

OUTSIDE COUNSEL

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Actual-Innocence Policy, Non-DNA Innocence Claims

The 212 people exonerated by DNA evidence since 1989 have raised significant awareness about the criminal justice system's failure to protect the innocent from wrongful conviction and have led to reform in the handling of criminal investigations and prosecutions.¹

As 149 of these DNA exonerations have come in the last seven years, a body of data has recently developed that can now be relied upon for meaningful analysis of the causes of erroneous convictions. Cases most likely to result in the conviction of the innocent involve faulty eyewitness identification, misleading forensic evidence, false confessions, or unreliable informant testimony.²

Studies also suggest that for every DNA exoneree there are hundreds if not over a thousand wrongfully convicted defendants whose cases do not contain biological evidence that could prove innocence.³

Post-conviction DNA exonerations will undoubtedly diminish in the future as testing becomes more prevalent in the early stages of criminal investigations and prosecutions. However, wrongful convictions in non-DNA cases will continue virtually unabated unless the judiciary, heeding the lessons from the DNA exonerations, adjusts its approach to considering claims of actual innocence.

Benchmark Decision

On Dec. 18, 2007, the Second Department in *People v. Martin Tankleff*⁴ rendered

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a benchmark decision in a non-DNA post-conviction case. There, the court reversed the lower court's denial of a CPL §440.10 motion, leading to the release of a man who had been incarcerated for more than 17 years for the murder of his parents in their Long Island home. Mr. Tankleff was only 17 years old at the time of the murders and his arrest. The case against him was based upon a dubious confession obtained after intensive interrogation, during which police lied to Mr. Tankleff, telling him that his father awoke from a coma and implicated him in the murders. Evidence was offered at the 440.10 proceeding that his father's ex-business partner, who was deeply in debt to his father, may have been the actual killer.

The case is a milestone on the newly discovered evidence front. But the opinion is also significant for what it failed to decide: the status of the actual innocence doctrine in New York, an underdeveloped yet important area of law for innocent convicts, especially those whose cases lack DNA evidence.

A claim of actual innocence is premised on the notion that the imprisonment of an innocent person violates due process of law and the protection against cruel and unusual punishment embodied in the federal and state constitutions.⁵ Unlike

most post-conviction claims, which must be based either on constitutional error or on newly discovered evidence advanced with due diligence, an actual innocence claim can stand alone irrespective of antecedent constitutional error; this type of claim is referred to as a "freestanding actual innocence claim." Moreover, unlike a newly discovered evidence claim,⁶ a claim of actual innocence can be raised at any time,⁷ and can be founded on "any reliable evidence," including hearsay and other evidence that may be inadmissible at trial.⁸ As one New York court explained, "this is so because the focus is on factual innocence and not on whether the government can prove the defendant's guilt beyond a reasonable doubt."⁹ A litigant need only show true factual innocence to prevail.

The concept is so basic that it is surprising that the doctrine is now just developing. Indeed, courts have struggled to accept a doctrine that many believe should exist, but that does not fit easily into the existing framework of rigid procedural rules that restrict avenues of recourse for postconviction litigants. Although only marginally recognized by the U.S. Supreme Court, over the last five years claims of actual innocence have gained momentum in state courts.

Actual Innocence

The Supreme Court in *Herrera v. Collins* suggested in dicta that executing a truly innocent person would offend the U.S. Constitution.¹⁰ However, the Court refused to recognize a "claim [of actual innocence...][as a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."¹¹

The Court interpreted actual innocence as a question of fact outside the proper scope of review, because “federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact.”¹² In other words, “what we have to deal with on habeas review is not the petitioners’ innocence or guilt, but solely the question [of whether their constitutional rights have been preserved.]”¹³ *Herrera* has been understood by federal courts to mean that keeping an innocent person in prison does not violate the Constitution if the trial was free from constitutional error and the state provides for executive clemency as a mechanism for entertaining a claim of innocence.¹⁴

The result in *Herrera* directly reflects the extent of the justices’ reliance on criminal trials to accurately establish guilt or innocence. As Justice Sandra Day O’Connor explained, “[Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.]”¹⁵ Thus, in Justice O’Connor’s view, the issue presented in *Herrera* was “whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction.”¹⁶ The *Herrera* majority assumes that criminal trials produce reliable results, and that wrongful convictions are exceedingly rare. Notably, *Herrera* was decided in 1993, years before the frequency of DNA exonerations increased to steady stream, and before many of the studies of exonerations cases were published.

In *Schlup v. Delo*,¹⁷ another capital habeas case, the Court expanded on *Herrera*, distinguishing *Herrera*’s claim from that of the petitioner in *Schlup*, who raised a claim of actual innocence in conjunction with a constitutional claim. A showing of actual innocence, the Court determined, could act as a “gateway” to reach the merits of an otherwise procedurally defaulted claim.¹⁸ Thus, under federal law, a sufficiently persuasive showing of actual innocence can confer limited relief, but only where the claim is coupled with an independent constitutional violation.¹⁹

The Court’s justification for rejecting a freestanding innocence claim in *Herrera* was tied to the theoretical possibility of

executive clemency, the existence of which meant that the petitioner was not entirely without legal remedy.²⁰ The flaw with this rationale was emphasized in Justice Harry Blackmun’s dissent. “[The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal.]”²¹ Subsequent state court opinions have also noted that pardons are often highly political, and are routinely “denied based on arbitrary cri-

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teria.”²² Furthermore, executive clemency is not a fair and comprehensive avenue of recourse for the actually innocent. Rather than a means of exoneration, “[a pardon is an act of grace...which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.]”²³

Importantly, in deciding *Herrera* the Supreme Court was also constrained by concerns of federalism unique to federal habeas review of state criminal convictions. Thus, as the Court suggested, state courts are the better forum for the development of the doctrine of actual innocence.²⁴ The New Mexico Supreme Court recently echoed this sentiment, noting that state courts are best able to consider their state’s sovereignty interest in “ensuring accuracy in criminal convictions in order to maintain credibility within the judiciary.”²⁵ Furthermore, as a practical matter state courts consider the vast majority of postconviction cases in which claims of actual innocence are likely to be raised, and when the evidence is fresher and more available.

Consequently, the development of the actual innocence doctrine remains squarely on the shoulders of the state courts.

In the State Courts

The high courts of five states have adopted some form of freestanding actual innocence in the wake of *Herrera* and *Schlup*.²⁶ In addition, lower courts in other states, including New York, have also recognized freestanding innocence claims. With one exception, all of the courts to recognize a freestanding innocence claim have grounded their decisions in the due process provisions of their state constitutions.²⁷

In New York, the doctrine was first adopted in 2003 by the Kings County Supreme Court in *People v. Cole*.²⁸ Until the lower court’s decision in *People v. Tankleff*,²⁹ *Cole* was the only court in New York to recognize a freestanding actual innocence claim. *Cole* held that “the conviction or incarceration of a guiltless person...runs afoul of the due process clause of the State Constitution,” and “punishing an actually innocent person...violates the cruel and inhuman treatment clause.”³⁰ Furthermore, as “CPL 440.10(1)(h) provides for the vacating of a judgment which was obtained in violation of an accused’s constitutional rights,” *Cole* further held that a motion under this statute is the appropriate procedure to raise a freestanding claim of actual innocence.³¹

However, rather than applying the statutory standard of proof prescribed for all motions brought under CPL §440.10, *Cole* instead imposed the higher standard suggested in *Herrera*, requiring that “a movant making a free-standing claim of innocence must establish by clear and convincing evidence...that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty.” In contrast, the statute requires only a showing by a preponderance of the evidence that the result of a new trial, if granted, would “probably” be different, based on the entire record before the hearing court.³²

With respect to the question of remedy, the statute requires that a court granting a 440.10 motion must vacate the conviction, but otherwise allows wide discretion to “dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate under the circumstances.”³³ *Cole*, however, reasoned that, “[if a court has determined by clear and convincing evidence that no reasonable

juror could convict the defendant of the charged crime, what purpose does a new trial serve? ... Thus, if a court sustains a free-standing claim of innocence, the court should vacate the conviction and dismiss the accusatory instrument."³⁴

The petitioner in *Cole* never appealed the court's decision, and therefore the Second Department did not have the opportunity to consider the freestanding innocence doctrine until *Tankleff*. The lower court in *Tankleff* relied explicitly on *Cole* and acknowledged the existence of the actual innocence doctrine, but found that *Tankleff* failed to meet *Cole*'s clear and convincing standard. *Tankleff*'s appeal presented the Second Department with the opportunity to expound upon the doctrine. A compelling case of actual innocence was advanced, and the issue was thoroughly briefed. Furthermore, the *Tankleff* case illustrated the problems created by narrow interpretation of procedural limits on newly discovered evidence claims, and the acute need for a freestanding innocence claim where a petitioner can prove innocence but may not be able to satisfy the due diligence requirement for a newly discovered evidence claim.³⁵ Moreover, as *Tankleff* was being briefed in the Second Department, the New Mexico Supreme Court adopted the freestanding actual innocence doctrine in a sweeping opinion that relied heavily upon New York's *People v. Cole*.³⁶

Nevertheless, by deciding that *Tankleff* was entitled to relief on newly discovered evidence grounds, the Second Department entirely avoided the freestanding innocence claim. Although the court held that the lower court "properly denied" defendant's actual innocence claim because "defendant did not establish that he was entitled to this relief," the court provided no explanation as to what a litigant would need to show or why *Tankleff*'s showing was insufficient. Rather, the court stated, "we do not decide the contention, advanced by the defendant, that New York recognizes a free-standing claim of actual innocence that is cognizable by, or which may be addressed within the parameters of CPL 440.10(1)(h)."³⁷ The opinion makes no mention of *Cole*, which explicitly held that a freestanding innocence claim is available under CPL 440.10(1)(h).

Arguably, the Second Department's decision to avoid the innocence claim

could be viewed as an exercise in judicial restraint. Certainly it was easier to rest the decision on newly discovered evidence grounds, even though to do so required the court to overturn the lower court's finding of lack of due diligence.³⁸ Indeed, to decide the case on actual innocence grounds it would have forced the court to confront a host of difficult issues.

Unanswered Questions

There are a number of questions surrounding the actual innocence doctrine that must be answered. Because the focus is on actual innocence and not a finding of lack of guilt at trial, should not the proper inquiry be whether a petitioner can prove actual innocence to a court, as opposed to whether no reasonable juror could convict? As to the standard, is clear and convincing evidence, as applied in *Cole* and by the lower court in *Tankleff*, the appropriate standard? This is the burden of proof applied by most state courts that have considered the issue.³⁹ However, this standard was gleaned from federal jurisprudence that developed in the context of habeas corpus litigation, where state remedies had already been exhausted and federalism concerns mandated a higher burden of proof. In the state arena, in contrast, the case is less stale, and the state's interest in freeing the innocent can be more flexibly balanced against the interest of finality.

New York courts may want to examine the course taken by the Illinois Supreme Court. Relying on the Illinois Post-Conviction Hearing Act, the court applied a standard akin to preponderance: Evidence "of such a conclusive character as would probably change the result on retrial."⁴⁰ The Illinois court's opinion provides strong support for the argument that the similar standard prescribed by New York's equivalent statute, CPL §440.30 (6), should control.

A question that remains, however, is whether the standard should be different when the claim of actual innocence is coupled with a violation of a constitutional right, such as ineffective assistance of counsel or prosecutorial misconduct. Under such circumstances, it would be logical for the courts to utilize a lower standard of proof when confronting non-

freestanding claims of actual innocence. Or perhaps, consistent with the vast discretion conferred to 440.10 courts in fashioning relief, courts should be permitted to allocate the burden on a case-by-case basis.

Courts must also consider the appropriate remedy, a question that is inextricably connected to the burden of proof. According to *Cole*, it would be inappropriate to order a new trial of a person who is conclusively found to be innocent.⁴¹ For this reason, *Cole* necessarily set the burden of proof very high to meet the enormity of the relief, dismissal of the indictment. The better course perhaps, and one that is supported by CPL §440.10(4) and generally consistent with *Cole*, is that the nature of the relief be related to the degree of proof shown by the litigant. If the petitioner can satisfy only the minimum showing by a preponderance that he or she is probably innocent, then a new trial, not dismissal, may be the appropriate remedy. If, however, the petitioner can prove his or her innocence by a higher standard, or where the actual innocence claim is coupled with an established constitutional violation, then dismissal of the indictment may be the more appropriate remedy. But to take an all-or-nothing approach, as in *Cole*, and preclude reliance on a lesser burden of proof to grant any form of relief short of full dismissal is unnecessary and may unfairly limit meritorious claims of actual innocence.

Conclusion

The increasing numbers of DNA exonerations in recent years continue to demonstrate that criminal trials do not adequately protect the innocent from wrongful convictions. But the DNA exoneration cases only present the tip of the iceberg. Exponentially greater numbers of people, whose cases lack DNA evidence, are currently in prison for crimes they did not commit. Common sense dictates that the judiciary should start to take claims of actual innocence more seriously in non-DNA cases, especially when the convictions are predicated on evidence we now know is susceptible to producing wrongful convictions. The actual innocence doctrine provides the courts with the vehicle to reevaluate these cases, including those cases previously rejected before

studies of DNA exonerations addressing the causes of wrongful convictions have come to light.

Although it was passed over by the Second Department in *People v. Tankleff*, it is time for the New York courts to embrace and conscientiously develop the actual innocence doctrine.



1. See <http://www.innocenceproject.org/> for current count of U.S. DNA exonerations and recent reforms to the system. The number of exonerations was 212 as of Feb. 12, 2008. Of these, 149 were since 2000.

2. See, e.g., Brandon L. Garrett, "Judging Innocence," 108 Colum. L. Rev. (Jan. 2008) (analysis of 200 DNA exonerees' criminal trials and appeals, examining causes of wrongful conviction and how the cases were handled by the criminal justice system); Samuel R. Gross, et al., "Exonerations in the United States 1989 through 2003," 95 J. Crim. L. & Criminology 523 (2005) (comprehensive study of 328 non-DNA and DNA exoneration cases); <http://www.innocenceproject.org/understand/> (analysis of causes of wrongful conviction in first 130 U.S. DNA exoneration cases). All of the exoneration studies show that the leading contributors to the underlying wrongful convictions were: (1) erroneous eyewitness identification (involved in 72-90 percent of wrongful convictions studied); (2) misleading forensic evidence (55 percent); (3) false confessions (31-35 percent); and (4) unreliable or dishonest informant testimony (21-35 percent).

3. The vast majority of criminal prosecutions involve no biological evidence, and DNA exonerations are not representative of wrongful convictions. See Garrett, "Judging Innocence," supra note 2; Adam Liptak, "Study on Wrongful Convictions Raises Questions Beyond DNA," New York Times, July 23, 2007.

4. *People v. Martin Tankleff*, 848 NYS2d 286, 2007 N.Y. Slip Op. 10186 (2d Dept. 2007).

5. See, e.g., *People v. Cole*, 1 Misc.3d 531, 542 (Sup. Ct., Kings Cty. 2003); *Montoya v. Ulibarri*, 163 P.3d 476, 484 (2007) ("the conviction, incarceration, or execution of an innocent person violates all notions of fundamental fairness implicit within the due process provision of our state constitution"); *Ex Parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1997) ("the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person...such claims raise issues of federal constitutional magnitude"); cf. *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) ("the execution of a [n]...innocent person would be a constitutionally intolerable event").

6. See CPL §440.10(1)(g); *People v. Salemi*, 309 N.Y. 208 (1955) (explaining six threshold requirements that must be shown in a post-conviction motion based on newly discovered evidence).

7. Although this is of particular importance in states with strict time limitations on new trial motions based on newly discovered evidence, see, e.g., *People v. Washington*, 171 Ill.2d 475, 479-80, 665 N.E.2d 1330, 1332-33 (1996) (motion must be made within two years after final judgment), this aspect of the actual innocence doctrine also represents a significant departure from the requirement that such motions be made promptly after the new evidence is discovered or could have been discovered with due diligence. See *Montoya v. Ulibarri*, 163 P.3d at

487 ("the focus of our inquiry is on actual innocence rather than when the evidence could have been discovered or procedural error").

8. *People v. Cole*, 1 Misc.3d at 543 (court should consider "any reliable evidence whether in admissible form or not").

9. *Id.*

10. The majority, per Justice William Rehnquist, "assume[d. for the sake of argument...that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render an execution of a defendant unconstitutional," but noted that "the threshold showing for such an assumed right would necessarily be extraordinarily high" because of "the need for finality in capital cases." *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

11. *Id.* at 400.

12. *Id.*

13. *Id.* (quoting *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) (Holmes, J.)).

14. See, e.g., *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999); *Sellers v. Ward*, 135 F.3d 1333, 1338-39 (10th Cir. 1998); *Meadows v. Delo*, 99 F.3d 280, 283 (8th Cir. 1996); *Milone v. Camp*, 22 F.3d 693, 705 (7th Cir. 1994).

15. *Herrera*, 506 U.S. at 420 (O'Connor, J., concurring).

16. *Id.*

17. *Schlup v. Delo*, 513 U.S. 298 (1995).

18. *Id.* at 326-27.

19. This limited "gateway" function of an actual innocence claim reflects the equitable "miscarriage of justice" concept in habeas corpus jurisprudence that traditionally could justify exemptions from otherwise strict procedural restrictions. A limited version of this concept survived the 1996 revisions to the federal habeas corpus statute in the Anti-terrorism and Effective Death Penalty Act (AEDPA). See 28 U.S.C. § 2254 (e)(2).

20. *Herrera*, 506 U.S. at 415-16.

21. *Herrera*, 506 U.S. at 440 (Blackmun, J., dissenting) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416 (1986)).

22. *Cole*, 1 Misc. 3d at 539.

23. *United States v. Wilson*, 32 U.S. 150, 160-61 (1833); see *Lyons v. Goldstein*, 290 N.Y. 19, 27 (1943); 97 A.L.R.5th 293 (majority view that pardoned conviction is considered a "prior offense" for purpose of increasing penalty for subsequent offense).

24. See *Herrera*, 506 U.S. at 407-08; see also *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (overruled on other grounds); cf. *Engle v. Issac*, 456 U.S. 107, 128 (1982).

25. *Montoya v. Ulibarri*, 163 P.3d at 483.

26. Connecticut, Illinois, Missouri, New Mexico, and Texas have adopted the freestanding actual innocence doctrine. See *Miller v. Comm'r of Correc.*, 242 Conn. 745, 700 A.2d 1108 (1997).

27. The Texas Court of Criminal Appeals, holding that a freestanding innocence claim is cognizable in a state habeas corpus petition, based its decisions on the federal constitution. *Ex Parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1997); see also *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994).

28. *People v. Cole*, 1 Misc.3d 531 (Sup. Ct., Kings Cty. 2003).

29. *People v. Tankleff*, Suffolk County Court (Braslow, J.), March 17, 2006.

30. *Cole*, 1 Misc.3d at 542.

31. *Id.*

32. C.P.L. §§440.30 (6), 440.10 (1); cf. § 440.30(1-a); see also *People v. Washington*, 665 N.E.2d at 1337 (Supreme Court of Illinois, relying on Illinois's post-conviction statute, held that the statutory standard, similar to preponderance of the evidence, should be applied to actual innocence claims).

33. C.P.L. §440.10 (4).

34. *Cole*, 1 Misc.3d at 544.

35. In *Tankleff*, the newly discovered evidence consisted of two affidavits, one sworn in August 1994 and the other in August 2003. Thus, nine years passed between the discovery of one piece of new evidence and the filing of the 440.10 motion, and two months passed with respect to the other new evidence. The lower court determined that the due diligence requirement was not satisfied. See *Tankleff*, 848 N.Y.S.2d at 290-91, 298.

36. *Montoya v. Ulibarri*, 163 P.3d at 484-87.

37. *Tankleff*, 848 N.Y.S.2d at 303.

38. See *Tankleff*, 848 N.Y.S.2d at 301 (expressing disagreement with lower court and finding that "waiting to amass all of the evidence and then presenting it cumulatively" was not a lack of due diligence, and even "preserved judicial resources").

39. See, e.g., *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003); *Miller v. Comm'r of Correc.*, 242 Conn. 745, 700 A.2d 1108 (1997); *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1997).

40. *People v. Washington*, 665 N.E.2d at 1337 (internal citations omitted).

41. 1 Misc.3d at 544. The Court interpreted actual innocence as a question of fact outside the proper scope of review, because "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact."¹² In other words, "what we have to deal with on habeas review is not the petitioners' innocence or guilt, but solely the question [of whether their constitutional rights have been preserved]."¹³ *Herrera* has been understood by federal courts to mean that keeping an innocent person in prison does not violate the Constitution if the trial was free from constitutional error and the state provides for executive clemency as a mechanism for entertaining a claim of innocence.¹⁴