

³² *Id.* (citing *Frye v. United States*, 293 F. 1013, 1014 (1923)).

³³ *Id.* at 585 (comparing *United States v. Shorter*, 809 F.2d 54, 59-60 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 817 (1987) (applying the "general acceptance" standard), with *Deluca v. Merrell Dow Pharm., Inc.*, 911 F.2d 941, 955 (3rd Cir. 1990) (rejecting the "general acceptance" standard)).

³⁴ *Id.* at 580.

³⁵ *Id.* at 587.

³⁶ See *Daubert*, 509 U.S. at 580. Justice Blackmun was joined by Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas. *Id.* at 581. Chief Justice Rehnquist and Justice Stevens dissented. *Id.* at 598.

³⁷ *Id.* at 589.

³⁸ *Id.* at 592.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 590.

methodology underlying the expert's testimony is scientifically valid."⁴² In describing the second requirement, which ensured that the expert testimony was relevant, the Court relied on the plain language of Rule 702 and stated that Rule 702's "helpfulness standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."⁴³ In addition, the Court provided a list of general factors that may assist a trial judge in his inquiry, which included: whether the theory or technique can be or has been tested; whether the theory or technique has been subject to peer review or publication; the known or potential rate of error in the particular scientific technique; and the general acceptance of the methodology or technique in the scientific community.⁴⁴ Therefore, *Daubert* had the effect of replacing the "general acceptance test" of *Frye* with a two-part test premised on Rule 702,⁴⁵ which a trial court should utilize in determining issues of admissibility regarding expert witness testimony.⁴⁶

C. *Facts of United States v. Smithers*⁴⁷

On the morning of November 12, 1996, a man robbed the Monroe Bank and Trust in Terrence, Michigan, by approaching a bank teller, Teresa Marino, and handing her a note that read, "I have a gun. Give me your large bills."⁴⁸ Ms. Marino complied with the demand by giving the robber the money located within her teller drawer.⁴⁹ Still unsatisfied, the robber demanded more money and Ms. Marino unlocked her other teller drawer and gave him three more packs of large bills.⁵⁰ The robber repeated his demand for more money a final time, but when Ms. Marino told him that was all she had the robber abruptly ran from the bank.⁵¹ The entire incident lasted only about two minutes.⁵²

In addition to Ms. Marino, two other witnesses observed the robbery.⁵³ Debra White was also working as a teller that day when she noticed an unfamiliar customer standing at Ms. Marino's teller station.⁵⁴ After observing the man take a large sum of money and quickly exit the bank, she asked Ms. Marino if she had been robbed.⁵⁵ When Ms. Marino responded that she had, Ms. White yelled out that they had been robbed and went to lock the doors of the bank, at which time she saw the robber getting into the passenger side of a car parked in the parking lot.⁵⁶ Timothy Wilson was a customer who entered the bank at the same time as

⁴² See *Daubert*, 509 U.S. at 592-93.

⁴³ *Id.* at 591-92.

⁴⁴ *Id.* at 593-94.

⁴⁵ FED. R. EVID. 702.

⁴⁶ See *Daubert*, 509 U.S. at 597.

⁴⁷ 212 F.3d 306 (6th Cir. 2000).

⁴⁸ *Id.* at 308.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *Smithers*, 212 F.3d at 308.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

the robber and noticed him go straight to the teller and leave the bank quickly.⁵⁷

The three witnesses gave descriptions of the robber to investigators from the Monroe County Sheriff's Department later that day.⁵⁸ In addition, Ms. White described the car driven by the robber as a two-toned brown and black, late 1970's Monte Carlo, with a cream colored landau roof and an Ohio license plate.⁵⁹ It was this description and Ms. White's subsequent identification of the car, which lead police to the car's owner, James Smithers.⁶⁰ The police went to Smithers's home, where his wife informed them that he was at his parents' house.⁶¹ The police conducted a search of Smithers's home, which revealed no incriminating evidence.⁶² Ultimately, the police located Smithers at his parents' home, where he agreed to accompany the police to his apartment.⁶³ He informed the police that he had bought the vehicle from his brother-in-law, Steve Dallas, who still retained his own set of keys to the car.⁶⁴ Smithers informed the police that on the morning of November 12, 1996, he had noticed his rear license plate was missing and moved his front plate to the rear and that on various occasions he had noticed gas missing from the car.⁶⁵ Smithers consented to a search of the car, which also revealed no incriminating evidence.⁶⁶ He voluntarily went to the sheriff's department where he provided handwriting samples to the police and was also photographed and fingerprinted.⁶⁷ Detective Redmond, who photographed Smithers, recorded his height at 6' 6 1/2."⁶⁸

Later Detective Redmond prepared a photo spread, which consisted of six photographs, including a photo of Smithers.⁶⁹ Two days after the robbery, Redmond showed the photo spread to Ms. Marino, Mr. Wilson and Ms. White.⁷⁰ Ms. Marino and Mr. Wilson were unable to identify the robber from the photo spread, while Ms. White picked out Smithers as the robber.⁷¹ Immediately after identifying Smithers, Ms. White informed Ms. Marino that she had been able to identify the robber from the photo spread.⁷² In addition, laboratory analysis of Smithers's handwriting samples, as well as a fingerprint on the demand note used by the robber, yielded inconclusive results.⁷³

On June 16, 1997, a grand jury returned an indictment charging Smithers with one count of bank robbery in violation of 18 U.S.C. § 2113(a).⁷⁴ On

⁵⁷ *Id.*

⁵⁸ *Id.* at 308-09.

⁵⁹ *See Smithers*, 212 F.3d at 309.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See Smithers*, 212 F.3d at 309.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See Smithers*, 212 F.3d at 309.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

December 18, 1997, Smithers filed a motion *in limine* to determine the admissibility of certain expert testimony regarding the reliability of eyewitness identification.⁷⁵ After the commencement of the trial on January 14, 1998, the district court denied Smithers's motion *in limine*, reasoning that everything an expert would have to say about eyewitness identification was within the jury's "common knowledge" and that the court would give its own instruction on eyewitness testimony.⁷⁶ At this time, Smithers's attorney requested permission to make a written proffer regarding the expert witness testimony, which was allowed by the district court.⁷⁷ The government presented its case, which relied on eyewitness testimony from Ms. Marino, Ms. White and Mr. Wilson.⁷⁸ Despite their prior inability to identify Smithers as the robber from the photo spread, Ms. White and Mr. Wilson identified Smithers as the robber in court.⁷⁹ Ms. Marino and Ms. White testified that they did not recollect the robber having any distinguishing features.⁸⁰

After the government rested its case, Smithers filed his renewed motion *in limine* and offer of proof, regarding the expert testimony on eyewitness identification.⁸¹ This proffer detailed the anticipated testimony of Dr. Solomon Fulero, who the defendant asserted was an eyewitness identification expert.⁸² The proffer explained how Dr. Fulero's testimony would describe to the jury several general factors that may affect the accuracy and reliability of eyewitness testimony.⁸³ One factor alluded to in the proffer was "detail salience," which proposes that eyewitnesses tend to focus on unusual characteristics of the people they observe.⁸⁴ With respect to this issue, Dr. Fulero stated that "[h]ad Smithers been the robber, the eyewitnesses would have been able to recall the large scar located on Smithers' [sic] neck."⁸⁵

After hearing oral argument on Smithers's renewed motion, the district court ruled to exclude the expert testimony.⁸⁶ The rationale for the district court's determination was based primarily on Smithers's alleged delay in proffering the specifics of the evidence to the court.⁸⁷ However, the court also noted that Dr. Fulero's testimony was "not a scientifically valid opinion," and reasoned, "a jury can fully understand that its [sic] got an obligation to be somewhat skeptical of eyewitness testimony."⁸⁸ The district court believed that admitting Dr. Fulero's testimony was equivalent to declaring the defendant not guilty as a matter of law

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *Smithers*, 212 F.3d at 309.

⁷⁸ *Id.*

⁷⁹ *Id.* at 309-10.

⁸⁰ *Id.* at 310.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *Smithers*, 212 F.3d at 310.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

and that “[a]bsent the eyewitness testimony I don’t think there’s enough here to go to the jury.”⁸⁹ In disposing of the issue, the district court also concluded that, “I’m also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case. I recognize it’s the defendant’s fate that’s at stake, but you can always argue for a new trial if he’s convicted.”⁹⁰

After excluding the expert testimony, Smithers presented a few witnesses, most notably his wife, in order to establish an alibi defense.⁹¹ Ms. Smithers testified to Smithers, whereabouts during the time of the murder, remarked about her husband’s appearance, maintaining that he is 6’ 8” and weighed 245 pounds in November of 1996, and stated he has a four-inch long scar on the right front side of his neck.⁹²

Ultimately, the jury returned a verdict of guilty, and the district court sentenced Smithers to a forty-one month term of imprisonment.⁹³ Smithers timely appealed his conviction to the Sixth Circuit Court of Appeals and asserted three issues on appeal, only one of which was addressed by the Court: the exclusion of Dr. Fulero as an eyewitness expert.⁹⁴

III. HOLDING AND RATIONALE OF *UNITED STATES V. SMITHERS*⁹⁵

A. *The Majority Opinion*⁹⁶

The majority of the Sixth Circuit Court of Appeals held that the district court’s refusal to admit the expert testimony based on a lack of scientific validity in the testimony and on Smithers’s delay in proffering the specifics of the testimony constituted an abuse of discretion.⁹⁷ The majority concluded that the district court was under an obligation to conduct a hearing under *Daubert* in order to ascertain whether Dr. Fulero’s proffered testimony reflected scientific knowledge, and whether the testimony was relevant and would have aided the trier of fact.⁹⁸ In doing so, the Sixth Circuit reversed the district court’s conviction of Smithers and remanded the case for proceedings in accordance with their decision.⁹⁹

The Sixth Circuit began by providing the appropriate standard of review and stating that generally a trial court’s evidentiary determinations will not be disturbed, absent an abuse of discretion.¹⁰⁰ The court then discussed that while the use of expert testimony regarding eyewitness identification was initially

⁸⁹ See *Smithers*, 212 F.3d at 310.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 212 F.3d 306 (6th Cir. 2000).

⁹⁶ See *id.* at 307.

⁹⁷ *Id.* at 318.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 310-11.

discouraged in the 1970's, the emerging view is that expert testimony may be admissible in certain circumstances, such as on the subject of psychological factors which influence the memory process.¹⁰¹ The court noted that this trend is deserved based on the inherent unreliability that may accompany eyewitness testimony and the heavy reliance that juries tend to place on such testimony.¹⁰² As evidence, the court pointed to its own decision in *United States v. Smith*,¹⁰³ which allowed testimony from the same psychologist, Dr. Fulero, on the subject of eyewitness testimony.¹⁰⁴ The court discussed how its decision in *Smith* was premised on a four-part test derived from *United States v. Green*,¹⁰⁵ which *Smithers* asserted must govern the issue of admissibility in the present case.¹⁰⁶ However, the court surmised that given the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*,¹⁰⁷ the significance of their decision in *Smith* was questionable.¹⁰⁸

After outlining the two-step approach set forth in *Daubert*,¹⁰⁹ the court referred to a subsequent Supreme Court case, *Kumho Tire Co. v. Carmichael*,¹¹⁰ which provided that a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of reliability of expert testimony.¹¹¹ Placing reliance on the Supreme Court's application of *Daubert* within *Kumho Tire*, the court reasoned that the *Daubert* test is necessary to ensure a standard of evidentiary reliability in matters described within Rule 702 and that given the expert testimony proffered in the present case, the standards of *Daubert* should have been applied.¹¹² The court then pointed out how it was immaterial that several cases, which utilized the *Daubert* test, have excluded expert testimony on eyewitness identification, as the court is not concerned with the result reached but rather the manner in which the testimony was analyzed.¹¹³ The majority then examined the facts of the present case and determined that not only did the district court judge fail to make any reference to *Daubert*, but he also failed to conduct a sufficient inquiry into the reliability and the relevancy of the proffered expert testimony.¹¹⁴

In concluding that the district court judge had abused his discretion, the court

¹⁰¹ *Smithers*, 212 F.3d at 311.

¹⁰² *Id.* at 310-11.

¹⁰³ 736 F.2d 1103 (6th Cir. 1984).

¹⁰⁴ *See Smithers*, 212 F.3d at 312.

¹⁰⁵ 548 F.2d 1261 (6th Cir. 1977) (holding that in order for expert testimony to be admitted, the witness must be a qualified expert, who is testifying to a proper subject that has conformed to a generally accepted explanatory theory, and the probative value of the testimony outweighs its prejudicial effect).

¹⁰⁶ *See Smithers*, 212 F.3d at 312-13.

¹⁰⁷ 509 U.S. 579 (1993).

¹⁰⁸ *See Smithers*, 212 F.3d at 313.

¹⁰⁹ *See Daubert*, 509 U.S. at 592-93 (providing that a trial court judge must inquire into whether an expert's testimony reflects scientific knowledge and is relevant to the task at hand).

¹¹⁰ 526 U.S. 137 (1999).

¹¹¹ *See Smithers*, 212 F.3d at 313-14.

¹¹² *Id.* at 314.

¹¹³ *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

¹¹⁴ *Id.* at 314-16.

partially relied on the “experiment” comment made by the judge in excluding such evidence.¹¹⁵ The court surmised this statement reflected a “troubling disregard for this Defendant’s rights” and “[b]asing an evidentiary decision on personal curiosity rather than on applicable case law and the rules of evidence is a patent abuse of discretion.”¹¹⁶ However, the court noted that their determination was not solely based on the “experiment” comment as the district court’s failure to implement the *Daubert* analysis alone would have constituted an abuse of discretion.¹¹⁷ While the court also addressed issues such as: how a *Daubert* analysis might be applied in the present case; whether there was a delay in proffering the evidence; and whether the trial court’s error was harmless,¹¹⁸ these issues will not be addressed, as the sole focus of this note is whether the district court judge abused his discretion in failing to implement the *Daubert* analysis.

B. *The Dissent*¹¹⁹

Circuit Judge Alice M. Batchelder dissented, suggesting that the district court’s decision to exclude Dr. Fulero’s testimony should be affirmed on the basis of Smithers’s delay in proffering the specifics of the evidence to the court and the Government.¹²⁰ However, Judge Batchelder also indicated that if she were to reach the merits of the decision, she would hold that the analysis the district court conducted in excluding Dr. Fulero’s testimony was not an abuse of the court’s discretion.¹²¹

In determining that an abuse of discretion by the district court judge was lacking, Judge Batchelder focused on the lack of deference the majority gave to the district court’s findings, which is required under that standard.¹²² She stated that discretion should be given to a trial court not only in deciding if a particular expert’s testimony is relevant or reliable, but also in the methodology a trial court implements in reaching such a conclusion.¹²³ She argued that the factors set forth in *Daubert* were merely suggestive of the relevant subjects a trial court should consider when evaluating proffered expert witness testimony.¹²⁴ In support of this proposition, she referred to language in Justice Scalia’s concurring opinion in *Kumho Tire*¹²⁵ which provided that the factors in *Daubert* are “not holy writ” that the trial court must invoke by name whenever expert witness testimony is

¹¹⁵ *Id.* at 314-15 (referring to the district court judge’s comment, “I’m also interested in seeing what a jury will do absent the expert testimony. It makes it a more interesting case. I recognize it’s the defendant’s fate that’s at stake, but you can always argue for a new trial if he’s convicted.”).

¹¹⁶ *Id.* at 315.

¹¹⁷ *See Smithers*, 212 F.3d at 315.

¹¹⁸ *Id.* at 315-18.

¹¹⁹ *Id.* at 318 (Batchelder, J., dissenting).

¹²⁰ *Id.*

¹²¹ *Id.* at 324.

¹²² *Id.*

¹²³ *See Smithers*, 212 F.3d at 324 (Batchelder, J., dissenting).

¹²⁴ *Id.*

¹²⁵ 526 U.S. 137 (1999) (Scalia, J., concurring).

analyzed.¹²⁶ Furthermore, “whether *Daubert’s* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.”¹²⁷

Justice Batchelder also pointed out that the “core holding of the *Daubert* decision” was to emphasize that the admissibility of expert testimony is to be governed by the Federal Rules of Evidence and that the “general acceptance” test was no longer good law.¹²⁸ Nonetheless, she stated that despite not referring to *Daubert* by name, the district court did make an assessment regarding both the reliability and relevancy of Dr. Fulero’s testimony, as the court made reference to the briefs presented by Smithers and the Government pertaining to these issues.¹²⁹

The dissent expressed her displeasure with the “experiment” comment of the district court judge, but suggests it was not his rationale for excluding the evidence, as it was made after his determination had already been rendered regarding the evidence and in the context of establishing defendant’s record to appeal his decision.¹³⁰ She contended that a single comment, taken out of context, should not serve as a basis for the majority’s finding of a “patent abuse of discretion.”¹³¹

IV. ANALYSIS

The Sixth Circuit Court of Appeals in *Smithers* overturned a defendant’s bank robbery conviction, on the grounds that the trial court judge had abused his discretion in excluding certain expert witness testimony on eyewitness identifications.¹³² The court’s decision was based not on the result reached by the district court judge but rather the manner in which the district court judge made this evidentiary determination.¹³³ This result was proper as the trial court judge failed to follow applicable case law set forth by the United States Supreme Court and made comments which, in effect, denied the defendant his right to a fair trial.¹³⁴

A. Abuse of Discretion as the Standard of Review

In determining whether the Sixth Circuit Court of Appeals should have overturned Smithers’s conviction, a threshold issue that must be addressed is the

¹²⁶ See *Smithers*, 212 F.3d at 324 (Batchelder, J., dissenting) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999)).

¹²⁷ *Id.*

¹²⁸ *Id.* (Batchelder, J., dissenting) (citing *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 587 (1993)).

¹²⁹ *Id.* at 325.

¹³⁰ *Id.* at 326-27.

¹³¹ *Id.* at 327.

¹³² See *Smithers*, 212 F.3d at 318.

¹³³ *Id.* at 314.

¹³⁴ *Id.* at 317-18.

appropriate standard of review by which the court should have examined the district court's decision to exclude the proffered expert witness testimony. Both the majority and dissent were in agreement that a trial court's evidentiary determinations are to be reviewed under an abuse of discretion standard.¹³⁵ This standard is appropriate as the United States Supreme Court recently held in *General Electric Co. v. Joiner*¹³⁶ that abuse of discretion is the proper standard by which to review a district court's decision regarding the admissibility of scientific evidence.¹³⁷ In *Joiner*, the Court found that an "overly stringent" standard of review applied by the Eleventh Circuit Court of Appeals to a district court judge's evidentiary determination was inappropriate, as "it failed to give the trial court the deference that is the hallmark of the abuse of discretion review."¹³⁸ The United States Supreme Court's opinion in *Joiner* also emphasized that a reviewing court should not categorically distinguish between rulings allowing expert testimony and rulings that disallow it.¹³⁹ In ascertaining the significance of this standard, the Sixth Circuit has relied on the Supreme Court's opinion in *Salem v. United States Line Co.*¹⁴⁰ and stated that a trial judge generally has broad discretion in the admission or exclusion of expert testimony and his decision should be sustained unless manifestly erroneous.¹⁴¹

Thus, the question of which standard to apply to the district court's evidentiary ruling is not at issue. Rather, it is in the application of this standard where the majority and dissent diverge, as the dissent suggests that the majority does not give the appropriate deference to the district court's evidentiary determinations as required under the standard.¹⁴² Nonetheless, in analyzing the Sixth Circuit's decision in *Smithers*, it is important to keep in mind that a Judge's evidentiary determinations are to be sustained unless clearly or manifestly erroneous,¹⁴³ as deference is given to a trial court's evidentiary determinations.¹⁴⁴

B. *Evidentiary Analysis Mandated by Daubert*¹⁴⁵

To ascertain whether the district court abused its discretion the precise impact of the *Daubert* holding must be ascertained.¹⁴⁶ Specifically, it must be determined whether *Daubert* mandates a particular analysis or a hearing performed whenever a trial court judge is faced with an issue regarding the admissibility of expert testimony or whether the trial court judge retains broader

¹³⁵ *Id.* at 310-11, 324.

¹³⁶ 522 U.S. 136 (1997).

¹³⁷ *Id.* at 146. See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (applying an abuse of discretion standard in reviewing a trial court's decision to admit or exclude the expert testimony of a tire failure analyst).

¹³⁸ See *Joiner*, 522 U.S. at 143.

¹³⁹ *Id.* at 142.

¹⁴⁰ 370 U.S. 31 (1962).

¹⁴¹ See *American & Foreign Ins. Co. v. G.E.*, 45 F.3d 135, 137 (6th Cir. 1995).

¹⁴² See *United States v. Smithers*, 212 F.3d 306, 324 (6th Cir. 2000) (Batchelder, J., dissenting).

¹⁴³ See *American & Foreign Ins. Co.*, 45 F.3d at 137 (citing *Salem v. United States Line Co.*, 370 U.S. 1, 35 (1962)).

¹⁴⁴ See *Joiner*, 522 U.S. at 143.

¹⁴⁵ *Daubert Inc. v. Merrell Dowell Pharm.*, 509 U.S. 579 (1993).

¹⁴⁶ See *id.*

latitude in the methodology by which he considers such evidence.

Since *Daubert*, the United States Supreme Court has suggested that “the trial judge must have considerable leeway in deciding how to go about determining whether particular expert testimony is reliable.”¹⁴⁷ This statement tends to give credence to the dissent’s argument that the trial court judge should not only have broad discretion in his evidentiary determinations of reliability and relevancy, but in the methodologies he employs to reach such evidentiary determinations.¹⁴⁸ The dissent relies on *Kumho Tire* for the proposition that the factors listed in *Daubert* were merely suggestive of the relevant analysis, which a trial court may use in evaluating experts under Rule 702.¹⁴⁹ The dissent is correct because the majority in *Kumho Tire* expressly stated that “whether *Daubert*’s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.”¹⁵⁰ This assertion is a logical one as it is inconsistent to grant a trial court judge broad latitude in determining evidentiary issues of reliability and relevancy, yet confine the judge to specific guidelines, which may or may not be appropriate.¹⁵¹ Thus, the district court judge was not automatically required to examine the four general factors included within *Daubert* for determining evidentiary reliability, as the factors do not constitute a “definitive checklist or test.”¹⁵²

However, the Supreme Court’s opinion in *Kumho Tire* does not stray from the two-step inquiry of *Daubert*, which requires a trial judge to inquire into both the reliability and relevancy of proffered expert testimony.¹⁵³ The Supreme Court in *Kumho Tire* explicitly stated that “[w]e conclude that *Daubert*’s general principles apply to the expert matters described in Rule 702.”¹⁵⁴ In fact, the Court in *Kumho Tire* then went on to set forth the two-part *Daubert* test and consider how it might be applied to the facts at hand.¹⁵⁵ Thus, it cannot be suggested that *Kumho Tire* somehow did away with *Daubert*’s two-part inquiry into reliability and relevancy.¹⁵⁶ Rather, most commentators have speculated that the true impact of *Kumho Tire* was to extend *Daubert*’s “gatekeeping” obligation to, not only scientific testimony, but to all expert testimony as well.¹⁵⁷

The dissent asserted that the “core holding” of the *Daubert* decision was to

¹⁴⁷ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

¹⁴⁸ See *United States v. Smithers*, 212 F.3d 306, 324 (6th Cir. 2000) (Batchelder, J., dissenting).

¹⁴⁹ *Id.* (citing *Kumho Tire Co.*, 526 U.S. at 153).

¹⁵⁰ *Id.* (quoting *Kumho Tire Co.*, 526 U.S. at 153).

¹⁵¹ See Robert J. Goodwin, *The Hidden Significance of Kumho Tire Co. v. Carmichael: A Compass for Problems of Identification and Procedure Created by Daubert Inc. v. Merrell Dow Pharmaceuticals, Inc.*, 52 BAYLOR L. REV. 603, 624 (2000) (emphasizing that a *Daubert* inquiry is meant to be a flexible one and suggesting that the four general factors may not be applicable in every instance, even when scientific testimony is involved).

¹⁵² See *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 593 (1993).

¹⁵³ *Id.* at 590, 592.

¹⁵⁴ See *Kumho Tire*, 526 U.S. at 149.

¹⁵⁵ *Id.* at 149-53.

¹⁵⁶ *Id.* at 149.

¹⁵⁷ See Goodwin, *supra* note 151, at 604-05 (suggesting that the practical result of the conclusion reached by the United States Supreme Court in *Kumho Tire* was to extend *Daubert*’s gatekeeping obligation to all expert testimony).

emphasize that the *Frye* “general acceptance” test was no longer good law because expert testimony is governed by the Federal Rules of Evidence.¹⁵⁸ However, the *Daubert* opinion explicitly stated “the Rules of Evidence, especially Rule 702, do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”¹⁵⁹ Thus, the two-part test must be read into the *Daubert* opinion, and the majority in *Smithers* was correct in concluding that “*Daubert*’s general principles apply to the expert matters described in Rule 702.”¹⁶⁰ Therefore, the district court judge had, at the very least, a duty under *Daubert* to inquire into the reliability and relevancy of the proffered testimony.¹⁶¹

C. *The Need for an Evidentiary Hearing*

Having concluded that *Daubert*’s two-part inquiry is mandatory, a procedural issue that must be addressed is whether *Daubert* requires a trial judge to hold an evidentiary hearing whenever a trial court is faced with an issue regarding the admissibility of expert witness testimony.¹⁶² The majority in *Smithers* indicated that in making its inquiry into reliability and relevancy, the district court should have conducted a hearing under *Daubert*.¹⁶³ However, in *Kumho Tire* the United States Supreme Court did not expressly mandate such a hearing and determined that a trial court retains discretion in the procedures it employs to gauge the relevancy and reliability of expert testimony.¹⁶⁴

Recent cases among other circuits have been inconsistent with this issue, but the general trend seems to be that although such a hearing is not required it is highly recommended.¹⁶⁵ As one commentator has stated “holding an evidentiary hearing may be the most prudent course, as it is doubtful that it will ever be viewed as an abuse of discretion for a trial court to develop too many facts to guide its decision and support its reliability determination.”¹⁶⁶ Thus, the Sixth Circuit Court of Appeals has a legitimate rationale for requiring an evidentiary hearing under *Daubert* as it serves to assist the court in its review of the record.¹⁶⁷ However, this conclusion reached by the majority seems rather inconsistent with

¹⁵⁸ See *United States v. Smithers*, 212 F.3d 306, 324 (6th Cir. 2000) (Batchelder, J., dissenting).

¹⁵⁹ See *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 597 (1993).

¹⁶⁰ See *Smithers*, 212 F.3d at 314 (quoting *Kumho Tire Co.*, 526 U.S. at 149).

¹⁶¹ See *Daubert*, 509 U.S. at 589.

¹⁶² *Id.* at 597.

¹⁶³ See *Smithers*, 212 F.3d at 318.

¹⁶⁴ See *Kumho Tire*, 526 U.S. at 152 (“The trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefings or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert’s relevant testimony is reliable.”).

¹⁶⁵ Compare *Tanner v. Westbrook*, 174 F.3d 542, 549 (5th Cir. 1990) (holding that the trial court’s failure to hold a *Daubert* hearing was not abuse of discretion, but emphasizing that absent an evidentiary hearing a reviewing court is left with a less complete record to review), with *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (stating that a failure to hold a *Daubert* hearing may be an abuse of discretion when the ruling on admissibility turns on factual issues, particularly in the summary judgment context).

¹⁶⁶ See Goodwin, *supra* note 151, at 639-40.

¹⁶⁷ See generally *id.* (encouraging an evidentiary hearing as the most prudent course).

its previous stance on the issue, as the court had recently suggested that a district court is not automatically required to conduct a hearing under *Daubert*.¹⁶⁸ It is evident that this previous holding is more in line with the view of the United States Supreme Court in *Kumho Tire*, which gives a trial court a great deal of deference in the evidentiary procedures it employs.¹⁶⁹ Therefore, despite a legitimate rationale for developing a more complete record, it was incorrect for the majority to suggest that a hearing under *Daubert* was mandatory in *Smithers*.¹⁷⁰

D. Analysis Performed by the District Court¹⁷¹

The failure of the district court to conduct a hearing under *Daubert* could be overlooked if the district court performed a sufficient inquiry into the relevancy and reliability of the proffered testimony.¹⁷² In fact, the dissent's central argument is that even though the district court judge did not invoke the *Daubert* test by name or conduct a hearing under *Daubert*, the reliability and relevancy prongs of the *Daubert* test were satisfied.¹⁷³ Thus, the extent of the inquiry made by the district court judge into the reliability and relevancy of Dr. Fulero's proffered testimony must be ascertained.¹⁷⁴

1. Inquiry into Reliability

In *Daubert*, the United States Supreme Court stated that in order to establish a standard of evidentiary reliability, an expert's testimony must pertain to "scientific knowledge."¹⁷⁵ The dissent argued that since the government focused its attack on the relevancy of the proffered testimony as opposed to its reliability, an inquiry into the reliability of the testimony was unnecessary.¹⁷⁶ However, this argument does not seem to coincide with the "gatekeeping" function assigned to trial court judges by the United States Supreme Court in *Daubert*, which explicitly stated "under the Rules the trial judge must ensure that any and all

¹⁶⁸ See *Greenwell v. Boatwright*, 184 F.3d 492, 498 (6th Cir. 1999) (holding that a trial court's failure to conduct a hearing under *Daubert* does not alone demand remand, but rather requires a reviewing court to inquire as to the reliability and relevancy of expert testimony).

¹⁶⁹ See *Kumho Tire*, 526 U.S. at 152 ("The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefings or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable.").

¹⁷⁰ See *United States v. Smithers*, 212 F.3d 306, 318 (6th Cir. 2000).

¹⁷¹ *Id.* at 309-10.

¹⁷² See *Greenwell*, 184 F.3d at 492, 498 (holding that when a *Daubert* hearing is lacking, a reviewing court should inquire as to the reliability and relevancy of expert testimony).

¹⁷³ See *Smithers*, 212 F.3d at 323-24 (Batchelder, J., dissenting).

¹⁷⁴ *Id.* at 324.

¹⁷⁵ See *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 589-90 (1993). See also *Kesan*, *supra* note 13, at 1998-99 (emphasizing that the reliability prong of *Daubert* requires a trial court judge to explore the validity of the scientific methodology utilized by the expert).

¹⁷⁶ See *Smithers*, 212 F.3d at 325 (Batchelder, J., dissenting).

scientific testimony or evidence admitted is not only relevant, but reliable.”¹⁷⁷ This statement would require a judge to inquire into the reliability and relevancy of all evidence as a precondition to its admissibility, regardless of whether or not it has been contested.¹⁷⁸

Nonetheless, the dissent contended that even though it was not required, the district court did make an inquiry into reliability.¹⁷⁹ However, the majority asserted the district court did not make any determination as to the expert’s scientific reasoning or methodology, which are the cornerstone of the reliability prong.¹⁸⁰ At one point in the trial, the district court did make a statement regarding the persuasiveness of the government’s argument, which could be speculated to pertain to the reliability of the proffered testimony.¹⁸¹ However, this isolated statement is not sufficient to constitute a proper inquiry into the reliability of the proffered testimony.¹⁸² More importantly, there is no evidence that the district court judge investigated the scientific methodology employed by Dr. Fulero,¹⁸³ which is required under *Daubert*.¹⁸⁴ While it has been established that the four general factors of *Daubert*¹⁸⁵ are not mandated,¹⁸⁶ *Kumho Tire* provides that “a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.”¹⁸⁷ In *Smithers*, the district court judge failed to examine any of the general factors listed in *Daubert*, which might assist a judge in assessing reliability.¹⁸⁸ Furthermore, there is no evidence that the district court judge supplemented the reliability prong with any other factors that he, acting within his discretion, may have deemed applicable in light of the facts of the case.¹⁸⁹ Thus, it must be concluded that the district court judge did not meet the first prong of *Daubert*, as he failed to question the reliability of the proffered evidence

¹⁷⁷ See *Daubert*, 509 U.S. at 589.

¹⁷⁸ *Id.*

¹⁷⁹ See *Smithers*, 212 F.3d at 325 (Batchelder, J., dissenting) (arguing that since both the government and *Smithers* submitted briefs on the admissibility of expert testimony pertaining to eyewitness identification procedures, it may be presumed that the judge examined the briefs, thus performing the necessary inquiry into reliability).

¹⁸⁰ *Id.* at 315.

¹⁸¹ *Id.* at 325 (Batchelder, J., dissenting).

¹⁸² *Id.* at 315.

¹⁸³ *Id.*

¹⁸⁴ See *Kesan*, *supra* note 13, at 1999-2000 (discussing the need for judges to conduct independent investigations into the scientific methodologies utilized by expert witnesses before determining if such evidence is reliable).

¹⁸⁵ See *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 593-94 (1993) (providing a list of general factors, which may assist a judge in his reliability inquiry that included: whether the scientific theory or technique can be or has been tested; whether the scientific theory has been subject to peer review or publication; the known or potential rate of error in the particular scientific technique; and the general acceptance of the methodology or technique in the scientific community).

¹⁸⁶ *Id.* at 593 (stating that the general factors do not constitute a “definitive checklist”).

¹⁸⁷ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

¹⁸⁸ See *Smithers*, 212 F.3d at 314-15 (describing the failure of the trial court to analyze the proffered testimony under *Daubert*).

¹⁸⁹ *Id.* See also *Kumho Tire*, 526 U.S. at 145-46 (explaining that the *Daubert* factors were illustrative and a trial court judge may consider other factors in determining whether or not to admit scientific evidence).

and determine whether or not the evidence reflected scientific knowledge.¹⁹⁰

2. Inquiry into Relevancy

The second requirement of *Daubert* places a duty on a trial court to ensure that the proposed expert testimony is relevant to the task at hand and will aid the trier of fact.¹⁹¹ As the majority acknowledges, the district court judge did perform some inquiry into relevancy, as evidenced by his statement that “a jury can fully understand” its “obligation to be somewhat skeptical of eyewitness testimony.”¹⁹² However, this statement not only goes against the extreme majority view in federal courts today,¹⁹³ but the Sixth Circuit Court of Appeals’ own view in *United States v. Smith*.¹⁹⁴ Much support exists for the majority’s position, as it has been shown that jurors tend to overestimate the accuracy of eyewitness identifications for a variety of reasons.¹⁹⁵ One common mistake made by jurors is to assume that a confident witness is an accurate witness, as studies have shown otherwise.¹⁹⁶ Another misconception is that jurors believe that an eyewitness who makes an observation under a stressful situation is more reliable, when studies have shown that high stress can actually diminish an eyewitness’s ability to focus on events.¹⁹⁷ Based on the well documented misconceptions that

¹⁹⁰ *Smithers*, 212 F.3d at 315. See also *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 590 (1993) (stating the first prong requires the expert’s testimony to pertain to scientific knowledge).

¹⁹¹ See *Daubert*, 509 U.S. at 592-93. See also Kesan, *supra* note 13, at 1999 (discussing how the relevancy prong requires the trier of fact to inquire as to “whether the nexus between the expert testimony and the facts of the particular case is sufficient to assist in resolving the dispute”).

¹⁹² See *Smithers*, 212 F.3d at 315.

¹⁹³ See *Daubert*, 509 U.S. at 592-93.

¹⁹⁴ See *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984) (suggesting that Dr. Fulero’s expert testimony on the reliability of eyewitness identification was relevant and involved a proper subject for the purpose of Federal Rule of Evidence 702).

¹⁹⁵ See Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1022 (1995) (citing Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688 (1981) (explaining several of the inherent misconceptions that jurors possess regarding the reliability of eyewitness testimony)).

¹⁹⁶ *Id.* at 1022 (discussing how jurors persist in accepting confidence as indicative of accuracy because it would be illogical to think otherwise).

¹⁹⁷ *Id.* at 1023 (arguing that an eyewitness in a high stress situation is more likely to be an unreliable witness than one not under such stress). As contrary authority the author cited numerous studies. See, e.g., GARY L. WELLS, *EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK* 17 (1988) (comparing the effects of violence and stress on eyewitness identification); KATHERINE W. ELLISON & ROBERT BUCKHOUT, *PSYCHOL. AND CRIM. JUST.* 95 (1981) (discussing the levels of stress on eyewitness identification); Lowell K. Kuehn, *Looking Down a Gun Barrel: Person Perception and Violent Crime*, 39 PERCEPTUAL & MOTOR SKILLS 1159 (1974) (advocating that at high levels of stress self preservation is key and details are forgotten); LAWRENCE TAYLOR, *EYEWITNESS IDENTIFICATION* 32 (1982) (observing stress has a different effect on individuals’ ability to remember for eyewitness identification); Robert T. Croyle & Elizabeth F. Loftus, *Psychology and the Law*, in 2 COMPANION ENCYCLOPEDIA OF PSYCHOLOGY 1029, 1031 (Andrew M. Colman ed., 1994) (explaining the Yerkes-Dodson law which states stress will increase memory to a point, then it will decrease).

juries have regarding eyewitness testimony,¹⁹⁸ the position previously taken by the Sixth Circuit¹⁹⁹ and a majority of federal courts,²⁰⁰ and most importantly the cursory inquiry made by the district court judge,²⁰¹ the majority was justified in finding that the district court judge erred in determining that expert testimony on eyewitness identification was not relevant and would not aid the trier of fact.²⁰² Therefore, the failure of the district court judge to follow *Daubert* and perform a sufficient inquiry into the reliability and relevancy of Dr. Fulero's proffered testimony must constitute an abuse of discretion.²⁰³

E. The "Experiment" Comment²⁰⁴

In finding an abuse of discretion on the part of the district court, the majority's decision was based in part on the district court judge's "experiment" comment.²⁰⁵ The "experiment" comment by the district court judge consisted of the following statements: "I'm also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case. I recognize it's the Defendant's fate that's at state, but you can always argue for a new trial if he's convicted."²⁰⁶ The majority found this statement indicated a "troubling disregard for the defendant's rights" and concluded that "[b]asing an evidentiary decision on personal curiosity rather than on applicable case law and the rules of evidence is a patent abuse of discretion."²⁰⁷ The dissent, while pointing out her displeasure with the comments, insisted they were taken out of context.²⁰⁸ The dissent also contended that since the comments were made after the district court judge denied Smithers final motion to have the evidence admitted they had no bearing on his decision to exclude the evidence.²⁰⁹ This assertion is blatantly flawed, as the dissent is making an unsupported assumption that the reasoning set forth within these comments played no part in the judge's determination, just because they were made after his decision was rendered.²¹⁰ It is just as likely that this was the district court judge's mindset at the time his ruling was made and these comments were indicative of his true reasoning for excluding the evidence.

This author proposes that the indifference expressed towards Smithers by the district court judge²¹¹ is comparable to situations in which a judge has exhibited hostility towards a criminal defendant, such as to deny the defendant of the right

¹⁹⁸ See *supra* notes 192-94.

¹⁹⁹ See *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984).

²⁰⁰ See *Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 592-93 (1993).

²⁰¹ See *United States v. Smithers*, 212 F.3d. 306, 315 (6th Cir. 2000).

²⁰² *Id.* at 315-16.

²⁰³ *Id.* at 318. See also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (holding that a district court, by definition, abuses its discretion when it makes an error of law).

²⁰⁴ See *Smithers*, 212 F.3d at 310.

²⁰⁵ *Id.* at 314-15.

²⁰⁶ *Id.* at 310, 314-15.

²⁰⁷ *Id.* at 315.

²⁰⁸ *Id.* at 326-27 (Batchelder, J., dissenting).

²⁰⁹ *Id.* at 327.

²¹⁰ See *Smithers*, 213 F.3d at 327 (Batchelder, J., dissenting).

²¹¹ *Id.* at 310, 314-15.

to a fair trial.²¹² When a party claims an unfair trial based on hostility exhibited by a judge, the decision is generally reviewed for plain error.²¹³ The Sixth Circuit Court of Appeals has defined "plain errors" to include those "which strike at fundamental fairness, honesty or public reputation of the trial."²¹⁴ In *United States v. Segines*, the Sixth Circuit Court of Appeals considered the hostile remarks of a trial court judge, who sought to prevent the defendant's attorney from pursuing legitimate avenues in developing his client's defense, such as impeaching the Government's witnesses.²¹⁵ Included in the judge's comments was the statement, "[w]hen I make a ruling I expect that ruling to be obeyed whether you like it or not. If you don't like it, you can take it to the Sixth Circuit."²¹⁶ Ultimately, the Sixth Circuit Court of Appeals in *Segines* reversed the defendant's conviction, holding that under the plain error doctrine the hostile comments and attitude of the judge violated the defendant's due process rights to a fair trial.²¹⁷ The court emphasized that the defendant is not required to make a showing as the effect of these comments, as there is presumptively a "chilling effect."²¹⁸ The Sixth Circuit Court of Appeals has also stated in *United States v. Frazier*²¹⁹ that a trial judge is required to exhibit "impartiality in demeanor as well as in actions."²²⁰ In *Smithers*, the district court judge did not exhibit impartiality, as he was more concerned with satisfying his personal curiosity, than ensuring that the defendant's liberty and rights were protected.²²¹ The comments of the district court judge must be read for their plain meaning and the only reasonable interpretation indicates a disregard for the defendant's rights so extreme as to rise to the level of hostility.²²² Therefore, a reviewing court could have found reversible error based solely on the district court judge's comments.²²³

²¹² See *United States v. Segines*, 17 F.3d 847, 852-53 (6th Cir. 1994) (discussing the inherent "chilling effect" a judge's hostile comments have upon the conduct of a trial and holding that a defendant is not required to make a specific showing as to the effect of such hostility in asserting that the defendant has been deprived of a fair trial).

²¹³ *Id.* at 850. See also *United States v. Seago*, 930 F.2d 482, 493 (6th Cir. 1991) (implementing a plain error standard where a trial court judge allegedly made gestures suggesting that the defendant's testimony was not credible).

²¹⁴ See *Seago*, 930 F.2d at 493 (citing *United States v. Causey*, 834 F.2d 1277, 1281 (6th Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988)).

²¹⁵ See *Segines*, 17 F.3d at 853.

²¹⁶ *Id.* (citing Trial transcript at 607).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ 584 F.2d 790 (6th Cir. 1978).

²²⁰ *Id.* at 794.

²²¹ See *United States v. Smithers*, 212 F.3d 306, 310, 314 (6th Cir. 2000) ("I'm also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case.").

²²² *Id.* at 310, 314-15.

²²³ *Id.* See also *Rocha v. Great Amer. Ins. Co.*, 850 F.2d 1095, 1100 (6th Cir. 1988) (holding that remarks made by the judge during trial indicating a hostility towards one of the parties can be the basis for plain, reversible error).

V. CONCLUSION

In *United States v. Smithers*,²²⁴ the Sixth Circuit Court of Appeals overturned defendant James Smithers's bank robbery conviction after finding that the district court abused its discretion in considering whether to admit expert testimony regarding the reliability of eyewitness identification.²²⁵ The result was proper, as the district court failed to follow applicable precedent set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*²²⁶ and made comments, which in effect, denied the defendant his right to a fair trial.²²⁷

Although generally a trial court retains broad discretion in making evidentiary determinations,²²⁸ the United States Supreme Court in *Daubert* and the Federal Rules of Evidence²²⁹ mandate that a trial court judge, faced with a decision to admit or exclude expert testimony, must perform a two-prong inquiry into the proffered testimony.²³⁰ Initially, in order to ensure the expert's testimony is reliable, a trial court must determine if the expert is proposing to testify to scientific knowledge.²³¹ Second, a trial court must ascertain whether the proffered testimony is relevant to the task at hand in that it will assist the trier of fact to understand or determine an issue.²³² In *Smithers*, the district court judge abused his discretion,²³³ as although his failure to hold an evidentiary hearing under *Daubert* may be overlooked,²³⁴ his failure to perform a basic inquiry into the reliability and relevancy of the proffered testimony pursuant to *Daubert* cannot be justified and must result in the reversal of the defendant's conviction.²³⁵

Finally, the "experiment" comment made by the district court judge alone constituted plain, reversible error and provided sufficient grounds to overturn Smithers's conviction.²³⁶ This comment reflected an indifference towards the defendant's liberty, which rose to a level of hostility that in effect denied Smithers his right to a fair trial.²³⁷

²²⁴ 212 F.3d 306 (6th Cir. 2000).

²²⁵ *Id.* at 318.

²²⁶ 509 U.S. 579 (1993).

²²⁷ *See Smithers*, 212 F.3d at 310.

²²⁸ *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

²²⁹ *See* FED. R. EVID. 702. This Rule provides: "If scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. . ." *Id.*

²³⁰ *See Daubert Inc. v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993).

²³¹ *Id.* at 589-90.

²³² *Id.* at 591-92.

²³³ *See United States v. Smithers*, 212 F.3d 306, 318 (6th Cir. 2000).

²³⁴ *See Greenwell v. Boatwright*, 184 F.3d 492, 498 (6th Cir. 1999).

²³⁵ *See Smithers*, 212 F.3d at 318.

²³⁶ *Id.* at 310, 314-15.

²³⁷ *Id.* at 315. *See also Rocha v. Great Amer. Ins. Co.*, 850 F.2d 1095, 1100 (6th Cir. 1988) (holding that remarks made by the judge during trial indicating hostility towards one of the parties can be the basis for an error).

HARVEY V. HORAN: PRISONERS SHOULD HAVE A POST-CONVICTION CONSTITUTIONAL RIGHT UNDER 42 U.S.C. § 1983 TO ACCESS EVIDENCE FOR DNA TESTING

*by Karen A. Saunders**

I. INTRODUCTION

Imagine that the year is 1980. John (a white male in his early thirties, of average weight and height, with brown hair and brown eyes) is home alone and spends the evening watching television before going to bed. He has recently lost his factory job and has not had good luck finding another one. His divorce and unemployment have put him in a poor financial situation and he is facing the loss of his car and home. The next afternoon, police come to his home to question him about a failed armed robbery of a local bank, which ended in the shooting deaths of a security guard and a bank employee.

The bank robber escaped, but from information obtained from the surviving bank employee and grainy security video footage, police are able to produce a composite sketch of the robber. This sketch closely resembles John, and has been in the newspaper and on the television news all day. Following an anonymous tip, police decide to question John and discover that he has no alibi and his financial situation provides a motive for the robbery attempt. He is taken to the police station and placed in a line-up,¹ where the surviving witness of the robbery attempt positively identifies him as the killer.

During his murder trial several hairs were introduced into evidence having been found in one of the victim's hands. The hair was pulled from the robber's head during the struggle and some of the hairs had scalp tissue attached. At the time, DNA evidence was not available to test the tissue, but hair analysis² and blood (serology)³ tests were performed on the samples. The blood type of the sample was the same as that of John, but it is a common blood type in the

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¹ See generally Innocence Project, *Causes & Remedies*, at <http://www.innocenceproject.org/causes/mistakenid.php> (last visited Oct. 12, 2002) (stating that sixty of the first eighty-two DNA exonerations involved mistaken eyewitness identifications).

² *Id.* at <http://www.innocenceproject.org/causes/serology.php> (finding that twenty-one out of the first seventy DNA exonerations were found to involve microscopic hair comparison matches which were unreliable evidence of guilt).

³ *Id.* at <http://www.innocenceproject.org/causes/index.php>. Forty of the first seventy DNA exonerations were found to involve serology inclusion results. *Id.* Before DNA analysis, investigators could only test blood evidence by conventional serology, including ABO blood typing (yields inclusion rates of between five and forty percent of the population), secretor status (seventy-five to eighty-five percent of the population are secretors), and enzyme testing. *Id.* at <http://www.innocenceproject.org/causes/serology.php>.

population. The hair sample was also consistent with John's hair sample but both were brown, straight, and belonged to a white individual, a set of characteristics common to the population.

After the prosecution presented the witness who identified John as the robber, the hair and blood evidence which were consistent with John's hair and blood type, his financial motive for attempting to rob a bank, and some unfavorable character evidence from John's ex-wife, he is convicted by a jury and sentenced to life in prison without possibility of parole. Having exhausted all appeals, John serves twenty-two years in prison before realizing that with today's advances in DNA technology he may finally have a way to prove his innocence. He has his attorney make a request to the prosecutor's office that handled his case for the release of the hair sample for DNA testing of the scalp tissue, in the hopes that the test results will exclude John as the perpetrator. The prosecutor's office acknowledges that the sample is still in existence and has been well preserved, but refuses to comply with John's request, stating that the correct individual has been prosecuted and convicted for the crime. John's state has no statute granting access to evidence for DNA testing for convicted prisoners.

Now John has few avenues that he can pursue in order to obtain the hair and tissue samples. First, he may file a habeas corpus petition in state court asking for post-conviction relief in the form of access to the biological evidence from his case if he is able to meet the requirements of his state's habeas corpus statute.⁴ If this fails, he can file a 42 U.S.C. § 1983 action in federal court in the hope that the court will recognize a constitutional right to post-conviction access to evidence for DNA testing.⁵

This note argues that the United States Court of Appeals for the Fourth Circuit in *Harvey v. Horan*⁶ incorrectly decided that a prisoner does not have a post-conviction constitutional right to access the biological evidence from his case for DNA testing under 42 U.S.C. § 1983.⁷ Furthermore, the questions of how and when convicted prisoners get this access should not be left for the legislative branch of government to decide, but should be decided by the judiciary. Part II provides a summary of the traditional post-conviction remedies available to a prisoner seeking access to evidence for DNA testing, a background of 42 U.S.C. § 1983 and information on the Innocence Project.⁸ Part III discusses the facts, procedural history, rationale, holding and concurring opinions in *Harvey v. Horan II*.⁹ Part IV details the circuit split among the Fourth, Fifth

⁴ WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 28.1, at 1292 (2d ed. 2000) (stating that every jurisdiction has one or more procedures through which defendants can present post-appeal challenges to their convictions).

⁵ 42 U.S.C. § 1983 (2000).

⁶ 285 F.3d 298 (4th Cir. 2002). Hereinafter referred to as *Harvey II*.

⁷ *Harvey II*, 285 F.3d at 299.

⁸ See generally Innocence Project, *About This Innocence Project*, at <http://www.innocenceproject.org/about/index.php> (last visited Oct. 12, 2002) (stating that the Innocence Project is a non-profit legal clinic founded by Barry Scheck and Peter Neufeld in 1992 and deals exclusively with cases where post-conviction DNA testing could exonerate a wrongfully convicted prisoner).

⁹ 285 F.3d at 298.

and Eleventh Circuits.¹⁰ Part V analyzes and rebuts the arguments of the Fourth and Fifth Circuits and advocates both the passage of the Innocence Protection Act¹¹ and a United States Supreme Court-declared post-conviction constitutional right to access biological evidence for DNA testing. Part VI concludes.

II. BACKGROUND

A. *Traditional Post-Conviction Relief Available*

If a convicted prisoner has a claim of factual innocence, it means that there is old or new evidence which would place reasonable doubt of the prisoner's guilt in the minds of jurors.¹² Among the grounds for state post-conviction relief, newly discovered evidence has typically fallen into the category of egregious legal errors with a motion for a new trial being the remedy sought.¹³ Traditionally, a request for DNA testing of old evidence would be treated as a claim of innocence based on newly discovered evidence.¹⁴

Each state has its own laws as to post-conviction relief, leading to conflict among the states' laws, as well as with the federal government.¹⁵ Some state legislatures have passed statutes providing for post-conviction DNA testing, others have not.¹⁶ In states without post-conviction DNA testing statutes, there is no procedural step for the prisoner to petition the court for access to biological evidence samples.¹⁷ Without being able to test the evidence, the prisoner cannot present any conclusive new evidence showing his innocence.¹⁸ To overcome this problem, a few states allow a claim of innocence based on newly discovered

¹⁰ See *id.* (holding that prisoners cannot gain access to evidence for post-conviction DNA testing by filing suit under § 1983). See also *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002) (holding that prisoners cannot gain access to evidence for post-conviction DNA testing by way of a § 1983 action). But see *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002) (holding that prisoners are permitted to file a § 1983 suit in seeking the production of evidence for post-conviction DNA testing).

¹¹ See generally Innocence Project, *Legislation*, at http://www.innocenceproject.org/legislation/display_description.php?id=Senate-Bill-486 (last visited Oct. 12, 2002) (explaining that the Innocence Protection Act is pending in both the House of Representatives and the Senate and would safeguard and standardize post-conviction DNA testing for inmates).

¹² Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 ST. THOMAS L. REV. 547, 550 (1997).

¹³ See DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF* § 1-9, at 24 (1998).

¹⁴ Cynthia Bryant, *When One Man's DNA Is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Remedies*, 33 COLUM. J.L. & SOC. PROBS. 113, 122-26 (2000).

¹⁵ WILKES, *supra* note 13, § 1-9, at 24.

¹⁶ See generally Innocence Project, *Legislation*, at http://www.innocenceproject.org/legislation/display_legislation.php (last visited Oct. 12, 2002) (providing a list of states with enacted or pending DNA testing statutes).

¹⁷ Donna Buchholz, Comment, *Modern Day Chateau D'If in Florida? Collecting Dust on the Shelves of Justice: Potentially Exculpatory DNA Evidence Waits for a Turn in the Florida Sunshine*, 30 STETSON L. REV. 391, 411 (2000).

¹⁸ *Id.*

evidence in a writ of habeas corpus proceeding.¹⁹ A writ of habeas corpus is used to bring a person before a court, most frequently to ensure that the person's imprisonment is not illegal.²⁰ All state avenues for relief must be exhausted²¹ by the prisoner before he can file a writ of habeas corpus in federal court.²² This process can delay the prisoner's access to the biological evidence in his case for years, extending the amount of time a wrongfully convicted prisoner remains incarcerated.²³

B. 42 U.S.C. § 1983: Civil Action for Deprivation of Rights

A plaintiff can file tort claims under 42 U.S.C. § 1983²⁴ for deprivation of federal rights under color of state law.²⁵ Defendants are usually state or local officials or government,²⁶ and state-law immunities do not apply to the officer as they might in a state claim.²⁷ There are additional advantages to plaintiffs' filing of a § 1983 claim: the ability to recover damages,²⁸ reasonable attorney's fees and the ability to file in either state or federal court, whichever the plaintiff determines to be more favorable.²⁹ The majority of § 1983 claims are brought pursuant to constitutional amendments, such as the Fourteenth Amendment,

¹⁹ See *People v. Gonzales*, 800 P.2d 1159, 1205-06 (Cal. 1990). See also *Miller v. Commissioner of Correction*, 700 A.2d 1108, 1135 (Conn. 1997) (allowing a freestanding claim of actual innocence in habeas corpus proceedings); *Valenzuela v. Newsome*, 325 S.E.2d 370, 373-74 (Ga. 1985) (stating that to avoid a miscarriage of justice, newly discovered evidence of innocence would be permitted for use as grounds for post-conviction relief).

²⁰ LAFAVE, *supra* note 4, § 28.1, at 1292.

²¹ See *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (requiring that a state prisoner exhaust state remedies before proceeding to federal court).

²² 28 U.S.C. § 2254(b) (2000).

²³ See *Frontline: The Case for Innocence: Interview with Barry Scheck* (PBS television broadcast, Jan. 11, 2000), at <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/scheck.html> (last visited Oct. 24, 2002) (quoting Barry Scheck as stating that "[t]he Constitution ought to allow people to prove that they shouldn't be rotting away in jail if they didn't commit the crime").

²⁴ 42 U.S.C. § 1983. This Section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

²⁵ See DAN B. DOBBS, *THE LAW OF TORTS* § 44, at 82 (2000).

²⁶ *Id.*

²⁷ *Id.* § 44, at 83.

²⁸ *Id.* § 275, at 742.

²⁹ *Id.* § 44, at 83.

which guarantees substantive and procedural due process of law and equal protection of the laws.³⁰

Under the Fourteenth Amendment's Due Process Clause, individuals are protected against "serious, shocking, deprivation of life, liberty, or property that is in some sense wrong regardless of legal procedures."³¹ The test as to whether a person has been deprived of substantive due process "is whether the official conduct shocks the conscience of the court."³² For a convicted prisoner seeking access to the biological evidence from his case for DNA testing, being able to bring a claim under § 1983 in federal court would recognize a constitutional right of post-conviction access to biological evidence.³³

C. *The Innocence Project and DNA Testing*

As of October 12, 2002, the Innocence Project has exonerated one hundred and fourteen prisoners in the United States using DNA evidence.³⁴ The Innocence Project is a non-profit legal clinic founded by Barry C. Scheck and Peter Neufeld that exclusively takes cases in which DNA testing of biological evidence may exonerate prisoners.³⁵ A majority of the Innocence Project's clients share the following characteristics: they are financially disadvantaged, have been imprisoned long enough for the public to have forgotten them, and have exhausted all means for judicial relief.³⁶ However, in recent years the criminal justice system has changed in the area of DNA testing.³⁷

Through DNA testing it has been proven with scientific certainty that innocent people get sent to prison.³⁸ In recent times, DNA analysis of biological evidence has replaced the older serology methods, which tested blood evidence to help identify criminals.³⁹ Because of the application of DNA profiling to biological evidence samples, convicted prisoners are increasingly seeking to have this evidence tested with the new procedures⁴⁰ if evidence from the case still exists.⁴¹ The traditional legal avenues⁴² by which prisoners request post-conviction DNA testing have presented problems for prisoners.⁴³ Innocence Project attorneys Peter Neufeld and Barry C. Scheck have attempted to find a

³⁰ *Id.* § 44, at 84.

³¹ DOBBS, *supra* note 25, § 44, at 84.

³² *Id.*

³³ *Harvey II*, 285 F.3d 298, 310-12 (4th Cir. 2002).

³⁴ Innocence Project, *About This Innocence Project*, at <http://www.innocenceproject.org/about/index.php> (last visited Oct. 12, 2002).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Charles Strom, *Genetic Justice: A Lawyer's Guide to the Science of DNA Testing*, 87 ILL. B.J. 18 (1999).

⁴⁰ Innocence Project, *About This Innocence Project*, at <http://www.innocenceproject.org/about/index.php> (last visited Oct. 12, 2002).

⁴¹ *Id.*

⁴² *See supra* Part II. A.

⁴³ Bryant, *supra* note 14, at 122-26.

new avenue for convicted prisoners to access biological evidence from their cases by asserting that the prisoners have a post-conviction constitutional right to access under 42 U.S.C. § 1983.⁴⁴

III. HARVEY V. HORAN⁴⁵

A. Facts and History

On April 30, 1990, James Harvey was sentenced to twenty-five years for rape and fifteen years for forcible sodomy following a jury trial in Fairfax County Circuit Court.⁴⁶ Serology testing on the biological samples taken from the victim identified the presence of spermatozoa on the mouth smear, vaginal smear, thigh smear and the victim's pantyhose.⁴⁷ The serology testing and the restriction fragment length polymorphism (RFLP)⁴⁸ method of DNA testing, at the time, could not exclude either Harvey or his co-defendant.⁴⁹ Harvey did not appeal his conviction, but did file a writ of habeas corpus which was rejected in 1993 by the Virginia Supreme Court.⁵⁰

On February 25, 1994 Harvey filed a 42 U.S.C. § 1983 action against the Governor of Virginia in the United States District Court for the Eastern District of Virginia, alleging that the Governor deprived him of Due Process by failing to order a short tandem repeat (STR)⁵¹ method of DNA testing on the biological evidence.⁵² That court ruled that Harvey would have to re-file his claim as a petition for writ of habeas corpus.⁵³ Harvey complied with the court's ruling and alleged in his petition "...that the Governor had refused to order the DNA test which could prove plaintiff's innocence."⁵⁴ Harvey's petition was dismissed on July 25, 1995 because the court found that Harvey had not fully exhausted state remedies as required⁵⁵ by Virginia law.⁵⁶

⁴⁴ *Harvey II*, 285 F.3d 298, 299 (4th Cir. 2002).

⁴⁵ *Id.* at 298.

⁴⁶ *Harvey v. Horan*, 278 F.3d 370, 373 (4th Cir. 2002). Hereinafter referred to as *Harvey I*.

⁴⁷ *Id.*

⁴⁸ NAT'L INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 14 (2000), at <http://www.ojp.usdoj.gov/nij/dna/pubs.htm> (last visited Oct. 12, 2002) [hereinafter N.I.J. PREDICTIONS 2000] (explaining that restriction fragment length polymorphism (RFLP) was the dominant method of DNA testing during the decade between 1985 and 1995, and that an important limitation of the process is that it requires a relatively large quantity of DNA to be present and well-preserved in a biological sample).

⁴⁹ *Harvey I*, 278 F.3d at 373.

⁵⁰ *Id.*

⁵¹ N.I.J. PREDICTIONS 2000, *supra* note 48, at 17, at <http://www.ojp.usdoj.gov/nij/dna/pubs.htm> (last visited Oct. 12, 2002) (explaining that short tandem repeat (STR) is the current preferred method of DNA testing, allowing analysis of miniscule amounts of biological material even if the material is not freshly collected).

⁵² *Harvey I*, 278 F.3d at 373.

⁵³ *Id.*

⁵⁴ *Harvey v. Horan*, 119 F. Supp. 2d 581, 582 (E.D. Va. 2000).

⁵⁵ *Harvey I*, 278 F.3d at 373.

⁵⁶ VA. CODE ANN. § 8.01-654(B)(2) (Michie 2000).

The Innocence Project contacted the Virginia Division of Forensic Science in 1996 on Harvey's behalf and requested the biological evidence from his case.⁵⁷ Director Paul Ferrara referred the Innocence Project to the Fairfax County Attorney's Office.⁵⁸ The Innocence Project alleged that it first contacted Commonwealth attorney Ray Morrogh in February 1998 and received no response.⁵⁹ In 1999, the Innocence Project tried again and Assistant Commonwealth Attorney Todd Saunders responded by letter stating that because of the facts of the case, in his opinion, post-conviction DNA testing was unnecessary.⁶⁰ Harvey contended that his case did warrant such testing and that the results could have proven to be exculpatory.⁶¹ Harvey's complaint under 42 U.S.C. § 1983 alleged:⁶²

[T]hat the defendant, Commonwealth's Attorney Horan, acting under color of state law, has deprived him of his constitutional rights. Plaintiff's claims for relief were: (1) that the defendant has deprived plaintiff of due process under the Fourteenth Amendment by refusing to search for and provide the evidence for DNA Testing; (2) that by refusing to provide the evidence for DNA testing, defendant has deprived plaintiff the opportunity to show he is innocent in violation of the Fourteenth and Fifth Amendments;...(5) that by refusing to search for and provide the evidence for DNA testing, defendant has deprived plaintiff of the opportunity to litigate his claim that he is innocent, effectively denying him access to the courts in violation of the Fourteenth and First Amendments;...

The equitable relief Harvey sought was a search for the biological evidence from his case and its release to Dr. Paul Ferrara for STR method of DNA testing.⁶⁴ The defendant Horan filed first a Federal Rules of Civil Procedure 12(b)(6)⁶⁵ motion to dismiss⁶⁶ and then a 56(b) motion for summary judgment in the United States District Court for the Eastern District of Virginia.⁶⁷ However, the court found that Harvey had "a due process right of access to the DNA evidence under *Brady v. Maryland*⁶⁸ and a right to conduct DNA testing on the

⁵⁷ *Harvey I*, 278 F.3d at 373.

⁵⁸ *Harvey*, 119 F. Supp. 2d at 582.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 582-83. Claims raised by Harvey not related to the Fourteenth Amendment have been omitted and will not be discussed in this note.

⁶³ *Id.*

⁶⁴ *Harvey*, 119 F. Supp. 2d at 583.

⁶⁵ FED. R. CIV. P. 12(b)(6) (providing for a party to make a motion to dismiss for failure to state a claim upon which relief can be granted).

⁶⁶ *Harvey*, 119 F. Supp. 2d at 583.

⁶⁷ *Harvey v. Horan*, No. 00-1123-A, 2001 U.S. Dist. LEXIS 9587, at *1 (E.D. Va. Sept. 21, 2001).

⁶⁸ See *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (holding that a prosecutor must turn over material, exculpatory evidence to defendant that, if suppressed, would deprive the defendant of a

biological evidence using the new STR technology.”⁶⁹ Therefore, the court denied both motions.⁷⁰ The defendant then appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the district court and remanded the case with direction to dismiss it; treating Harvey’s claim as a petition for habeas corpus filed without leave of court.⁷¹ Harvey then filed a petition for rehearing and rehearing en banc, which the United States Court of Appeals for the Fourth Circuit denied finding that Harvey did not have a claim under 42 U.S.C. § 1983.⁷²

B. Reasoning of the Court⁷³

1. Concurring Opinion of Chief Judge J. Harvie Wilkinson III⁷⁴

Chief Judge J. Harvie Wilkinson III believed Harvey should get access to the biological evidence in his case for newer methods of DNA testing than were available at the time of his trial.⁷⁵ However, he stated that a § 1983 action is an inappropriate vehicle by which to gain access to the evidence.⁷⁶ He reasoned that the American justice system has procedures for pressing a claim of innocence and prisoners must proceed according to those procedures.⁷⁷ Further, prisoners should not be able to bypass the state courts by way of a § 1983 action in federal court⁷⁸ stating that “...claims of innocence should be entertained, where possible, in the first instance by the court, or at least by the court system, that initially heard the case.”⁷⁹ He then concluded that the time, efforts, and expense of jury trials in state courts should not be disregarded.⁸⁰

Chief Judge Wilkinson speculated that if Harvey’s § 1983 claim were allowed to proceed, the “precise nature and scope of the substantive due process right that a federal court would have to bestow on Harvey”⁸¹ would be unclear⁸² and also, that many types of state prisoners could claim a right to DNA testing.⁸³ Those convicted of capital crimes, felonies, sentenced to a certain minimum amount of time in prison, or some combination thereof could all qualify for testing.⁸⁴ He asserted that there would have to be a threshold showing of some

fair trial).

⁶⁹ *Harvey I*, 278 F.3d 370, 374 (4th Cir. 2002).

⁷⁰ *Id.*

⁷¹ *Id.* at 388.

⁷² *Harvey II*, 285 F.3d 298, (4th Cir. 2002).

⁷³ *Id.*

⁷⁴ *Id.* (Wilkinson, J., concurring).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 299.

⁷⁸ *Harvey II*, 285 F.3d at 299 (Wilkinson, J., concurring).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Harvey II*, 285 F.3d at 300 (Wilkinson, J., concurring).

kind to demonstrate that the prisoner is entitled to post-conviction testing.⁸⁵ Additionally, the problem of who would pay for the DNA testing would have to be decided, and whether or not the prisoner could bring a damages action for wrongful conviction if exonerated by the tests.⁸⁶

Chief Judge Wilkinson next pointed out that many states and Congress have either already passed or are considering passing statutes regarding access for prisoners to DNA evidence.⁸⁷ He advocated the position that the judicial branch should not interfere with legislative efforts to resolve the problem by stating that “[t]he case for legislative bodies retaining control of advances in science is powerful because scientific discoveries have the potential to affect society in ways that may be profoundly beneficial or profoundly harmful.”⁸⁸

Lastly, the opinion stated that by recognizing a § 1983 claim in *Harvey II*, the court would be overruling its decision in *Hamlin v. Warren*⁸⁹ and also the Supreme Court in *Preiser v. Rodriguez*,⁹⁰ both of which stand for the principle that “state courts should have the first chance to review challenges to a state judgment of conviction.”⁹¹ The Fourth Circuit Court of Appeals’ decision in *Hamlin* also held that “a prisoner’s § 1983 claim had to proceed under the habeas framework when the prisoner was seeking to establish ‘every predicate’ for a subsequent request for release.”⁹² Chief Judge Wilkinson commented that in *Heck v. Humphrey*,⁹³ the Supreme Court prohibited “a state prisoner from challenging his conviction in federal court in the first instance through an unexhausted habeas claim masquerading as a § 1983 claim.”⁹⁴ By declining to declare a constitutional right of post-conviction access to DNA evidence, the court in *Harvey I* properly left the matter up to the state and federal legislatures, as evidenced by the fact that Harvey has recently gained access to the evidence in his case by a state court order.⁹⁵

⁸⁵ *Id.* at 300-01. Issues of identity, guilty pleas, and whether the prisoner must prove the outcome of his trial would have been different if the DNA testing now sought had been performed at the time. *Id.*

⁸⁶ *Id.* at 301.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 664 F.2d 29 (4th Cir. 1981).

⁹⁰ 411 U.S. 475 (1973).

⁹¹ *Harvey II*, 285 F.3d at 303 (Wilkinson, J., concurring).

⁹² *Id.* (citing *Hamlin*, 664 F.2d at 30, 32).

⁹³ 512 U.S. 477 (1994).

⁹⁴ *Harvey II*, 285 F.3d at 303 (Wilkinson, J., concurring).

⁹⁵ *Id.* at 304. See also Brooke A. Masters, *DNA Testing Confirms Man's Guilt in Va. Rape*, WASH. POST, May 16, 2002, at B01 (reporting that the results of DNA testing of the evidence from Harvey's case confirmed the presence of Harvey's DNA, yielding conclusive proof of his guilt).

2. Concurring Opinion of Judge J. Michael Luttig⁹⁶

Judge J. Michael Luttig concurred in the decision to deny rehearing of Harvey's case, but would have granted rehearing en banc if Harvey had not obtained access to the DNA evidence by a state court order for which he filed after the court's decision in *Harvey I*.⁹⁷ Judge Luttig believed that the court in *Harvey I* incorrectly treated Harvey's § 1983 claim as a petition for writ of habeas corpus and that Harvey did indeed have a constitutional post-conviction right of access to the biological evidence in his case for STR DNA analysis.⁹⁸

He stated that in *Harvey I* the court concluded "that the assertion of a post-conviction right to evidence for the purpose of STR DNA testing necessarily implies the invalidity" of Harvey's conviction.⁹⁹ This is because under *Heck v. Humphrey*, any claims a prisoner might raise that would necessarily imply the invalidity of an underlying criminal judgment must be filed as petitions for writ of habeas corpus.¹⁰⁰ "Consequently, [the Fourth Circuit court] held that appellee did not, and could not, state a claim for relief under § 1983. Thereafter, ...the majority proceeded also to hold, ...that there is no right under the Constitution to access evidence post-conviction for STR DNA testing...."¹⁰¹

Judge Luttig stated that he does not share the opinion of the majority in *Harvey I* and believed that a post-conviction claim requesting access to evidence does not necessarily imply that the underlying conviction is invalid.¹⁰² He pointed out that the test results may turn out to be inconclusive or inculpatory, neither of which would constitute an attack on the judgment.¹⁰³ Furthermore, even if the prisoner is exculpated by the results, he or she still has to file a separate action at a later date in order to get his or her conviction overturned.¹⁰⁴ He offered two United States Supreme Court cases detailing when a cause of action would necessarily imply the invalidity of a conviction and be characterized as a habeas corpus petition and when one would not, allowing the § 1983 action to proceed.¹⁰⁵ He found that Harvey's access claim did not necessarily imply that his conviction was invalid by comparing his case to examples given in *Heck*.¹⁰⁶ Therefore, a § 1983 action was the correct avenue for the claim.¹⁰⁷ Next, Judge Luttig proceeded to what he perceived to be the issue in the case, "whether there exists a constitutional right, post-conviction, to access previously-produced forensic evidence for the purpose of DNA re-testing in light

⁹⁶ See generally Brooke A. Masters, *2 Conservative Jurists Back DNA Testing*, WASH. POST, Mar. 29, 2002, at A07 (stating that Judge J. Michael Luttig is the first federal appeals court judge to hold that a convicted inmate has a constitutional right to perform DNA tests on evidence from his case).

⁹⁷ *Harvey II*, 285 F.3d at 304 (Luttig, J., concurring).

⁹⁸ *Id.* at 308.

⁹⁹ *Id.* at 307 (citing *Harvey I*, 278 F.3d 370, 374 (4th Cir. 2002)).

¹⁰⁰ *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

¹⁰¹ *Harvey II*, 285 F.3d at 307 (Luttig, J., concurring).

¹⁰² *Id.* at 308.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 308-09.

¹⁰⁶ *Id.*

¹⁰⁷ *Harvey II*, 285 F.3d at 310 (Luttig, J., concurring).

of the particular, extra-ordinary scientific advance represented by STR....”¹⁰⁸ Under these circumstances, Judge Luttig believed that Harvey did have a constitutional right to gain access to the evidence from his case.¹⁰⁹

IV. SPLIT AMONG CIRCUIT COURTS¹¹⁰

After the Fourth Circuit Court of Appeals’ decisions in *Harvey I* and *II*, the United States Court of Appeals for the Fifth Circuit was faced with the same issue in *Kutzner v. Montgomery County*.¹¹¹ Kutzner had been convicted of capital murder and had previously tried by habeas petition to compel the state to allow him access to the biological evidence in his case for DNA testing.¹¹² His habeas petition unsuccessful, Kutzner next filed a § 1983 action to gain access to the evidence.¹¹³ The United States District Court for the Southern District of Texas dismissed the action and Kutzner appealed.¹¹⁴ The Fifth Circuit Court of Appeals refused to find that Kutzner had a constitutional right to access the evidence stating that “[w]e agree with the analysis of the Fourth Circuit, which recently held, under *Heck*, that no § 1983 claim exists for injunctive relief to compel DNA testing under materially indistinguishable circumstances.”¹¹⁵ The Fifth Circuit Court of Appeals affirmed the dismissal of the action, and Kutzner was executed the same day the court rendered its decision.¹¹⁶

On September 23, 2002, the United States Court of Appeals for the Eleventh Circuit had a chance to decide the same issue in *Bradley v. Pryor*.¹¹⁷ Bradley had been convicted of murder and sentenced to death.¹¹⁸ He had unsuccessfully appealed his conviction, and his state post-conviction proceedings and federal habeas corpus proceedings had ended in failure.¹¹⁹ His § 1983 action was dismissed by the district court, and he appealed to the Eleventh Circuit Court of Appeals.¹²⁰ The Eleventh Circuit Court of Appeals stated in its opinion that “we disagree with the Fourth Circuit panel that *Heck* does not permit a § 1983 suit for the production of evidence for the purpose of DNA testing. On the contrary,

¹⁰⁸ *Id.* at 311.

¹⁰⁹ *Id.* at 312.

¹¹⁰ *See id.* at 298 (holding that prisoners cannot gain access to evidence for post-conviction DNA testing by filing suit under § 1983). *See also* *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002) (holding that prisoners cannot gain access to evidence for post-conviction DNA testing by way of a § 1983 action). *But see* *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002) (holding that prisoners are permitted to file a § 1983 suit in seeking the production of evidence for post-conviction DNA testing).

¹¹¹ 303 F.3d 339 (5th Cir. 2002).

¹¹² *Id.* at 340.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 340 n.1.

¹¹⁷ 305 F.3d 1287 (11th Cir. 2002).

¹¹⁸ *Bradley*, 305 F.3d at 1288.

¹¹⁹ *Id.*

¹²⁰ *Id.*

Heck explicitly authorizes a § 1983 action that does not ‘necessarily imply’ the invalidity of the plaintiff’s conviction....”¹²¹ The court went on to say that since all Bradley sought was the production of evidence his suit did not attack the validity of his conviction and, therefore, reversed the district court’s decision and remanded the case.¹²²

V. ANALYSIS

Judge Luttig’s concurring opinion in *Harvey II* and the Eleventh Circuit Court of Appeals’ holding in *Bradley v. Pryor* are the proper interpretation of the law under *Heck*, providing that a § 1983 action is an appropriate avenue for a convicted prisoner to pursue access to the biological evidence from his or her case for DNA testing.¹²³ The Fourth Circuit Court of Appeals and the Fifth Circuit Court of Appeals’ decisions on the same issue are flawed in their interpretation of *Heck* and reliance on the legislatures to rectify the problem.¹²⁴

A. Judge Luttig and the Eleventh Circuit are Correct¹²⁵

1. Interpreting *Heck v. Humphrey*¹²⁶

The Fourth and Fifth Circuit Court of Appeals believe that the United States Supreme Court’s holding in *Heck* prevents a state prisoner “...from challenging his conviction in federal court in the first instance through an unexhausted habeas claim masquerading as a § 1983 claim.”¹²⁷ In *Heck*, the Supreme Court stated that a convicted prisoner cannot file a § 1983 action which would “necessarily imply the invalidity of his conviction or sentence” unless he also proves “that the conviction or sentence has already been invalidated.”¹²⁸ Additionally, a prisoner would have to exhaust all state remedies and, even then, he still would have no cause of action under § 1983 until his conviction had been invalidated.¹²⁹ The Fourth Circuit Court of Appeals then erroneously held in *Harvey I* that Harvey’s § 1983 claim to access the evidence from his case would necessarily imply that his conviction was invalid and so would be precluded under *Heck*.¹³⁰

¹²¹ *Id.* at 1291.

¹²² *Id.* at 1292.

¹²³ See *Godschalk v. Montgomery County*, 177 F. Supp. 2d 366 (E.D. Pa. 2001) (holding that a prisoner did have a due process right to access biological evidence for the limited purpose of DNA testing).

¹²⁴ See *Harvey II*, 285 F.3d 298, 308-09, 312 (4th Cir. 2002).

¹²⁵ See Innocence Project, *About This Innocence Project*, at <http://www.innocenceproject.org/about/index.php> (last visited Oct. 12, 2002) (stating that post-conviction DNA testing could exonerate a wrongfully convicted prisoner).

¹²⁶ 512 U.S. 477 (1994).

¹²⁷ *Harvey II*, 285 F.3d at 303.

¹²⁸ *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

¹²⁹ *Id.* at 489.

¹³⁰ *Harvey I*, 278 F.3d 370, 374 (4th Cir. 2002).

The error of the Fourth and Fifth Circuit Court of Appeals' rationale is pointed out by Judge Luttig's concurring opinion in *Harvey II*.¹³¹ He stated that he does not believe it is even arguable "that a post-conviction action merely to permit access to evidence for the purpose of STR DNA testing 'necessarily implies' invalidity of the underlying conviction."¹³² He correctly analogized Harvey's § 1983 claim to the United States Supreme Court's example in *Heck* of a plaintiff bringing a § 1983 action for damages resulting from an illegal search yielding evidence used to convict the plaintiff.¹³³ Because the evidence might still be admissible under some other doctrine, the plaintiff's § 1983 action would not necessarily imply that his conviction was invalid.¹³⁴ When this reasoning is applied to Harvey and Bradley's cases, both Judge Luttig and the Eleventh Circuit Court of Appeals pointed out that the only relief sought by prisoners is the access to the evidence or an accounting of its absence and that the testing may actually inculcate the prisoner or be inconclusive, rather than prove that his conviction was unlawful.¹³⁵ If the DNA testing proves his guilt, the prisoner no longer has any grounds to continue to challenge his conviction and if the testing provides exculpatory results, the prisoner will have to bring an action separate from his § 1983 action to further challenge his conviction.¹³⁶

2. Finality of State Court Convictions Versus Claims of Innocence

In *Harvey II*, Chief Judge Wilkinson stated that it is important for claims of innocence to be heard whenever possible in the court or court system that first heard the case.¹³⁷ In *Harvey I*, the majority placed great importance on the finality of decisions, voicing a fear that if a constitutional right to access evidence for DNA testing post-conviction were declared, inmates everywhere would rush out to file § 1983 actions.¹³⁸ The inmates could continue to file them whenever advances in technology would permit it resulting in the loss of finality of convictions.¹³⁹

Judge Luttig correctly counters these arguments by stating that DNA testing is a unique tool for determining innocence, one which the justice system has never seen the likes of in terms of accuracy and practical certainty.¹⁴⁰ He, therefore, states that DNA testing should be given special consideration by the courts and, even though the finality of some state court decisions will be called into question, he asserts that:

¹³¹ *Harvey II*, 285 F.3d at 308.

¹³² *Id.*

¹³³ *Id.* at 309.

¹³⁴ *Heck*, 512 U.S. at 487.

¹³⁵ *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002).

¹³⁶ *Id.*

¹³⁷ *Harvey II*, 285 F.3d at 299.

¹³⁸ *Harvey I*, 278 F.3d 370, 375-76 (4th Cir. 2002).

¹³⁹ *Id.*

¹⁴⁰ *Harvey II*, 285 F.3d at 305.

[N]o one, regardless of his political, philosophical, or jurisprudential disposition, should otherwise be troubled that a person who was convicted in accordance with law might thereafter be set free,..., because of evidence that provides absolute proof that he did not in fact commit the crime for which he was convicted.¹⁴¹

He goes on to say that "it would be a high credit to our system of justice that it recognizes the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science."¹⁴²

Judge Luttig's arguments are very persuasive by themselves, but additional support can be found in information compiled by the Innocence Project.¹⁴³ First, in contrast to the argument that inmates would rush to file § 1983 claims, forty-six percent of the Innocence Project's first seventy exonerations were the result of prosecutorial consent, rather than litigation.¹⁴⁴ It is the hope of those working for the Innocence Project that this prosecutorial consent will become commonplace as DNA testing becomes more common and accepted.¹⁴⁵ Second, the use of DNA testing to exonerate suspects after arrest but before trial is increasing.¹⁴⁶ As police departments begin to use DNA testing as an investigative tool before charging suspects with crimes, fewer and fewer people will be wrongfully convicted.¹⁴⁷ This will eliminate the time and expense of needless trials and transactional costs.¹⁴⁸ Thirdly, in testimony before the United States Senate Committee on the Judiciary, attorney Barry Scheck stated that "[t]he vast majority (probably eighty percent) of felony cases do not involve biological evidence that can be subjected to DNA testing."¹⁴⁹ The relatively small number of cases where DNA testing is applicable will therefore also help allay the fear that there will be an expensive, court docket-clogging rush to file § 1983 actions for DNA testing.¹⁵⁰

¹⁴¹ *Id.* at 306.

¹⁴² *Id.*

¹⁴³ See Innocence Project, *Causes & Remedies*, at <http://www.innocenceproject.org/causes/dna.php> (last visited Oct. 12, 2002).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See generally *id.* (profiling cases where DNA testing exonerated suspects before trial).

¹⁴⁸ *Id.*

¹⁴⁹ *Protecting the Innocent: Proposals to Reform the Death Penalty. Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (testimony of Barry Scheck, co-founder of the Innocence Project), at http://judiciary.senate.gov/testimony.cfm?id=290&wit_id=633 (last visited Oct. 12, 2002).

¹⁵⁰ *Id.* But see Deirdre Shesgreen, *Bill Would Broaden Access to DNA Testing*, ST. LOUIS POST-DISPATCH, June 30, 2002, at B1 (quoting Philadelphia deputy district attorney Ronald Eisenberg as stating that "[t]here are going to be a lot of defendants who may be looking for negative results on a DNA test...even though they may have been involved in the crime" but did not leave behind any DNA at the scene).

3. Courts Should Not Leave the Issue to the Legislative Branch

a. *Problems With State Statutes for Post-Conviction Relief*

The need for the United States Supreme Court to recognize a constitutional right of access to evidence for DNA testing is further illustrated by the problems manifested in various legislatures' attempts to solve the problem.¹⁵¹ Although thirty-four states¹⁵² have post-conviction DNA testing statutes either pending or enacted, the remaining states have no statutes in place.¹⁵³ Additionally, the statutes that have been enacted vary from state to state.¹⁵⁴ First, statutes of limitation as to when an inmate can request DNA testing have caused inmates to be denied testing completely.¹⁵⁵ If the particular test the inmate needs has not been invented before the statute of limitations runs, the prisoner becomes time-barred from requesting testing.¹⁵⁶ Second, there is sometimes an offense or penalty specific provision as to which prisoners can request testing under the statute, such as only prisoners sentenced to death or a minimum number of years are eligible for testing under the statute.¹⁵⁷ Thirdly, the standard that the prisoner must meet as to whether the testing will favorably impact his or her case varies from state to state.¹⁵⁸ Some statutes require that the prisoner show that had the test results been available, he would not have been charged with the crime or would not have been convicted.¹⁵⁹ Louisiana requires that the prisoner must

¹⁵¹ Judith A. Goldberg & David M. Siegal, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 399-406 (2002) (discussing common problems among various state post-conviction DNA testing statutes, such as time bars, offense-specific limitations to testing, pleading requirements, and cost issues).

¹⁵² Innocence Project, *Legislation*, at http://www.innocenceproject.org/legislation/display_legislation.php (last visited Oct. 12, 2002) (listing the states as: Arizona, Arkansas, California, Delaware, Florida, Hawaii, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, and Oklahoma).

¹⁵³ *See id.* (listing all states with enacted or pending post-conviction DNA statutes; the remaining states therefore have no such legislation).

¹⁵⁴ Goldberg & Siegal, *supra* note 151, at 396.

¹⁵⁵ *Id.* at 400.

¹⁵⁶ *Id.* *But see* ARIZ. REV. STAT. ANN. § 13-4240(K) (West 2002) (stating that post-conviction requests for DNA testing are exempt from time bars). *See also* TENN. CODE ANN. § 40-30-403 (2002) (providing for no time bars for DNA testing requests).

¹⁵⁷ *See, e.g.*, CAL. PENAL CODE § 1405(a) (West 2002) (applying only to inmates convicted of felony offenses); VA. CODE ANN. § 19.2-327.1(A) (Michie 2002) (applying only to inmates convicted of felony offenses); IND. CODE ANN. § 35-38-7-1 (West 2001) (applying only to inmates convicted of murder or A, B, or C class felonies); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001) (allowing testing for inmate convicted of any crime punishable by twenty or more years incarceration). *But see, e.g.*, *Frontline: The Case for Innocence: Interview with Barry Scheck* (PBS television broadcast, Jan. 11, 2000), at <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/scheck.html> (last visited Oct. 24, 2002) (stating that The Commission On The Future of DNA Evidence found that prosecutors and judges should consent to DNA testing, no matter what statutes of limitations are in place).

¹⁵⁸ Goldberg & Siegal, *supra* note 151, at 404.

¹⁵⁹ *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4240(B)(1) (West 2002) (requiring a reasonable

show a "reasonable likelihood" that the testing would establish his innocence.¹⁶⁰ This piecemeal approach leaves inmates in some states in a much better position than inmates in other states.¹⁶¹ The United States Supreme Court should grant certiorari to consider the § 1983 issue and declare a constitutional right to testing pursuant to the Fourteenth Amendment's Due Process Clause,¹⁶² which would allow prisoners to file § 1983 actions in federal court to obtain the testing.¹⁶³ Prisoners in every state could then gain access to biological evidence, even in states having no post-conviction DNA testing statutes or in states where the statutes would deny access to prisoners.¹⁶⁴

b. *Innocence Protection Act Fails to Guarantee Prisoners
Access to DNA Testing*

The Innocence Protection Act (IPA), currently pending in Congress, would allow a prisoner convicted of a federal crime to request post-conviction DNA testing from a federal court if the testing supports a claim of innocence.¹⁶⁵ It was recently endorsed by the Senate Judiciary Committee¹⁶⁶ and it is possible that the entire Senate will vote on it later this year.¹⁶⁷ In the House of Representatives, the IPA¹⁶⁸ is expected to move to the floor later this term.¹⁶⁹ Some of the other provisions of the IPA include: preservation of evidence and criminal punishment for state prosecutors' offices that alter or destroy evidence, funding for indigent inmates to pay for DNA testing, post-testing procedures, helping states improve

probability that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing to exist before a court shall order DNA testing).

¹⁶⁰ LA. CODE CRIM. PROC. ANN. art. 926.1(C)(1) (West 2002). *But see* ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001) (omitting any evidentiary standards for requesting DNA testing); TENN. CODE ANN. § 40-30-403 (2002) (omitting any evidentiary standards for requesting DNA testing).

¹⁶¹ *See generally* Juliet Eilperin, *Death Row Legislation Gains Support on Hill; Bipartisan Bill Would Ensure Inmates' Access to DNA Evidence*, WASH. POST, July 22, 2002, at A02

(quoting Innocence Project Executive Director Nina Morrison as stating that currently there exists "an inadequate, often confusing patchwork of state DNA testing laws..."). *But see* Anne W. Reed, *Guilt, Innocence, and Federalism in Habeas Corpus*, 65 CORNELL L. REV. 1123, 1142-43 (1980) (stating that because states have an interest in securing proper trial verdicts, the states will safeguard inmates' avenues to attack wrongful convictions).

¹⁶² U.S. CONST. amend. XIV, § 1. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (reviewing examples of selective incorporation of the Bill of Rights provisions in the Fourteenth Amendment's Due Process Clause).

¹⁶³ *See* U.S. CONST. art. VI, § 1, cl. 2 (providing that all state judges and state laws are subject to the Constitution and must be bound by it). *But see* *Medina v. California*, 505 U.S. 437, 445-46 (1992) (explaining that the Supreme Court hesitates to interpret the Constitution in a way that will interfere with the states' power to administer justice).

¹⁶⁴ *See* U.S. CONST. art. VI, § 1, cl. 2 (providing that all state judges and state laws are subject to the Constitution and must be bound by it).

¹⁶⁵ Innocence Project, *Legislation*, at http://www.innocenceproject.org/legislation/display_description.php?id=Senate-Bill-486 (last visited Oct. 12, 2002).

¹⁶⁶ *See* Innocence Protection Act, S. 486, 107th Cong. (2001).

¹⁶⁷ The Innocence Project, *Legislation*, at <http://www.innocenceproject.org/legislation/index.php> (last visited Oct. 12, 2002).

¹⁶⁸ *See* Innocence Protection Act, H.R. 912, 107th Cong. (2001).

¹⁶⁹ Innocence Project, *Legislation*, at <http://www.innocenceproject.org/legislation/index.php> (last visited Oct. 12, 2002).

the quality of legal representation for those accused of capital crimes, and stricter standards to prevent frivolous requests.¹⁷⁰ Because the bills have numerous bipartisan supporters, they are expected to pass, but have been stalled due to the fact that Congress has been otherwise occupied.¹⁷¹

One important reason why Congress needs to pass the IPA is that it would prevent states from destroying old evidence which could be used for DNA testing.¹⁷² In his testimony before the Senate Judiciary Committee, Innocence Project co-founder Barry Scheck states that “[w]e are in a race against time and every day counts....without laws to prevent it, precious DNA evidence is surely being thrown away, wittingly or unwittingly, every day.”¹⁷³ Another reason for Congress to pass the IPA was given by Senator Patrick Leahy, who stated, “...many states still have not moved on this issue...[a]nd some of the states that have acted have done so in a way that will leave the vast majority of prisoners without access to DNA testing.”¹⁷⁴ For these reasons, the IPA should be passed by Congress to give a greater number of prisoners in this country access to DNA testing.¹⁷⁵

Even though the IPA will solve many problems (if and when Congress passes it) for the states that choose to comply, it cannot compel any state to comply with its provisions.¹⁷⁶ In order to get around “unconstitutional interference with the state police power by Congress, the Innocence Protection Act would operate by means of spending incentives”¹⁷⁷ to states that comply with the Act’s provisions.¹⁷⁸ If states choose not to comply with the Act’s provisions and forego the federal money, inmates in those jurisdictions will be no better off after the IPA passes than they were before.¹⁷⁹

The recent split among the Fourth, Fifth, and Eleventh Circuits gives the United States Supreme Court an opportunity to rule on the appropriateness of a §

¹⁷⁰ *Id.* at http://www.innocenceproject.org/legislation/display_description.php?id=Senate-Bill-486.

¹⁷¹ *Protecting the Innocent*, COLUMBUS DISPATCH, Aug. 3, 2002, at 10A. *But see* Deirdre Shesgreen, *Bill Would Broaden Access to DNA Testing*, ST. LOUIS POST-DISPATCH, June 30, 2002, at B1 (stating that there is opposition to the Innocence Protection Act from prosecutors who think the bill is too broad and will interfere with states’ rights to impose capital punishment).

¹⁷² *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (testimony of Barry Scheck, co-founder of the Innocence Project), available at http://judiciary.senate.gov/testimony.cfm?id=290&wit_id=633 (last visited Oct. 12, 2002).

¹⁷³ *Id.*

¹⁷⁴ Remarks of Sen. Patrick Leahy, Ranking Member, Senate Judiciary Comm., News Conference on Introduction of the Innocence Protection Act, (March 7, 2001), at <http://justice.policy.net/proactive/newsroom/release.vtml?id=21261> (last visited Oct. 12, 2002).

¹⁷⁵ *See Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (testimony of Barry Scheck, co-founder of the Innocence Project), available at http://judiciary.senate.gov/testimony.cfm?id=290&wit_id=633 (last visited Oct. 12, 2002).

¹⁷⁶ *See Printz v. United States*, 521 U.S. 898, 944-45 (1997) (stating that the states may not be compelled by the federal government to enact or administer a federal regulatory program).

¹⁷⁷ *Protecting the Innocent*, COLUMBUS DISPATCH, Aug. 3, 2002, at 10A.

¹⁷⁸ *Id.*

¹⁷⁹ *See Printz*, 521 U.S. at 944-45 (stating that the states may not be compelled by the federal government to enact or administer a federal regulatory program).

1983 action as an avenue for post-conviction relief.¹⁸⁰ Kent Scheidegger of the Criminal Justice Legal Foundation speculates that the Supreme Court might now be willing to make a decision on the issue.¹⁸¹ The nation's highest court should be willing to consider this problem, because the Court's decision would be binding immediately on all the states.¹⁸² Inmates everywhere would have the same avenue for post-conviction relief, and would not have to wait for the passage of a federal act or state statute that may never come into being.¹⁸³ For these reasons, the United States Supreme Court should resolve the split among the circuit courts and declare that prisoners have a post-conviction constitutional right of access to the biological evidence from their cases for DNA testing.¹⁸⁴

B. *Application to John's Case*

Recall John¹⁸⁵ from the introduction to this note. He is an innocent man, wrongfully imprisoned and seeking DNA testing of the evidence in his case. His state legislature has not enacted or introduced a DNA testing statute and the Innocence Protection Act is stalled in Congress. Now envision that the United States Supreme Court does grant certiorari to consider the issue of utilizing § 1983 claims for post-conviction access to evidence for DNA testing.¹⁸⁶ The Court resolves the issue by declaring a constitutional right of prisoners to access evidence for DNA testing under § 1983.

John's attorney immediately files a § 1983 action in federal court seeking that the state release the biological samples from his case for DNA testing. Because of the Supreme Court's decision, the district court rules in his favor, and he obtains the samples. The DNA testing is performed, and the results exonerate John. The DNA of the unknown bank robber turns out to match DNA found at another robbery crime scene in another state and recorded in a DNA database of solved crimes. The real bank robber is currently serving prison time for armed robbery and now admits committing the murder for which John was wrongfully convicted. Armed with the powerful new evidence of his innocence, John can now file a separate action to attack his conviction. Because of the decision of the Supreme Court, John is able to proceed on the path to securing his release without having to wait days, months, or possibly years for his state legislature or Congress to decide to act. Through the use of a § 1983 action to gain access to evidence for DNA testing, John will ultimately be freed from wrongful incarceration and exonerated.

¹⁸⁰ Jonathan Ringel, *Federal Judges Save Inmate's Chance for DNA Test*, BROWARD DAILY BUS. REV., Oct. 2, 2002, at A1.

¹⁸¹ *Id.*

¹⁸² See U.S. CONST. art. VI, § 1, cl. 2 (providing under the Supremacy Clause that all state judges and state laws are subject to the Constitution and must be bound by it).

¹⁸³ *Id.*

¹⁸⁴ See *Harvey II*, 285 F.3d 298, 326 (4th Cir. 2002) (Luttig, J., concurring) (stating that the question should receive further review in the future, if not by the Fourth Circuit Court of Appeals, then otherwise).

¹⁸⁵ See *supra* Part I.

¹⁸⁶ See 42 U.S.C. § 1983 (2000).

VI. CONCLUSION

The United States Supreme Court should grant certiorari to consider the issue of filing a § 1983 claim as an avenue for post-conviction access to evidence for DNA testing.¹⁸⁷ Furthermore, the Court should declare that prisoners have a post-conviction constitutional right of access to the evidence under § 1983, pursuant to the Due Process Clause of the Fourteenth Amendment.¹⁸⁸ This decision would eliminate the unfairness caused by differing state statutes involving statutes of limitation on the time an inmate is given to file a post-conviction claim, restrictions on types of crimes committed for DNA testing statutes to apply, and standards of proof as to whether the outcome of the inmate's trial would have been different if DNA testing had been available at the time.¹⁸⁹ The decision would also give a prisoner an immediate solution to the problem of getting access to the evidence from his case, instead of having to remain wrongfully incarcerated for an unknown amount of time waiting for the state legislatures and Congress to resolve the issue.¹⁹⁰

¹⁸⁷ See *Harvey II*, 285 F.3d at 326 (Luttig, J., concurring) (stating that the question should receive further review in the future, if not by the Fourth Circuit Court of Appeals, then otherwise).

¹⁸⁸ *Id.* But see *Bradley v. Pryor*, 305 F.3d 1287, 1292 (11th Cir. 2002) (Edmondson, C.J., concurring) (stating that Chief Judge Edmondson concurred in the decision but refrained from giving his view as to whether a § 1983 claim in this instance is appropriate and that Judge Birch concurred in the decision dubitante, believing that Bradley did not state a constitutional violation on which to base his § 1983 claim).

¹⁸⁹ See *supra* Part V. A. 3. a.

¹⁹⁰ See *supra* Part V. A. 3. b.

