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THE ETHICAL OBLIGATIONS OF PROSECUTORS IN CASES INVOLVING POSTCONVICTION CLAIMS OF INNOCENCE

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Recent developments in forensic science, particularly in the area of DNA analysis, have generated a new body of law for defendants who allege that they were wrongfully convicted. These innocence-based postconviction review statutes, adopted now in thirty-three states, provide avenues for defendants to obtain "new" or newly available scientific tests of "old" evidence from their cases. These statutes are designed to avoid many of the procedural hurdles of traditional postconviction relief and to provide a comparatively simple mechanism for review. Despite this new body of law, the reality for such defendants is that obtaining this type of review is often extremely difficult. Defendants must litigate these new claims against prosecutors whose primary objective is maintaining the integrity of the convictions, who may themselves have custody or control of both the evidence to be tested and the information concerning the evidence, and who typically have superior resources. The promise of innocence-based postconviction relief is hollow unless prosecutors adopt new ethical obligations to guide their responses to such claims. We propose that when faced with an innocence-based postconviction claim requesting the application of "new" science to "old" evidence, prosecutors should promptly seek the fullest accounting of the truth, effect the fullest possible disclosure, and use the most accurate science. We outline the significance of these standards by reviewing the range of legal issues that can arise under these new innocence-based postconviction review statutes, a series of common counterarguments to the proposed standards, suggested responses to these counterarguments and reasons why adoption of such standards is in the interest of all members of the criminal justice system.

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I. INTRODUCTION

As scientists discover increasingly precise methods to identify the origin of forensic material[1] and as the range of material that is forensically significant expands,[2] the criminal justice system is facing an increasing number of requests by convicted defendants to subject "old" evidence to "new" scientific tests.[3] This issue has drawn public attention recently due to the number of exonerations that have resulted from the application of short tandem repeat (STR)-based Deoxyribonucleic Acid (DNA) testing, including the exoneration of a significant number of persons facing execution.[4] In the past

1. The increase in precision is most notable with the advent of DNA testing. While body fluids such as blood, semen and saliva have been of forensic significance for years through serological testing, DNA testing has made these of far greater forensic significance because of their ability to positively exclude, or with a very high degree of accuracy include, a specific individual. By increases in precision, we mean changes in scientific methodology or techniques that allow identification of forensically significant items with greater discrimination and/or sensitivity. Whether the legal system recognizes a method as more or less precise is a separate question, as the legal system may well even recognize as forensically significant methodologies that are based upon subjective human judgments that lack traditional scientific underpinning. *See, e.g.*, D. Michael Risinger, et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problem of Expectation and Suggestion*, 90 CAL. L. REV. 1, 6, n.17 (2002) (discussing the "sciences" of handwriting analysis, teeth mark identification and tool mark identification).

2. The range of forensically significant material can expand either because a new process or technology allows items that could not be tested before to yield such information or because improvements in process or technology allow greater sensitivity such that smaller, older and/or more degraded samples can yield results. For example, Polymerase Chain Reaction (PCR) DNA testing is a process that is much more sensitive, in that it requires far less sample, than does the predecessor Restriction Fragment Length Polymorphism (RFLP) DNA testing. Edward J. Imwinkelried & D.H. Kaye, *DNA Typing: Emerging Or Neglected Issues*, 76 WASH. L. REV. 413, 457 (2001) ("The fifth phase of the judicial evaluation of DNA evidence is well underway. Harnessing the Polymerase Chain Reaction (PCR) enables laboratories to produce millions of identical copies of DNA fragments even from samples too small for RFLP typing.").

3. We use the term "old" evidence to refer to evidence that has been in existence during the pendency of the case. While some of the increase in the number of defendants seeking such testing may abate as new technologies and methods become integrated into the original pretrial investigation and prosecution (*e.g.*, law enforcement authorities prosecuting those charged with sexual offenses today often have already used DNA testing in preparing their cases, while those prosecuting cases two decades ago might not have had the benefit of such techniques), the ever increasing availability, discriminating ability, and sensitivity of technologies mean that the basic question will persist. Moreover, there are significant residual effects of a conviction even after incarceration has ended, so that individuals who are no longer incarcerated may desire such testing. These include direct restrictions on liberty through a term of parole or probation; requirements for registration—for example as a sex offender; a range of other legal consequences, such as loss of voting rights, restrictions on possession of firearms, and occupational restrictions; and deleterious personal and financial consequences from the stigma, stress, and costs of having been a convicted criminal defendant.

4. The Death Penalty Information Center reports that since 1973, ninety-nine death row inmates have been exonerated nationally. Of these, it reports that in eleven cases, DNA evidence "played a substantial factor in establishing innocence." Death Penalty Information Cen-

fifteen years, the legal system has devoted considerable attention to the legal requirements for the admissibility of new scientific technologies or methodologies,[5] and in the past four years, over half the states have enacted legislation addressing the availability of such testing.[6] Nevertheless, the legal framework within which defendants request "new" testing of "old" evidence is still very much in flux. Although a majority of states now have some form of innocence-based postconviction testing provision,[7] the enforceability of these provisions is often in doubt, and, in particular, whether the access to the postconviction testing that these provisions afford creates a right that is protected under the federal constitution.[8] While federal legislation has been proposed[9] to create a statutory right to such testing in federal criminal cases,[10] an avenue for federal habeas corpus relief in state capital cases for persons under a sentence of death,[11] and to establish financial incentives for states to provide such testing in state criminal cases,[12] this legislation has yet to be enacted.

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ter, *Innocence: Freed From Death Row, at* http://www.deathpenaltyinfo.org/Innocentlist.html (last visited Mar. 28, 2002). Thirteen death row exonerations in Illinois since 1987 resulted in the much-publicized moratorium on executions in January 2000. Of these thirteen, DNA evidence was the basis for exoneration in five cases. *See* Illinois Death Penalty Moratorium Project, *Thirteen innocent men over 100 years on Illinois' death row, at* http://www.illinois moratorium.org/exonerate.html (last visited Mar. 28, 2002).

5. This attention has been the product of the Court's decisions in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), General Electric Co. v. Joiner, 522 U.S. 136 (1997), and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), and numerous scholarly articles concerning these cases. *See, e.g.*, Joëlle Anne Moreno, *Beyond The Polemic Against Junk Science: Navigating the Oceans that Divide Science and Law with Justice Breyer at the Helm*, 81 B.U. L. REV. 1033 (2001).

6. Mark Hansen, *The Great Detective*, 87 A.B.A. J. 37, 39 (Apr. 2001) (describing nine states as having DNA postconviction testing and/or evidence preservation statutes, with similar legislation pending in eighteen other states and at the federal level).

7. We use the term "innocence-based" postconviction testing to denote this new body of law that is separate from traditional forms of postconviction review, such as a petition for a writ of habeas corpus. *See* discussion *infra* Part I. We also distinguish these statutes from a "bare innocence" claim for postconviction relief under Herrera v. Collins, 506 U.S. 390 (1993) (deciding that claim of "actual innocence" does not entitle habeas petitioner to relief).

8. *See* Harvey v. Horan, 278 F.3d 370, 380 (4th Cir. 2002) (holding no federal constitutional right, under the 14th Amendment's due process clause, to postconviction DNA testing). *But see* Harvey v. Horan, 285 F.3d 298, 308 (4th Cir. 2002), *reh'g and reh'g en banc denied*, (Luttig, J., concurring) (holding constitutional right to postconviction access to evidence for purposes of STR-based DNA testing).

9. Innocence Protection Act of 2001, S.B. 486 and H.R. 912, 107th Cong. (2001) [hereinafter "Act" or "Senate Bill 486"]. The provisions of these bills are identical. Section references are to House Bill 912.

10. Act § 102 provides for postconviction testing in federal criminal cases.

11. Act § 104(a)-(b). House Bill 912 prohibits denials of access to testing, under either state time limits or procedural default rules, or as a successive petition under 28 U.S.C. § 2254, for persons under sentence of death pursuant to Congress' powers to enforce the 14th Amendment of the U.S. Constitution under section 5. *See generally* Larry Yackle, *Congressional Power to Require DNA Testing*, 29 HOFSTRA L. REV. 1173 (2001) (arguing Congress has the power, under section 5 of the 14th Amendment, to require DNA testing).

12. Act § 103 conditions federal assistance to states for establishment of DNA databanks

Yet while these scientific developments have changed the law in some respects,[13] the system in which these claims are brought is still the same system that led to the original convictions. In other words, the forum for these new postconviction claims of innocence has not changed; they are still litigated in the same adversarial system in which all other postconviction claims, as well as the original criminal cases, are litigated. In this adversarial system, the "old" evidence that might be subject to such "new" testing is oftentimes in the control or custody of law enforcement authorities. Furthermore, information about the case, and thus information about the potential significance of the evidence, is in the control of law enforcement authorities, the prosecutor, or both. Moreover, defendants must make a showing about the evidentiary significance of evidence before such evidence may be subjected to new tests. This adversarial system, except in unusual circumstances, still reflects a resource imbalance favoring the government over the convicted defendant.

While the existence of innocence-based postconviction statutes in theory establishes a means of obtaining review, these statutes contain or raise numerous issues that prosecutors may view as a source of litigation when a defendant seeks testing.[14] Thus, even if there is a legal mechanism for a defendant to obtain testing in support of a postconviction claim of innocence, the efficiency, ease, and possibly the likelihood of success of such an effort can be dramatically affected by how the government responds.

No ethical prosecutor should ever oppose the pursuit of justice, insofar as this means ensuring that an innocent person has not been convicted.[15] To the extent that this requires disclosure or release of evidence, extant ethical precepts require this disclosure or release.[16] This truism, however, obscures the reality of the adversarial system in which an innocence-based postconviction claim is brought and the significance of the prosecutor's response to

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and other criminal justice efforts on their provision of postconviction DNA testing.

13. At least thirty-four states have enacted legislation concerning DNA testing issues, including authorization for postconviction testing, preservation of evidence, payment for testing, and/or compensation for the wrongfully convicted. *See* The Innocence Project, *at* http://innocenceproject.org/legislation /display_legislation.php (last visited Apr. 4, 2002).

14. *See* discussion *infra* Part III. A-I.

15. NAT'L PROSECUTION STANDARDS 1.1 (Nat'l Dist. Attorneys Ass'n 2d ed. 1991 ("The primary responsibility of prosecution is to see that justice is accomplished."). *See also* A.B.A. STANDARDS FOR CRIMINAL JUSTICE—PROSECUTION FUNCTION & DEFENSE FUNCTION 3.12(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

16. *See* A.B.A. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 15, at 3-3.11(a).

> A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused

Id. See also A.B.A. MODEL RULE OF PROFESSIONAL CONDUCT 3.8(d) (1998) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.").

such a claim in that system.[17] The prosecutor, who is accustomed to this adversarial system, can respond to a defendant's postconviction request to subject "old" evidence to "new" tests in a manner that affects the process in several ways. The prosecutor[18] can affect the availability of such testing, either by successfully opposing testing altogether or through delay to the point at which testing is no longer feasible[19] or no longer as important.[20] Moreover, the prosecutor can affect the speed with which such testing is obtained. Finally, the prosecutor can affect whether the request for "new" testing of "old" evidence even needs to be subjected to the adversarial process by deciding that collaboration with defense counsel can result in an equally or more efficient and reliable process.

Prosecutors have met defendants' requests to use new tests on old evidence with a range of reactions. On one end of the spectrum, prosecutors have assented to, and in some cases assisted with, the locating and testing of evidence. Some have even instituted programs to independently review cases for postconviction testing.[21] Many of these programs, however, rely upon prosecutorial judgments concerning which cases will ultimately receive test-

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17. Jennifer Boemer, Comment, *In the Interest of Justice: Granting Postconviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 WM. MITCHELL L. REV. 1971, 1987 (2001). "Moreover, it's not only the courts that can procedurally bar a defendant's right to postconviction DNA testing, but prosecutors as well." *Id.*

18. Many of the same observations concerning the effect of the prosecutorial responses also apply to the response of law enforcement authorities. For instance, evidence retention and preservation policies can change the availability of tests. To the extent that law enforcement authorities operate under the control of or in cooperation with prosecutors, this is an indirect way by which a prosecutor's response to a testing request can affect the availability of the test. While law enforcement authorities are not independently subject to the same ethical obligations as prosecutors, prosecutors are constitutionally charged with responsibility for the actions of law enforcement that affect the defendant's constitutional rights. *See* Kyles v. Whitley, 514 U.S. 419, 438 (1995).

> [While] no one doubts that police investigators sometimes fail to inform a prosecutor of all they know[,] . . . neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Id. (citations omitted).

19. Feasibility of tests can be affected by delay if delay results in sufficient degradation of material for testing.

20. Opposition or delay until a convicted defendant's sentence expires, for example, or until parole or alternative release is otherwise obtained, could significantly reduce the importance of the testing.

21. *See, e.g.*, Glenn Puit, *Prosecutors Examining Need for DNA Testing in Murder Cases*, LAS VEGAS REV.-J., Sept. 16, 2001, at 1B; Daniel Wise, *Brooklyn Prosecutors Find Convictions Pass DNA Test*, N.Y. L.J., Aug. 6, 2001, at 1; Joseph Morton, *3 Prosecutors Get Behind DNA Testing*, OMAHA WORLD HERALD, Apr. 16, 2001, at 18.

ing.[22] On the other end of this spectrum, prosecutors have forced defendants to engage in protracted litigation to obtain the evidence and the tests. This range of prosecutorial responses is unacceptable.[23] It has been due, at least in part, to a lack of legal and ethical rules to guide a prosecutor when a defendant requests assistance, oftentimes years after being convicted, in obtaining evidence to subject to new scientific testing. As the legal rules for obtaining testing change, so, too, must the ethical obligations of prosecutors who are necessary participants in the implementation of these rules.

This variety of prosecutorial responses would not be constitutionally permissible in the pretrial stage of a case, during which prosecutors have well-established obligations of disclosure to the defendant of exculpatory test evidence.[24] Similarly, in a traditional postconviction action, the prosecutor also has an obligation to disclose exculpatory material.[25]

Assuming, in the context of these new innocence-based postconviction claims, that certain defendants should have the opportunity to subject evidence to tests that could demonstrate their actual innocence, there needs to be recognized, basic ethical obligations for prosecutors facing such requests as a matter fundamental fairness. While the ethical standards that apply to prosecutors in the trial and postconviction adversarial context should translate into the innocence-based postconviction context, they do not do so effortlessly.[26] We thus provide in this article a model ethical obligation, with three related standards, that should apply to prosecutors facing an innocence-based postconviction claim seeking to apply new science or testing to old evidence in a case.

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22. *See, e.g.*, Puit, *supra* note 21, at 1B. *See also* Wise, *supra* note 21, at 1.

23. Other commentators have noted this position. *See generally* Karen Christian, *"And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1195 (2001) ("The author contends that an ad hoc, case-by-case approach to postconviction testing requests must be abandoned in favor of statutes that allow defendants to request this testing and receive a hearing if the results are favorable.").

24. Brady v. Maryland, 373 U.S. 83, 87 (1963).

25. Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) (explaining that "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction"). *See also id.* at 447 (White, J., concurring) (noting that the "obligation of the government to disclose exculpatory evidence is an exception to the normal operation of an adversary system of justice").

26. The non-disclosure of "old" evidence that could be subjected to "new" testing, in an innocence-based postconviction claim, has—in the only case yet to address the matter— been held *not* to constitute a *Brady* violation. *See* Harvey v. Horan, 278 F.3d 370, 378-79 (4th Cir. 2002).

> Harvey does not state a valid *Brady* claim because he is not challenging a prosecutor's failure to turn over material, exculpatory evidence that, if suppressed, would deprive the defendant of a fair trial. Harvey received a fair trial and was given the opportunity to test the DNA evidence during his trial using the best technology available at the time.

Id. (citations omitted).

This article first sets out the range of potential issues that can be litigated by canvassing the requirements of the new state innocence-based postconviction review statutes. Each of these issues, ostensibly "settled" by the relevant testing statute, could spawn litigation, and we explain how different responses by the prosecutor can affect the significance of these issues. We then briefly summarize the legal obligations of the prosecutor in the postconviction context and explain why limitations on these obligations, which arise in the traditional postconviction realm, are inapplicable in the innocence-based postconviction context. Next, we identify pressures that prosecutors face that may affect their responses to a request for postconviction testing and suggest reasons why postconviction testing is advantageous for prosecutors, as well as for other stakeholders in the criminal justice system. Finally, we set forth a model ethical obligation with three standards that we believe should be supported by an ethical prosecutor.

II. THE NEW INNOCENCE-BASED POSTCONVICTION REVIEW STATUTES

Scientific developments in forensic DNA analysis have driven legal developments. There is now an emerging body of law concerning what is—or in theory should be—available to a convicted defendant, who maintains that he is factually innocent, in the way of preservation of evidence, scientific testing, use of public funds for testing, and, in some cases, compensation for the wrongfully convicted. It is possible to make some general observations concerning the structure of these laws.

Although these statutes vary in several ways,[27] they all have three basic components. First, they provide defendants the right to subject evidence to scientific testing.[28] This "right" is a procedural one with significant substantive consequences. It is procedural in the sense that it is a right to have a type of test or examination performed, yet it is inextricably bound up with its potential substantive effects: a favorable result for a defendant often means that substantive relief is warranted.[29] The second basic component of these stat-

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27. *See* discussion *infra* Part III. A-I.

28. The bulk of these statutes address DNA testing, although some are not restricted to DNA testing. *See, e.g.*, ILL. CODE CRIM. PROC. § 5/116.3(a) (West 2002) (DNA or fingerprints); MINN. STAT. § 590.01(1a) (2002) (DNA or fingerprints).

29. The substantive consequences of these procedural rights are evident in provisions of some state statutes that describe the substantive relief defendants receiving favorable tests may obtain. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4504(b) (2001).

> The court may grant a new trial if the person establishes by clear and convincing evidence that no reasonable trier of fact, considering the evidence presented at trial, evidence that was available at trial but was not presented or was excluded, and the evidence obtained pursuant to subsection (a) of this section would have convicted the person.

Id.

This dual nature of the particular right at issue in postconviction DNA testing has recently been noted,

utes is that they create requirements for what the defendant must show concerning the state of the evidence to be tested (i.e., demonstration of adequate authentication and/or chain of custody).[30] Third, these statutes condition the right to test on a showing of the evidentiary significance of a favorable test result, or, in other words, what a test result must demonstrate in the factual context of a given case.[31] Many of these statutes also provide for appointment of counsel, mandate preservation of evidence, and/or require that the defendant explain the prior failure to test.

These statutes provide the means for obtaining postconviction review, and potentially relief, but they are not traditional postconviction relief statutes (such as those governing writs of habeas corpus or coram nobis). Although they sometimes use the language of traditional postconviction or habeas corpus law, they differ from those bodies of law in at least three important respects. First, perhaps most significantly, the innocence-based postconviction statutes are all premised on a single, specific, substantive claim by the defendant: that he or she is factually innocent.[32] In traditional forms of postconviction relief, such as petitions for a writ of habeas corpus, there may be a potentially infinite variety of substantive claims (i.e., the petitioner is being held in violation of any constitutional or federal statutory right), but factual innocence is neither required[33] nor is itself an independ-

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> At least as classically understood, it is not a right of procedural due process. And neither is it a typical substantive due process right. But it is a right that *legitimately* draws upon the principles that underlay all of these[.]

Harvey, 285 F.3d at 311 (Luttig, J., concurring).

30. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4504(a)(4) (2001).

31. Washington's statute appears to be an exception, with no mention of such requirements. *See* WASH. REV. CODE § 10.73.170 (2001).

32. One innocence-based postconviction testing statute makes clear that the postconviction remedy it affords is exclusive. MINN. STAT. § 590.01, Subd. 2 (2002):

> This remedy takes the place of any other common law, statutory or other remedies which may have been available for challenging the validity of a conviction, sentence, or other disposition and must be used exclusively in place of them unless it is inadequate or ineffective to test the legality of the conviction, sentence or other disposition.

33. Some have suggested that a claim of innocence should be a prerequisite of a habeas petition. *See generally* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). The Court has never held this, although some justices have advocated such a requirement. In *Kaufman v. United States*, 394 U.S. 217, 232-33 (1969), Justice Black's dissenting opinion stated: "Of course one important factor that would relate to whether conviction should be vulnerable to [federal] collateral attack is the possibility of the applicant's innocence." Justice Black also observed that: "In collateral attacks whether by habeas corpus or by § 2255 proceedings, I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt." *Id.* at 242. However, Justice Harlan distanced himself from "any implications that the availability of this collateral remedy turns on a petitioner's assertion that he was in fact innocent, or on the substantiality of such an allegation." *Id.* (citations omitted).

ently significant basis for relief.[34] Second, innocence-based postconviction statutes forego many of the procedural requirements that have become hallmarks of traditional postconviction litigation, such as strict time bars,[35] limitations upon collateral relief arising from procedural default at trial,[36] and limits on successive petitions.[37] They are explicitly designed to reach—rather than avoid—the merits of the claim.[38] As such, they create a process for review that circumvents the principle of finality.[39] Third, unlike any other means of enforcing rights in the criminal justice system, these statutes provide postconviction review specifically as the result of scientific tests.[40]

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34. While actual innocence can in theory be a basis for a habeas petition under *Herrera v. Collins*, 506 U.S. 390, 404 (1993), typically the claim of innocence is merely a way to avoid a procedural bar. *See* Schlup v. Delo, 513 U.S. 298, 314-15 (1995) ("procedural" claim of innocence can be a gateway through which other constitutional claims that would be procedurally barred can be heard under "miscarriage of justice" exception). The Court has long explained the fundamental justification for collateral remedies as the protection of constitutional rights, rather than error correction in the determination of guilt or sentencing. *See* Kaufman v. United States, 394 U.S. 229, 226 (1969) ("The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.").

35. The filing periods under these statutes vary widely. They range from a relatively short period in the context of development of "new" science or technology to an unlimited period. *Compare* DEL. CODE ANN. tit. 11, § 4504(a) (2001) (within three years after judgment of conviction became final) *and* FLA. STAT. ch. 925.11(1)(b) (2001) (within two years of finality of judgment and sentence, affirmance on direct appeal, or entry of collateral counsel, unless facts could not have been ascertained through due diligence) *with* ARIZ. REV. STAT. § 13-4240(K) (2002) (relief exists "[n]otwithstanding any other provision of law that would bar a hearing as untimely"); ARK. CODE § 16-112-202(a)(1) (Michie 2001) (motion may be filed "[e]xcept when direct appeal is available").

36. *See* Wainright v. Sykes, 433 U.S. 72, 84, 87 (1977) (requirement that habeas petitioner show cause and prejudice for procedural default).

37. McClesky v. Zant, 499 U.S. 467, 494-95 (1991) (habeas petitioner's failure to include claim in successor petition that could have been brought in prior petition constitutes abuse of the writ).

38. Senate Bill 486, for example, specifically provides that in federal cases the application for innocence-based postconviction testing shall not itself be considered a "motion," under 28 U.S.C. § 2255, for purposes of the bar on successive petitions, and that favorable test results shall result in a hearing and orders "notwithstanding any provision of law that would bar such hearing or orders as untimely." Act § 102, ch. 156, § 2291. The provisions for state postconviction testing in Senate Bill 486 also require that state laws allow a person whose test results are favorable "to apply for postconviction relief, notwithstanding any provision of law that would bar such application as untimely." *Id.* § 103(a)(1). Efforts to obtain testing through federal court have sometimes been found to be habeas petitions, subject to the procedural requirements those carry, notwithstanding defendants' claims to the contrary. *See* Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002).

39. *See, e.g.*, CAL. PENAL CODE § 1405(m) (West 2002):

> Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre.

40. While scientific evidence is often admitted in support of a claim that a defendant is entitled to relief (*e.g.*, evidence of a defendant's IQ is often admitted to demonstrate he could

III. BASIC PROCEDURAL AND PRACTICAL ISSUES IN POSTCONVICTION REQUESTS FOR APPLYING NEW SCIENCE TO OLD EVIDENCE

The application of newly created or newly advanced science to extant, or "old" evidence, presents issues similar to those involving newly discovered evidence.[41] Many, but not all jurisdictions, allow defendants to bring a motion for a new trial or action for postconviction relief based on evidence that was not or could not have been discovered before trial.[42] The application of new science presents an example of evidence that could not have been discovered before trial because of the limits of scientific or technological methodology. When the "new" science is applied to the "old" evidence, the results may be newly discovered evidence and may be a basis for postconviction relief.[43] It is also quite possible that the results reveal no newly dis-

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not have made a knowing and intelligent waiver), the only other situation in which a scientific test necessarily results in legal relief in the criminal justice system is arguably the evaluation of a criminal defendant's competence to stand trial. In those cases, the results of the forensic evaluations are the basis for enforcing the right not to be tried while incompetent. *See generally* Dusky v. U.S., 295 F.2d 743 (8th Cir. 1961) *and* Pate v. Robinson, 383 U.S. 375 (1966). In the innocence-based postconviction claim, the scientific test is a necessary prerequisite for relief, whereas it is not a prerequisite, for example, to a finding that a defendant is not competent to stand trial.

41. Many of the innocence-based postconviction testing statutes mirror the requirements for newly discovered evidence to be the basis for a motion for a new trial under Fed. R. Crim. P. 33. *See, e.g.*, United States v. Barbosa, 271 F.3d 438, 467 (3d Cir. 2001). These requirements include:

> (a) the evidence must be in fact newly discovered, i.e., discovered since trial;
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> (b) facts must be alleged from which the court may infer diligence on the part of the movant;
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> (c) the evidence relied on must not be merely cumulative or impeaching;
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> (d) it must be material to the issues involved; and
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> (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Id. (citing Fed. R. Crim. P. 33).

42. Michael J. Muskat, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 158-60 (1996) (noting in 1996 that at most only forty-one states provided post-conviction relief mechanisms that would be useable for claim of actual innocence).

43. One state's innocence-based postconviction testing statute makes this explicit. *See, e.g.*, Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing) Amendment to Florida Rules of Appellate Procedure 9.140 & 9.141, 807 So. 2d 633, 635 (2001) ("A motion to vacate filed under rule 3.850 or a motion for postconviction or collateral relief filed under rule 3.851, which is based solely on the results of the court-ordered DNA testing obtained under this rule, shall be treated as raising a claim of newly-discovered evidence. . . .").

covered evidence (if they are inconclusive), or the results may confirm the petitioner's guilt.

A series of issues arise whenever "new" science may be applied to "old" evidence. These issues are not limited to innocence-based postconviction claims, or efforts to obtain DNA testing, but are issues concerning the general application of new, or newly available, science to old evidence in criminal cases. The new innocence-based postconviction statutes address these issues, and we briefly examine how they do so. We identify these issues not to resolve them but to outline the range of areas in which the prosecutor's response matters.

A. Application of Statutes of Limitation or Procedural Bars

Many states dramatically limit the time in which criminal defendants may challenge, by a motion for a new trial, their convictions in a trial court.[44] As the Court noted in 1993,[45] only nine states do not limit the time in which a motion for new trial may be brought.[46] A defendant's ability to bring these actions is typically further limited by a requirement that the defendant either raised, and preserved, the issue at trial or can justify or explain the failure to do so.[47]

Application of these time limits could present potentially insurmountable hurdles with respect to requests for postconviction testing. If the science does not evolve sufficiently during the limitations period, the defendant would be time-barred from pursuing testing. The time-barred defendant must then present his claim as a traditional motion for a new trial based on newly discovered evidence, which creates a new set of issues concerning when the

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44. ALA. CODE § 15-17-5(a) (2001) (30 days); ARIZ. R. CRIM. P.24.2(a) (2002) (60 days); ARK. R. CRIM. P.33.3(b) (2001) (30 days); FLA. R. CRIM. P.3.590 (2002) (10 days); HAW. R. PENAL P.33 (2000) (10 days); ILL. COMP. STAT. ANN. § 725(b) (2001) (30 days); IND. R. CRIM. P.16 (2001) (30 days); MICH. CT. R. CRIM. P.6.431(A)(1) (2001) (42 days); MINN. R. CRIM. P.26.04(3) (2001) (15 days); MO. R. CRIM. P.29.11(b) (2001) (15-25 days); MONT. CODE ANN. § 46-16-702(2) (2001) (30 days); S.D. CODIFIED LAWS § 23A-29-1 (2001) (10 days); TENN. R. CRIM. P.33(b) (2002) (30 days); TEX. R. APP. P.31.4(a) (2001) (15 days); UTAH R. CRIM. P.24(c) (2001) (10 days); VA. SUP. CT. R. 3A:15(B) (2001) (21 days); WIS. STAT. § 809.30(2)(b) (2001) (20 days).

45. Herrera v. Collins, 506 U.S. 390, 410-11 nn. 8-11 (1993).

46. Footnotes in the Herrera case list the statutes from the nine states.

CAL. PENAL CODE ANN. § 1181(8) (West 1985) (no time limit); COLO. R. CRIM. P. 33 (Supp. 1992) (no time limit); GA. CODE ANN. 5-5-40, 5-5-41 (1982) (30 days, can be extended); IDAHO CODE 19-2407 (Supp. 1992) (14 days, can be extended); IOWA R. CRIM. P. 23 (1993) (45 days, can be waived); KY. R. CRIM. P. 10.06 (1983) (one year, can be waived); MASS. R. CRIM. PROC. 30 (1979) (no time limit); N.J. R. CRIM. PRAC. 3:20-2 (1993) (no time limit); N.Y. CRIM. PROC. 440.10(1)(g) (McKinney 1983) (no time limit); N.C. GEN. STAT. 15A-1415(b)(6) (1988) (no time limit); OHIO R. CRIM. P. 33(A)(6), (B) (1988) (120 days, can be waived); ORE. REV. STAT. 136.535 (1991) (five days, can be waived); PA. R. CRIM. P. 1123(d) (1992) (no time limit); S.C. R. CRIM. P. 29(b) (Supp. 1991) (no time limit); W.VA. R. CRIM. P. 33 (1992) (no time limit). *Id.*

47. For example, by showing that the evidence was newly discovered.

science or testing became "available" or was "discovered," and/or when it became admissible in the jurisdiction. This also raises factual questions concerning when the existence of the evidence became known, or could have become known, to the defendant. Some testing statutes address this issue by explicitly exempting postconviction relief based upon newly available testing from such time bars,[48] while others impose no time limits on when testing can be obtained.[49]

The issues concerning when a methodology became "available" or was discovered, and factual issues concerning what was known about it or about the evidence, could significantly complicate an application for testing. Whether the defendant knew or should have known about the existence of testing may raise issues of ineffective assistance of counsel (i.e., whether counsel, had he or she been effective, would have known of the availability of the tests), as well as issues of prosecutorial disclosure of the evidence.

B. Offense or Penalty-Specific Limitation on Applicability

Some jurisdictions limit the circumstances under which defendants may bring innocence-based postconviction claims to those in which they were convicted of certain offenses, suffered certain penalties,[50] or are still subject to the sentence originally imposed.[51] Statutes include offenses that range from a general description of "felonies" to specific enumerated offenses.[52] A few jurisdictions do not limit access of testing by either type of offense or

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48. *See, e.g.*, ARIZ. REV. STAT. § 13-4240(K) (2002).

> Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of the postconviction deoxyribonucleic acid testing are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to this article or the Arizona Rules of Criminal Procedure.

Id.; Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing) Amendment to Florida Rules of Appellate Procedure 9.140 & 9.141, 807 So. 2d 633, 635, 639-40 (2001). One jurisdiction makes innocence-based postconviction testing, when chosen, the defendant's exclusive form of relief. MINN. STAT. ANN. § 590.01, subd. 2 (2001) ("This remedy takes the place of any other common law, statutory or other remedies which may have been available for challenging the validity of a conviction, sentence, or other disposition and must be used exclusively in place of them unless it is inadequate or ineffective to test the legality of the conviction, sentence or other disposition.").

49. *See, e.g.*, TENN. CODE ANN. § 40-30-403 (2002) (no time limit).

50. Many jurisdictions' testing procedures apply only to felony convictions. *See, e.g.*, CAL. PENAL CODE § 1405(a) (West 2002); VA. CODE ANN. § 19.2-327.1(A) (West 2002). Some jurisdictions allow testing only for certain, more serious convictions. *See, e.g.*, IND. CODE ANN. § 35-38-7-1 (West 2001) (murder and class A, B, or C felonies); ME. REV. STAT. tit. 15, § 2137 (2002) (any crime punishable by 20 years incarceration or more).

51. *See, e.g.*, CAL. PENAL CODE § 1405(a) (West 2002) (defendant must still be incarcerated); ME. REV. STAT. tit. 15, § 2137 (2002) (requires defendant be "in actual execution of a sentence of imprisonment or . . . [be] subject to a sentence of imprisonment that is to be served in the future because another sentence must be served first"); WASH. REV. CODE ANN. § 10.73.170(1) (West 2002) (felony conviction and serving term of imprisonment).

52. *See supra* note 50.

penalty.[53] It is important to recognize that even after release from incarceration, a convicted defendant faces significant continuing disabilities.[54] It should be relatively straightforward to determine whether a defendant satisfies the offense or sentence-based prerequisite for bringing a motion for postconviction testing. The speed of the prosecutor's response, however, could certainly affect whether the testing can occur during the pendency of the sentence, and therefore the availability of testing under certain statutes.

C. Pleading Requirements

Even with a provision authorizing testing, some formal pleading is required to begin the process. Testing statutes require varying degrees of specificity and formality for this document (i.e., motion, oath, verification, etc.).[55] The degree to which prosecutors raise procedural shortcomings in the formality of the required pleading can delay the testing.

D. Evidence Authentication Requirements

Almost all jurisdictions that permit testing require some showing about the authenticity of the evidence the defendant seeks to test.[56] This involves procedural questions concerning who bears the burden of demonstrating authenticity and by what standard. Some statutes require that the evidence be in the possession or control of the court or other state officials.[57] Other statutes require that there is sufficient evidence to demonstrate that the evidence has not been substituted, tampered with, replaced, or altered in any material respect.[58] At least one requires a finding about the degree of possible degra-

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53. *See, e.g.*, MINN. STAT. ANN. ch. 590.01, subd. 1(2) (2001) (except when direct appeal is pending, anyone "convicted of a crime who claims that . . . scientific evidence not available at trial . . . establishes [their] actual innocence may apply").

54. *See supra* note 3.

55. *See, e.g.*, VA. CODE ANN. § 19.2-327.1(B) (2001):

> [P]etitioner shall assert categorically and with specificity, under oath, the facts to support the items enumerated in subsection A and (i) the crime for which the person was convicted, (ii) the reason or reasons the evidence was not known or tested by the time the conviction became final in the circuit court, and (iii) the reason or reasons that the newly discovered or untested evidence may prove the actual innocence of the person convicted.

56. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(A)(ii) (2002) ("the evidence . . . (ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect"); UTAH CODE ANN. § 78-35a-301(2)(b) (2001) ("the chain of custody is sufficient to establish that the evidence has not been altered in any material aspect"); VA. CODE ANN. § 19.2-327.1(A)(ii) (2001) ("the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way").

57. *See, e.g.*, ARIZ. REV. STAT. ANN. §13-4240(A) (Michie 2001).

58. *See, e.g.*, ARK. CODE ANN. § 16-112-202(b)(2) (Michie 2001); CAL. PENAL CODE § 1405(f)(2) (West 2002); DEL. CODE ANN. tit. 11 § 4504(a)(4) (2001); IND. CODE ANN. § 35-

dation of the evidence.[59] Although reliability of the evidence is necessary to obtain an accurate result, it should not present a legitimate issue when evidence has been in the custody of government officials. Nevertheless, prosecutors could demand that the defendant establish a chain of custody stretching over decades, through offices and personnel who are clearly beyond his control.[60]

E. Requirement of an Explanation for Prior Lack of Testing

To ensure that defendants diligently pursue available testing, some states require defendants to explain the failure to have previously conducted testing.[61] Typically this requires that the defendant demonstrate that the method of testing was either unavailable at the time of trial or has significantly improved since that time.[62] A few statutes provide that lack of avail-

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38-7-8 (West 2001); MD. CODE ANN., CRIM. PROC. § 8-201(c)(3) (2001); MINN. STAT. ANN. § 590.01(1a)(2)(b)(2) (2002); TEX. CRIM. PROC. CODE ANN. art. 64.03(a)(1)(A)(ii) (Vernon 2002); UTAH CODE ANN. § 78-35a-301(2)(b) (2001); VA. CODE ANN. § 19.2-327.1(A)(ii) (2001).

59. *See* MICH. COMP. LAWS § 770.16(7)(b) (2002):

> That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation described in subsection (1).

Id.

60. One state statute recognizes this possibility and requires that state agencies cooperate in determining chain of custody. *See* UTAH CODE ANN. § 78-35a-301(5) (2001) ("After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel have a duty to cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which may be subject to DNA testing.").

61. *See, e.g.*, ARK. CODE ANN. § 16-112-202(a)(1)(B) (Michie 2001) ("The evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial."). *See also* IND. CODE § 35-38-7-8(3) (2001):

> The evidence sought to be tested:
>
> (A) was not previously tested; or
>
> (B) was tested, but the requested DNA testing and analysis will:
>
> i) provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice; or
>
> ii) have a reasonable probability of contradicting prior test results.

62. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4504(a)(2) (2001) ("The evidence was not previously subject to testing because the technology for testing was not available at the time of the trial."); MICH. COMP. LAWS ANN. § 770.16(3)(b)(ii) (2002) ("The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously

ability of the evidence to counsel, or lack of knowledge concerning its existence, without regard to technological change, is sufficient.[63] Whether evidence was available, or known to the defendant or counsel, are of course questions that prosecutors may raise as a litigable issue.

F. Explanation of Potential Significance of Testing

As both a procedural and substantive matter, establishing the evidentiary significance of favorable test results is one of the most important issues in obtaining testing. It is also one that can easily be the most contentious. Procedurally, this issue involves the standard by which the defendant must demonstrate the potential "favorability" of the test result as a prerequisite to obtaining testing.[64] Substantively, this issue implicates issues of finality and availability of collateral relief more generally. Should it be enough that a test result is favorable simply by not inculpating the defendant? Should there be a requirement that if the test result had been in evidence at the time of the defendant's trial, there would very likely have been a different result?[65] Or should it be sufficient that, had the test result been in evidence, there possibly would have been a different result?[66] Does a "favorable" result include one that would reduce, without eliminating, the defendant's responsibility in the offense?

The statutes do not provide a uniform answer to these questions, and the answers that they do provide seem to beckon disputes about their meaning. A significant number of statutes require that identity was at issue in the case[67] or that it should have been if it was not.[68] Some statutes require the de-

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tested, will be subject to DNA testing technology that was not available when the defendant was convicted."); VA. CODE ANN. § 19.2-327.1(A)(i) (2001) ("the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the Division of Forensic Science at the time the conviction became final in the circuit court"). *See also* ARK. CODE ANN. § 16-112-202 (Michie 2001); FLA. STAT. ANN. § 925.11(2)(a)(2) (2001).

63. *See, e.g.*, MO. ANN. STAT. § 547.035(3)(b) -(c) (2002).

64. *Compare, e.g.*, N.M. STAT. ANN. § 31-1A-1(C) (Michie 2001) (clear and convincing evidence) *with* CRIM. PRO. CODE ANN. art. 64.03 (2) (Vernon 2002) (preponderance of the evidence).

65. The standard for the allowance of a new trial on collateral review, based upon insufficiency of the evidence at trial, is set forth in *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (a new trial is appropriate only when, viewing evidence in light most favorable to prosecution, no reasonable finder of fact could have concluded defendant guilty beyond a reasonable doubt). *See, e.g.*, N.M. STAT. ANN. § 31-1A-1(C)(8) (Michie 2001) (petitioner must demonstrate "if the evidence he wants the court to order DNA testing upon had been admitted at the petitioner's initial trial, a reasonable judge or jury would not have been able to find him guilty beyond a reasonable doubt").

66. *See, e.g.*, N.Y. CRIM. PROC. LAW § 440.10(1)(g) (Consol. 2001) (new trial available if evidence "is of such character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant.").

67. ARK. CODE ANN. § 116-112-202(b)(1) (Michie 2001); DEL. CODE ANN. tit. 11, § 4504(a)(3) (2001).

fendant to show that the testing would produce results that are "materially relevant" to a defendant's claim of innocence.[69] Others require the defendant to demonstrate that there is a reasonable probability that he would not have been prosecuted or convicted had the test results been available,[70] or that the verdict or sentence would have been more favorable if the results had been available.[71] One statute requires the defendant to show that the test results would establish his "actual innocence."[72] Others require new, noncumulative evidence that would be "material to a claim of innocence."[73] Yet others specify nothing about the required evidentiary significance of test results.[74]

G. Requirement and Duration of a Claim of Innocence

The procedures for testing in innocence-based postconviction actions, by definition, involve the claim that the defendant is innocent. Must the defendant have asserted his innocence throughout the case, or is it sufficient that the defendant has raised his innocence only for purposes of the postconviction action?[75] For example, prosecutors may assert that defendants who confessed or who plead guilty cannot obtain postconviction testing. However, absent an explicit statutory bar, the recency of a claim of innocence should not provide a basis for a prosecutor to oppose testing.

H. Cost Issues

Whether the defendant or the government should bear the costs of testing is a critical issue because it can either facilitate or preclude testing. Various statutes allocate the costs of testing differently. In addition to allocating the costs of testing, some statutes provide for the appointment of counsel, the availability of which may also either facilitate or preclude test-

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68. CAL. PENAL CODE § 1405(f)(3) (West 2002).

69. *See, e.g.*, ARK. CODE ANN. § 16-112-202(c)(1)(B) (Michie 2001); DEL. CODE ANN. tit. 11, § 4504 (a)(5) (2001); MD. CRIM. PRO. CODE ANN. § 8-201(c)(5) (2001).

70. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4240(b)(1) (2002).

71. *See, e.g.*, CAL. PENAL CODE § 1405(f)(5) (West 2002).

72. LA. CODE CRIM. PROC. ANN. art. 926.1(C)(1) (2002).

73. Arkansas' testing provision requires that the defendant establish a prima facie case that "[t]he testing has the scientific potential to produce new noncumulative evidence materially relevant to the defendant's assertion of actual innocence[.]" ARK. CODE ANN. § 16-112-202(c)(1)(B) (Michie 2001). Minnesota's provision is nearly identical. MINN. STAT. ANN. § 590.01 Subd.1(c)(2) (2002) ("the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence").

74. ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001); TENN. CODE ANN. § 40-30-403 (2002).

75. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 64.03(b) (2002), for example, provides that: "A convicted person who pleaded guilty or nolo contendere in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea."

ing. These issues unfortunately present a ripe opportunity for litigation, with the obvious consequence of delay.

I. Scientific Reliability Issues

An unspoken premise of these new testing provisions is that the forms of testing available are so reliable that they necessarily represent an improvement in what was available earlier in the case. But how reliable must a "new" form of testing, that a defendant seeks to apply to "old" evidence, be? Some of the new innocence-based postconviction statutes provide only for DNA testing, although many provide for any testing that is scientifically reliable and was not previously used in the case.

Prosecutors can decide to make each of these issues the subject of litigation. The resolution of such litigation may be rapid or protracted. In addition, the factual predicates for resolution of many of these issues are often within the control of prosecutors, which means that the decisions they make can shape not only the process, but also the outcome. Unless there is an ethical obligation on the part of the prosecution to promptly resolve all of these issues in a way that facilitates justice, the promise of exonerating those who legitimately claim that they were wrongfully convicted will be hollow.

IV. THE APPLICABILITY OF EXISTING ETHICAL AND LEGAL OBLIGATIONS TO THE INNOCENCE-BASED POSTCONVICTION CONTEXT

The principal legal obligations of prosecutors, with respect to ensuring the fairness of the trial process, are constitutionally based. They involve a range of obligations, all of which may be relevant to an innocence-based postconviction testing claim. These obligations "might loosely be called the area of constitutionally guaranteed access to evidence."[76] These obligations include:

(1) the prosecution's duty to disclose evidence within its possession or control that is exculpatory and material;

(2) the prohibition against the government's bad faith destruction of such evidence;

(3) the state's duty to provide the defense with the power through subpoena to gain the production of witnesses and physical items at trial;

(4) the state's duty to provide certain types of assistance or information to the defense that will allow it to use the power of subpoena to gain evidence; and

76. Arizona v. Youngblood, 488 U.S. 51, 55 (1988) (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).

(5) the prohibition against certain governmental actions that interfere with the defense use of the subpoena power.[77]

All of these obligations could conceivably become significant in an innocence-based claim for postconviction testing. For example, if the evidence to be tested is in the prosecution's control or possession, and a favorable test result would be material to the defendant's claim of innocence, it would fall within the disclosure requirements of *Brady*. Similarly, information about the existence or location of this evidence would appear to be the type of assistance the government must provide to enable the defense to subpoena the evidence for testing. Not interfering with such subpoenas or other efforts to obtain the evidence would necessarily be a part of this obligation as well. Preservation of evidence that might be tested also appears to be a prosecutorial obligation that is significant in innocence-based postconviction testing.

Although innocence-based claims for postconviction testing appear to implicate all these obligations, such claims do not readily implicate existing legal obligations, either for disclosure by prosecutors or access to evidence by defendants, for two basic reasons. The first of these reasons is doctrinal, and the second is procedural.

First, innocence-based claims for postconviction review are premised on the notion that the trial result was factually incorrect, *not* that the trial process was somehow unfair. The existing constitutional obligations for prosecutors to disclose evidence or information,[78] and existing constitutional rights of defendants to gain access to evidence or information,[79] have all been based on the constitutional guarantee of due process under the fourteenth amendment.[80] As such, they are premised on the notion that a trial may be rendered unfair by the failure to disclose evidence, or the denial of access to evidence.[81] The unfairness in the innocence-based postconviction claim, how-

77. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3, at 1096 (3d ed. 2000).

78. *See* Strickler v. Green, 527 U.S. 263 (1999); Kyles v. Whitely, 514 U.S. 419, 432-33 (1995); United States v. Bagley, 473 U.S. 667, 674-75 (1985); United States v. Agurs, 427 U.S. 97, 107 (1976); *and* Brady v. Maryland, 373 U.S. 83, 87 (1963).

79. Arizona v. Youngblood, 488 U.S. 51, 55 (1988) (describing "what might loosely be called the area of constitutionally guaranteed access to evidence"); Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

80. The exception to this is found in *Pennsylvania v. Ritchie*, in which the Court suggested that the compulsory process clause of the Sixth Amendment might afford a basis for obtaining counseling records of a witness, but held that the issue was "more properly . . . considered by reference to due process." 480 U.S. at 56.

81. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). In *Brady*, the Court held that:

> suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused[,] . . . . [s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

ever, is not a claim of past unfairness at the trial level, but rather that there is present unfairness at the postconviction level. Although as a common sense matter, it is easy enough to recognize that present denial of access to evidence that could exonerate a convicted person is fundamentally unfair, this is not the same as concluding that the trial was unfair. The Court has been careful to avoid creating constitutionally freestanding discovery requirements in criminal cases,[82] and the recognition that a defendant should have access to evidence, or be able to obtain information, that could support a claim of innocence need not amount to a constitutional right of discovery.

Second, there are a number of procedural limitations on traditional postconviction review that are based upon concerns that are inapplicable in the innocence-based postconviction context. These include limitations on collateral remedies, such as procedural default,[83] limitations on successive petitions,[84] and limitations on discovery, [85] which are a function of the finality and comity concerns of the collateral review process generally. These limitations do not apply with the same force to innocence-based postconviction claims, because this form of review carves out a limited exception to finality (in an effort to obtain a more accurate result) and because—as collateral

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Id. See also United States v. Bagley, 473 U.S. 667, 678 (1985) ("The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. . . . [S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial."); United States v. Agurs, 427 U.S. 97, 108 (1976) ("prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial"). More recently, in *Kyles v. Whitely*, 514 U.S. 419, 434 (1995), the Court decided that:

> Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant).

Id. See also Strickler v. Green, 527 U.S. 263, 296 (1999) (finding no prejudice at trial when the defendant could not show with a "reasonable probability that his conviction or sentence would have been different if the materials had been disclosed").

82. *See* Weathersford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.").

83. *See* Wainwright v. Sykes, 433 U.S. 72, 88 (1977).

84. McClesky v. Zant, 499 U.S. 467, 491 (1991) (explaining that finality is the source of the abuse-of-the-writ doctrine as a limit on successive petitions, because "[f]inality has special importance in the context of a federal attack on a state conviction[,] . . . [r]eexamination of state convictions on federal habeas 'frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights'") (internal citations omitted).

85. LAFAVE ET AL., *supra* note 77, § 28.7(e), at 1349. "Rule 6 of the Rules Governing § 2254 Cases allows discovery under the Federal Rules of Civil Procedure, 'if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so.'" *Id.* (citing Rule 6 of the Rules Governing § 2254 Cases). Indeed, "[g]eneralized statements about the possible existence of material do not constitute "'good cause.'" *Id.*

state proceedings—they do not implicate comity. This form of review is limited in that it opens only a specific area of inquiry concerning the validity of the conviction (typically identification), and does so for the sole purpose of seeking the truth.

Thus, while in traditional postconviction proceedings defendants seek to demonstrate that past unfairness led to injustice, in innocence-based postconviction proceedings defendants seek the factual truth. Because the purpose of innocence-based postconviction proceedings more closely mirrors the purpose of a trial, the principal ethical and legal obligations of a prosecutor that are relevant to postconviction testing in support of an innocence-based postconviction claim should be those that apply *at trial*, rather than those that typically apply in the postconviction context.

V. FACTORS AFFECTING PROSECUTORS' RESPONSES TO REQUESTS FOR POSTCONVICTION TESTING

There are individual and institutional pressures that may deter prosecutors from cooperating with a defendant's request for postconviction testing. For instance, the individual prosecutor faces institutional and public pressure to maintain the integrity of a conviction. The number of convictions obtained may be a measure of a prosecutor's individual success or failure.[86] Prosecutors may be perceived as being "soft" on crime or sympathetic towards defendants if they assist with, or fail to object to, postconviction testing. On a personal level, prosecutors may have worked with victims and investigators of horrific crimes, and may be loathe to reopen unsettling experiences. Prosecutors may themselves be invested in the knowledge or belief that the perpetrator has been punished and the case concluded.

In addition to these personal and institutional pressures, postconviction challenges undermine both theoretical and practical notions of finality. In a theoretical sense, finality is necessary to maintain the legitimacy and integrity of the criminal justice system. In a practical sense, victims of violent crime seek finality as a way of promoting closure. A defendant's postconviction request for scientific tests threatens to undermine both types of finality, which adds to the resistance to such testing.

As the Court has noted, however, with regard to federal habeas corpus claims, "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for . . . judicial review" and that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of consti-

86. *See* Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, it is how You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 292 (2001).

tutional rights is alleged."[87] If the "conventional notion of finality" can be set aside when the infringement of constitutional rights is alleged for exercising federal collateral review, surely a state should be able to set it aside in the narrow context of examining a claim of factual innocence.

VI. PROPOSED MODEL ETHICAL OBLIGATIONS FOR PROSECUTORS FACING A POSTCONVICTION REQUEST FOR APPLICATION OF NEW TESTING

While it is impossible to canvas the entire range of potential arguments in response to a defendant's request for the application of new scientific testing to evidence, several basic principles could guide an ethical response to such request. These are not designed to ensure a particular outcome or advantage, or disadvantage, for either side. Rather, they are intended to efficiently, reliably, and fairly ensure access to the most accurate assessment of all potential evidence to provide the fullest possible accounting of the truth in a particular case.

A. Obligation to Promptly Seek Fullest Possible Accounting of the Truth

The postconviction phase of a criminal case presents an effective role-reversal for the respective parties. The presumptions and burdens are the reverse of those in the investigative and trial phases of a case, and thus the actions of counsel must reflect this difference. Before conviction, when the government bears the burden of proof and the defendant enjoys the presumption of innocence, delays in the process may advantage the defendant. Defendants are constitutionally guaranteed a speedy trial, and defendants who are incarcerated pending trial suffer dramatic costs associated with delays. From a strategic perspective, however, delay can advantage a defendant who is not obligated to present witnesses or establish proof.

In the postconviction context, the reverse is true. The defendant bears the burden of proof, and all presumptions favor the government. Delay advantages the government because it preserves the defendant's conviction and incarceration. Delay in the postconviction context also reduces the likelihood of finding extant evidence that may be subjected to testing. The possibility that delay will result in degradation or destruction of potentially exculpatory evidence should give a prosecutor pause, and perhaps it should mean that a prosecutor will not raise a procedural argument against a defendant's effort to obtain testing in the first instance, based on the possible ramifications of the delay caused by such an argument.

The obligation to seek the fullest possible accounting of the truth does not, by itself, reflect a belief that the original conviction is either invalid or incorrect. Nor does it reflect an admission of the evidentiary or legal significance of potential evidence. Thus, a prosecutor must make decisions about

87. Kaufman v. United States, 394 U.S. 217, 228 (1969).

the process of locating and identifying evidence that might be subject to testing, and subjecting it to testing, without being influenced by the possible evidentiary or legal significance of the results of such tests.

This obligation also means that strategic or legal reliance on the principle of finality must not preclude exploring the existence of potentially exonerative evidence. Finality as a legal proposition is necessary to maintain the legitimacy and integrity of the criminal justice system.[88] As a practical matter, finality is an essential component of enabling crime victims to obtain closure, ensuring that there will be certainty that comes with the end of litigation, and allowing a defendant to focus on rehabilitation and reentry into society. Finality, though, is premised on the notion that the correct individual was held responsible for the offense.

The obligation to seek the fullest possible accounting of the truth means that prosecutors must be committed to obtaining test results from qualified persons who operate reliable testing facilities, according to accepted procedures. The obligation to seek this accounting means that the prosecution must either affirmatively seek, or passively accept, the use of such a facility, and will not interpose spurious arguments about the qualifications of a particular scientist or facility solely to hinder testing. For instance, state or police facilities may not be best suited to conduct such testing, either because of prior involvement in a case, lack of the requisite sophistication, or a backlog of more recent cases. Private facilities, because of experience, expertise, neutrality, or speed, may be better suited to undertake such testing.[89]

B. Obligation to Effect Full Disclosure in Completed Cases

The prosecutor bears a constitutional and ethical obligation to disclose exculpatory evidence prior to the conviction, and there is no principled reason that this obligation should not apply at the postconviction stage. Indeed, after conviction, a defendant typically may use a jurisdiction's public records law to obtain substantially all the documents in his case, not just those that are "exculpatory." More importantly, however, the access of a postconviction defendant to information about the case must be greater than access to basic exculpatory information because information that did not seem significant at the time of the conviction can become paramount as the result of a particular scientific advance. For instance, information concerning the availability of previously non-exculpatory, irrelevant evidence that the prosecution or police chose not to use at the time of trial may become significant if advances in testing make it possible to subject that evidence to testing. This

88. *See* Calderon v. Thompson, 523 U.S. 538, 555-56 (1998) (noting that finality is essential to the retributive and deterrent functions of the criminal law).

89. Examples of such arguments include those that an out-of-state lab will not be under prosecution's "control," or will preclude subsequent establishment of chain of custody for items analyzed there. Some state testing statutes provide for just such use of private testing facilities. *See* UTAH CODE ANN. §§ 78-35a-301(7) (a) & (b) (2001).

is not classic exculpatory evidence, yet the nondisclosure of the existence of such information or evidence effectively results in the suppression of potentially exculpatory evidence.

Nevertheless, prosecutors sometimes take the position that a postconviction effort to obtain the application of new science constitutes a reopening of the criminal case and thus makes it an "ongoing" or "pending" case. Once a defendant has been convicted for a particular crime, a prosecutor should not be allowed to argue persuasively that it is still an "open" case in response to the defendant's request for access to the government's information. Of course, there are legitimate exceptions to this obligation. For instance, identifying or personal information concerning victims or witnesses should not be disclosed absent some compelling reason that it could affect the availability of testing. Similarly, once information is developed that exonerates an individual, specific details that might compromise the government's ability to locate and prosecute the actual perpetrator should not be subject to disclosure.

C. Obligation to Utilize Most Accurate Scientific Methods

The use of the most accurate scientific methods increases the effectiveness of the truth-finding process, which is a primary goal of the criminal justice system. Legal finality based on a factual premise whose falsity is scientifically demonstrable is simply not genuine finality. This is the underlying premise of innocence-based postconviction review.

The desire for truth-finding, however, must be balanced against the practical need for finality. A never-ending obligation to utilize the most accurate scientific methods could result in the permanent sacrifice of legal finality on the altar of ever-expanding scientific development. The requisite degree of reliability of scientific evidence can be cabined between two poles. At a minimum, a defendant should be able to use the science that local prosecutors use in current cases. The rationale for this "floor" is that if the science is sufficiently reliable for the prosecutors to use to obtain convictions, it is sufficiently reliable in the postconviction context. At a maximum, a defendant should be able to use scientific tests that are admissible in the highest court of the jurisdiction.

VII. CONCLUSION

This article has presented three ethical obligations that should apply to prosecutors faced with an innocence-based postconviction request for testing. These obligations are designed to make real the promise of postconviction testing statutes that offer a means of establishing the innocence of wrongfully convicted persons. While the existence of these statutes is a critical step in ensuring that wrongful convictions are corrected, unless prosecutors adopt ethical obligations consistent with the premises of these new statutes, their promise will likely never be fulfilled.