

# THE PROBLEM WITH CYNICAL PROSECUTOR'S SYNDROME: RETHINKING A PROSECUTOR'S ROLE IN POST-CONVICTION CASES

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*One of the biggest challenges facing the criminal justice system is dealing with the growing tide of post-conviction petitions claiming wrongful conviction. Each year, the number of exonerees grows. In 2014, the United States recorded an unprecedented 125 exonerations. In analyzing how post-conviction matters are handled, it becomes apparent that one of the key roadblocks to remedying these injustices is not, as some have suggested, the attitude of young prosecutors. Rather, senior prosecutors become cynical about innocence claims and form a cognitive bias that impairs their ability to play a constructive role in the exoneration process. This article discusses the role of prosecutors in the post-conviction process, analyzes current studies of prosecutorial*

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*attitudes, and proposes reforms to ensure that meritorious post-conviction challenges are handled properly.*

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*“Citizens of this community need to know that the District Attorney’s Office considers exonerating an innocent person as important as [convicting] a guilty one.”*<sup>1</sup>

## I. INTRODUCTION

It is not about age; it is about attitude. Although recent scholarship has focused on the problems with overzealous young prosecutors, senior prosecutors can also have strong cognitive biases that impair their ability to properly evaluate criminal cases, especially post-conviction innocence claims. Experienced prosecutors frequently develop a cynicism that poses as much a roadblock to their decision-making as inexperience poses for newer prosecutors.

Ronald Wright and Kay Levine recently authored a wonderful paper on what they see as “The Cure for Young Prosecutors’ Syndrome.”<sup>2</sup> The article focused on junior prosecutors and how their lack of experience adversely affects their decision-making process.<sup>3</sup> As supported by interviews of scores of prosecutors, the article

<sup>1</sup> Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 *SAN DIEGO L. REV.* 401, 410 (2011) (quoting Gene Warner & Matt Gryta, *Man Jailed Nearly 7 Years for Rape Is Exonerated*, *BUFFALO NEWS*, June 22, 2010, at A1).

<sup>2</sup> Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 *ARIZ. L. REV.* 1065 (2014) [hereinafter Wright & Levine, *The Cure for Young Prosecutors’ Syndrome*]. Years ago, I also wrote a paper addressing similar issues for young federal prosecutors. See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *FORDHAM URB. L.J.* 553 (1999) [hereinafter Levenson, *Working Outside the Rules*].

<sup>3</sup> Wright & Levine, *supra* note 2.

demonstrates that prosecutors often evolve in their work. Over time, young prosecutors start to learn that there is something more important than winning or having a chance to try a case.<sup>4</sup> Many also learn to respect the role of defense counsel.<sup>5</sup> Most importantly, and not surprisingly, prosecutors learn from their mistakes.<sup>6</sup> As prosecutors mature, they gain perspective on how the cases they are prosecuting fit into the overall efforts of the criminal justice system and come to appreciate the infinite dimensions of human frailty.

While all of these observations may be true, there is another condition that demands our attention. Some senior prosecutors also routinely become cynical and resistant to wrongful conviction claims. I am a former prosecutor, who now runs a Project for the Innocent.<sup>7</sup> I now interact regularly with prosecutorial offices from the other side. I tend not to interact with young or middle-age prosecutors in my post-conviction work. Instead, the prosecutors assigned to significant habeas cases are mostly seasoned veterans of the office.<sup>8</sup> While I hope to see the mellowing described in Wright and Levine's study, my experience has been quite different. I have consistently witnessed senior prosecutors to be among the most resistant to believing their office made a mistake and one of their colleagues has helped convict an innocent person. Prosecutors often erect procedural hurdles to prevent petitioners having their habeas claims heard in court. They circle the wagons, even when their own investigating officers suggest that a mistake has been made.

Given the number of wrongful convictions that are being discovered,<sup>9</sup> it is time to address the mindset of senior prosecutors in

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<sup>4</sup> *Id.* at 1101.

<sup>5</sup> *Id.* at 1092.

<sup>6</sup> *Id.* at 1103-04.

<sup>7</sup> *Project for the Innocent*, LOYOLA LAW SCHOOL, LOS ANGELES, <http://www.lls.edu/academics/centersprograms/alarconadvocacycenter/projectfortheinnocent> (last visited Jan. 14, 2015).

<sup>8</sup> For example, in the Los Angeles County District Attorney's Office, the prosecutors in the Habeas Litigation Unit ("HABLIT") have spent an average of twenty years in the prosecutor's office. Rarely is a prosecutor assigned to the unit with less than five years of experience. Most are seasoned veterans. The heads of the appeals and habeas units have a combined 50 years of experience. *See* Interview with Brent Ferreira, Former Chief of HABLIT, in L.A., Cal. (Nov. 13, 2014). These senior prosecutors not only handle petitions for writ of habeas corpus, but they also review claims of *Brady* violations and requests for post-conviction discovery. *Id.*

<sup>9</sup> An unprecedented 125 exonerations were recorded in 2014. Kevin Johnson, *Exonerations hit record high in 2014*, USA TODAY (Jan. 27, 2015), <http://www.usatoday.com/story/news/nation/2015/01/27/exonerations-record->

habeas cases. It is important to understand why senior prosecutors are so reluctant to believe that they or their colleagues made serious mistakes in their prosecutions. While they proclaim that they are more seasoned and balanced in their perspectives than their junior colleagues,<sup>10</sup> in reality they do not realize their entrenched biases. What changes can be made to ensure that those who are in the highest decision-making posts are not weighed down by their own cynicism?

This article focuses on the role of seasoned prosecutors, especially in handling or supervising post-conviction matters. The impetus for this article stemmed from my interactions with the appellate/habeas unit of one of the largest District Attorney's Offices in the country. Because of its size, the Los Angeles District Attorney's Office has a separate unit of prosecutors just to evaluate post-conviction filings. Loyola Law School's Project for the Innocent has been working to build a collaborative process by which habeas cases can be jointly investigated and resolved, rather than relying on the courts for prolonged and contested habeas proceedings. While the leadership of the District Attorney's Office repeatedly expressed an interest in working cooperatively on habeas cases, creating such a process is not so easy. The biggest problem is not that new prosecutors are overly adversarial. Rather, older prosecutors can become entrenched in their adversarial

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high/22358511. There have been at least 337 post-conviction DNA exonerations. *The Cases: DNA Exoneree Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment> (last visited Jan. 17, 2016). The National Registry of Exonerations has recorded 1,304 total exonerations from 1989 to February 3, 2014 and has reported 87 exonerations in the year 2013. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2013 (2014), *available at* [https://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2013\\_Report.pdf](https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf); *see also* SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE U.S., 1989-2012: REPORT BY THE NAT'L REGISTRY OF EXONERATIONS 21 n.35 (2012), *available at* [https://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf); Pete Yost, *Study: 2,000 Convicted Then Exonerated in 23 Years*, ASSOCIATED PRESS (May 21, 2012), <http://www.cbsnews.com/news/study-2000-convicted-then-exonerated-in-23-years>; D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) (suggesting 3.3% wrongful conviction rate); Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 N.Y.L. SCH. L. REV. 837 (2011/2012) (even with error rate of only 1%, which is probably low given recent extrapolations from DNA exonerations, at least 72,000 innocent persons have been convicted and are under correctional supervision).

<sup>10</sup> Wright & Levine, *The Cure for Young Prosecutors' Syndrome*, *supra* note 3, at 1083-84.

roles and will not adjust to a collaborative model.<sup>11</sup> They operate from cognitive biases that often go unrecognized during their tenure as prosecutors.<sup>12</sup>

Consider what occurred when the Project for the Innocent approached the post-conviction unit of the District Attorney's Office. After a lengthy from demonstrating the likely innocence of the petitioner,<sup>13</sup> the senior deputy district attorneys were invited to ask questions about the case. On average, these prosecutors had spent twenty to thirty years as prosecutors. They had tried a wide range of cases, including murders and other violent offenses. They also regularly handled post-conviction motions, appeals and habeas petitions.

Yet, their attitudes were nothing like what Wright and Levine described in their study. Following the presentation of exculpatory evidence, these seasoned prosecutors had only one question: "Did the defendant give a statement after being given his *Miranda* rights?" When they were told by the habeas counsel that the defendant chose to invoke his *Miranda* rights, in part because he was so shocked that he had been arrested, the immediate response by the seasoned prosecutors was, "Oh, well, we all know then that he's guilty, don't we? Innocent people give a statement." When habeas counsel's jaw dropped, the senior prosecutor responded, "Sure, we all know what you teach about *Miranda* in law school. *But in the real world, innocent people waive their Miranda rights.*"<sup>14</sup>

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<sup>11</sup> The challenges are particularly great for head prosecutors who face reelection. They face daily pressures from voters and victims. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 996 (2009). These "[h]ead and supervisory prosecutors play important roles in shaping and communicating office culture and socializing line prosecutors in that culture." *Id.* at 998.

<sup>12</sup> See generally, Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, N.Y.U. J.L. & LIBERTY 512 (2007) [hereinafter Burke, *Neutralizing Cognitive Bias*]; Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Orenstein, *supra* note 2, at 423 (2001) ("the hyper-adversarial culture of some prosecutors' offices may make admitting mistakes seem like weakness").

<sup>13</sup> The lengthy presentation included an admission by the lead investigator that the wrong person had probably been convicted of the shooting, evidence of why the government's witnesses had made false identifications, facts regarding the real shooter, and evidence of the petitioner's alibi. Presentation from the Project for the Innocence to Los Angeles District Attorney's Office Habeas Litigation Unit (Mar. 25, 2014) (on file with author).

<sup>14</sup> Comment by Head of the Appellate Division, Los Angeles County District

This was not a statement from an inexperienced prosecutor. This was a statement from a seasoned prosecutor,<sup>15</sup> who turned to his years of experience to opine that the defendant must have been guilty because he chose to exercise his constitutional rights. Senior prosecutors often operate with an erroneous belief that years of service have given them the power to discern who is guilty and who is not. They may be even more likely than new prosecutors to disregard claims of innocence or prosecutorial misconduct. Their years of experience sometimes make it more difficult to accept the fact that they or their colleagues made mistakes that may have led to the conviction of an innocent person.<sup>16</sup>

For better or worse, senior prosecutors come to trust their instincts to decide whether a defendant is guilty.<sup>17</sup> They rely on tools—such as polygraphs—that they generally do not rely upon in making charging decisions.<sup>18</sup> They allow their experience to be their guide in determining whether they have stumbled upon a rare case of an innocent person that was wrongly convicted. Additionally, more seasoned prosecutors have developed close emotional ties with colleagues,

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Attorney's Office (emphasis added) (Mar. 25, 2014).

<sup>15</sup> Head of the Habeas Litigation Unit had been a prosecutor in the District Attorney's Office for more than 25 years. See Interview with Brent Ferreira, *supra* note 8.

<sup>16</sup> See Rachel Pecker, Note, *Quasi-Judicial Prosecutors and Post-Conviction Claims of Innocence: Granting Recusals to Make Impartiality a Reality*, 34 CARDOZO L. REV. 1609, 1620-21 (2013) (prosecutors often have difficulties with their dual responsibilities of freeing the innocent and convicting the guilty, especially when a prosecutor is confronted with the heightened risk that her own, or her office's, actions contributed to an innocent person being imprisoned). As discussed in this paper, there are many reasons prosecutors are hesitant to overturn convictions. These include: (1) fears that acknowledgment of errors will open the floodgates to challenges in other cases, (2) a concern that their own cases could be attacked, (3) fear that they will be ostracized by their fellow prosecutors and bench officers, (4) concerns about the impact on victims if a conviction is reversed, (6) concerns about their prospects for advancement in the prosecution office, (7) concerns about the financial implications of overturning a conviction, and (8) overall concerns about undermining confidence in the criminal justice system.

<sup>17</sup> These instincts are developed in a culture where prosecutors internalize the values of their office. See Jonathan A. Rapping, *How the American Prosecutor Came To Devour Those He Is Sworn To Protect*, 51 WASHBURN L. J. 513, 556 (2012). While individual prosecutors may soften in their approach to criminal cases, the overall attitude of an office may remain consistently adversarial toward claims of wrongful conviction.

<sup>18</sup> See *The Truth About Lie Detectors (aka Polygraph Tests)*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Aug. 4, 2004), <http://www.apa.org/research/action/polygraph.aspx>. In most jurisdictions, lie detector tests are inadmissible in court as evidence of the defendant's guilt or innocence.

investigating officers, and members of the bench.<sup>19</sup> These ties can color their impressions of a case and make it extremely difficult for seasoned prosecutors to be open to wrongful conviction claims.<sup>20</sup> Moreover, as one author explained, “[a]llowing a defendant—even an innocent one—to win could appear to be a loss for the side of the angels.”<sup>21</sup>

One of the major challenges of our era is to rectify wrongful convictions of the past. Wright and Levine’s article may help prevent future injustices, but the criminal justice system also has a problem when confronting mistakes of the past. Over 2,000 individuals have been exonerated in the last two decades.<sup>22</sup> This article focuses on the problems in opening prosecutors’ eyes to injustices of the past. To do so, prosecutors need to be taught new ways to look at post-conviction wrongful conviction claims. Traditional training of prosecutors may include claims that “inmates have nothing better to do in prison than file habeas” or that “the courts are inundated with frivolous claims.”<sup>23</sup> These

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<sup>19</sup> “Among President Obama’s judicial nominees: 118 out of 283 district court nominees (41.7%) have been state or federal prosecutors. [However, only] [f]orty-four out of 283 (15.5%) have been state or federal public defenders, [and] 60 out of 283 (21.2%) have been private criminal defense attorneys. 23 of 61 circuit court nominees (37.7%) have been prosecutors. Eleven of 61 (18%) have been private criminal defense attorneys, and five of 61 (6.8%) have been public defenders. Only two nominees, Jane Kelly and L. Felipe Restrepo, have been federal defenders.” ALLIANCE FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS 9 (2014), <http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf>.

Prosecutors also form close relationships with law enforcement officials with whom they work and whose work they must later reevaluate. See Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 545 (1994).

<sup>20</sup> Daily, prosecutors are constantly “exposed to victims, police officers, and others who graphically establish that the defendant deserves punishment and who would be unsympathetic to efforts to exonerate a defendant.” Lawton P. Cummings, Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works? Can an Ethical Person be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2154 (2010) (citing Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Visions*, 49 HOW. L.J. 475, 486 (2006)).

<sup>21</sup> Orenstein, *supra* note 1, at 424.

<sup>22</sup> As of January 1, 2014, the National Registry of Exonerations, a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law, included 1,304 individual exonerations as well as 12 “group exonerations” which included at least 1,100 additional exonerated criminal defendants who are not listed in the Registry itself. *Exonerations in 2013*, *supra* note 9, at 5.

<sup>23</sup> Often times such claims are made with no support at all, including in scholarly text.

attitudes have an impact on both new and seasoned prosecutors that is detrimental to their evaluation of wrongful conviction challenges.

Overall, the innocence movement has created a new world order for the prosecutorial profession. The need to uncover wrongful convictions depends heavily on prosecutors' discretion, judgment, and willingness to reopen questionable cases. Unfortunately, senior prosecutors assigned to habeas units, and whose job it is to carry out the innocence inquiry, can be hampered by institutional and structural habits. Trained to value convictions and deeply connected to the law enforcement community and the bench, senior prosecutors may be ill-equipped to evaluate innocence claims. Their instinct is to automatically assume that their colleagues obtained proper convictions. Furthermore, seasoned prosecutors may impede the innocence inquiry by automatically relying on past practices, the use of defensive legal maneuvers, and their gut instincts about defendants. Like workers in a world of changing technologies, senior prosecutors need to be retrained in the tools and commitments of a new era where there is more focus on claims of innocence. They need to reassess their assumptions about when an innocent defendant might invoke his *Miranda* rights, the problems with lie detector tests, how parole hearings impact challenges by innocent individuals, and, in particular, prosecutors' cognitive biases.

To show the changes required of seasoned, cynical prosecutors, Part IIA of this article provides an overview of post-conviction litigation and the types of decisions prosecutors typically make. While some of these decisions are similar to those made at the pretrial and trial stages, some are quite different. No longer does a defendant enjoy a presumption of innocence.<sup>24</sup> Prosecutors are well aware that, in the post-conviction arena, the burden is on the defendant to prove a miscarriage of justice.<sup>25</sup> Even more than with initial charging decisions, prosecutors

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*See, e.g.,* Jodena Carbone, *Selective Testing of DNA and its Impact on Post-Conviction Requests for Testing*, 10 RUTGERS J.L. & PUB. POL'Y 339 (2013) (opening line of the article is "The prisons are full of men and women who profess their innocence despite having been convicted on the weight of the evidence presented by the prosecution.").

<sup>24</sup> *See* *Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.").

<sup>25</sup> *See* Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 410 (2002) ("In the postconviction context . . . [t]he defendant bears the burden of proof, and all presumptions favor the government."); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 210 (2005)

wield enormous power over whether a defendant claiming wrongful conviction is likely to find a receptive audience. In the post-conviction setting, petitioners typically do not have counsel or the resources to conduct a full investigation.<sup>26</sup> Therefore, they often must rely upon prosecutors who are willing to reopen the investigation of a case because they too are concerned about whether an injustice was committed.<sup>27</sup>

In Part IIB, the article will discuss the range of attitudes of senior prosecutors. Empirical work in this area is ongoing, but anecdotal evidence is strong and suggests that seasoned prosecutors, at least as much as the rookies they supervise, need to closely examine their attitudes toward post-conviction claims. Because these senior prosecutors are in charge, rarely can a person with greater authority challenge their assumptions about post-conviction claims of innocence. When cynicism sets in, claims of injustice often fall on deaf ears.

In Part III, the focus shifts to what would be best practices for prosecutors in addressing post-conviction matters. Many of these best practices have been established in the last decade by Conviction Integrity Units in some prosecutors' offices.<sup>28</sup> They are best practices in

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("Once a defendant has been tried and has exhausted his appeals, the criminal justice system is prepared to assume both that the defendant received fair process and that the process resulted in an accurate judgment.").

<sup>26</sup> See Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1235 (2012); John H. Blume et al., *In Defense of Noncapital Habeas: a Response to Hoffman and King*, 96 CORNELL L. REV. 435, 445 (2011); Sarah L. Thomas, *A Legislative Challenge: a Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Proceedings for Indigent Petitioners*, 54 EMORY L. J. 1139, 1146 (2005).

<sup>27</sup> In the post-conviction world, prosecutors, not the courts, are the true gatekeepers. Without a prosecutor's openness to the possibility that there was a wrongful conviction, it is extraordinarily difficult for a petitioner to obtain relief. "After a conviction, in contrast [to pretrial charging decisions], there is minimal post-conviction process available to which the prosecutor may defer on the question of whether an injustice was done. The prosecutor, not the judge or jury, is the key fact finder. As a practical matter, there is no one else on whom to shift responsibility." Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 502 (2009). Specifically, petitioners must rely on prosecutors to provide key evidence in support of their post-conviction motions. "Because of the prosecutor's control of the evidence, he has the ability to thwart a defendant's ability to learn about favorable witnesses . . ." Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 329 (2001). See also Zacharias, *supra* note 25, at 175 ("[O]nce appeals are complete, the prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong.").

<sup>28</sup> See generally Terri Moore, *Prosecutors Reinvestigate Questionable Evidence*, 26

the sense that they provide the most objective approach for determining the merits of a post-conviction claim. Notably, they are not labeled as best practices because they are most likely to result in a ruling in favor of the prosecution. Most prosecutors' offices do not have conviction integrity units and their resistance to them is an indication that they are naturally resistant to post-conviction claims of innocence and unwilling to use their limited resources to help defendants who have already been convicted.

In Part IV, this article focuses on how to remedy the problem. Many articles have been written about prosecutors' attitudes.<sup>29</sup> These attitudes differ from prosecutor to prosecutor. Certainly, there are many fine and dedicated prosecutors who are already intent on remedying injustices. However, there are others who are stuck in the role of trying to preserve convictions at all costs. This article provides a roadmap.

Just as there is an approach to training young prosecutors, it is time to reevaluate the type of training, input and supervision more

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CRIM. JUST. 4 (2011); Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613 (2014); Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting it Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033 (2011/12); Daniel S. Medwed, *Prosecutorial Ethics in the Postconviction Setting from A to Zacharias*, 48 SAN DIEGO L. REV. 331 (2011); Ellen Yaroshesky, *Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 343 (2010); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Postconviction Pulpit*, 84 WASH. L. REV. 35 (2009) [hereinafter Medwed, *Prosecutor as Minister of Justice*]; Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010).

<sup>29</sup> See, e.g., Abbe Smith, *Can You be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 380 (2001) (describing prosecutors' tendency toward narrowness and cynicism); Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161 (2010) (discussing training by prosecutors' offices relating to evidentiary disclosure practices); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009) (exploring the role of the disciplinary process in discouraging prosecutorial conduct that tends to contribute to false convictions); See Medwed, *supra* note 28 (examining the post-conviction behaviors and attitudes of prosecutors); Bibas, *supra* note 11 (emphasizing that prosecution offices could value justice more than conviction statistics); Stephanos Bibas et al., *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1961 (2010) (analyzing prosecutorial disclosure practices, training and supervision, internal and external regulation, and systems and culture).

seasoned prosecutors receive. The benefit of this new approach is that it not only will it help defendants who seek exoneration, but it will also help prosecutors play a pivotal and essential role in the exoneration process.

## II. THE NATURE OF POST-CONVICTION LITIGATION AND THE IMPACT OF CYNICAL SENIOR PROSECUTORS

### A. Overview

At nearly every step of the process, prosecutors exercise a great deal of discretion in post-conviction cases—much like the discretion they possess in charging decisions.<sup>30</sup> Like their counterparts deciding whether to file charges in a case, prosecutors handling post-conviction cases must evaluate the seriousness of a post-conviction claim and the strength of the evidence supporting it. However, unlike with initial charging decisions, prosecutors often believe they have a stake in preserving a conviction.<sup>31</sup> Challenges to convictions frequently involve challenges to the work of prosecutors and the police officers with whom they work.<sup>32</sup>

Each prosecutorial office can decide how it will handle post-conviction claims. In some offices, the post-conviction cases are parceled out among many prosecutors—experienced and inexperienced. However, in larger offices, independent units may be tasked with handling post-conviction challenges.<sup>33</sup> For example, in the Los Angeles

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<sup>30</sup> See generally Zacharias, *supra* note 25, at 175. In fact, prosecutorial discretion is much greater at the post-conviction stage. “[O]nce appeals are complete, the prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong. . . . The prosecutor also may be the only person with the power to act, either because the requisite sources are subject to the prosecutor’s domain, or because statutes delegate the right to reopen matters to *prosecutorial* discretion.” *Id.* (emphasis in original).

<sup>31</sup> Pecker, *supra* note 16.

<sup>32</sup> “In the United States, the exercise of prosecutorial discretion to evaluate, investigate, and respond to new exculpatory evidence following a conviction is generally entrusted to the prosecutor’s office in the jurisdiction in which the conviction was obtained. That raises the unavoidable problem of cognitive bias.” Green & Yaroshefsky, *supra* note 28, at 487. See also Pecker, *supra* note 16, at 1620-23.

<sup>33</sup> For more information regarding the assignment of post-conviction filings, see Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 143 (2004) [hereinafter Medwed, *The Zeal Deal*]. As noted by Professor Medwed, large prosecution offices may routinely assign post-conviction motions to their appeals unit. This includes, for example the Office of the District Attorney of the City and County of Philadelphia. *Id.* at n.78.

County District Attorney's Office, which currently boasts nearly 1,000 deputy district attorneys,<sup>34</sup> there is a separate Post-Conviction Litigation and Discovery Division. It has a head deputy who has served in the office for more than twenty-five years. The unit is comprised of the habeas litigation team ("HABLIT"), the Discovery Compliance Unit (which handles post-conviction requests for Brady evidence pursuant to California Penal Code § 1054.9, and requests under California's Public Records Act<sup>35</sup>) and the Third Strike Resentencing Unit.<sup>36</sup> Each unit plays a vital role in post-conviction litigation. Without discovery, many petitioners have no chance of supporting a post-conviction claim of wrongful conviction. Under California law, prosecutors must disclose *Brady*<sup>37</sup> evidence in post-conviction death penalty and life without the possibility of parole cases.<sup>38</sup> However, in other cases, where a defendant has received a life sentence with the possibility of parole, statutory law does not require such disclosures.<sup>39</sup> It is up to the individual prosecutor to determine whether some allowance should be made for discovery. This decision may depend a great deal on that prosecutor's personal attitude toward personal assessment of post-conviction challenges.

Because habeas petitions can only be based upon constitutional claims other than violations of search and seizure law,<sup>40</sup> petitions for writ of habeas corpus focus on four possible claims: (1) prosecutorial misconduct, including the prosecution's use of false confessions, faulty eyewitness identifications and tainted forensic evidence; (2) police and

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<sup>34</sup> *Office Overview*, LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, <http://da.co.la.ca.us/about/office-overview> (last visited Jan. 16, 2016).

<sup>35</sup> CAL. GOV'T CODE § 6250 et seq. (West 2015).

<sup>36</sup> In November of 2012, California voters passed Proposition 36 ("Prop 36"), The Three Strikes Sentencing Reform Act. Before Prop 36 was passed, sections 667 and 1170.12 of the California Penal Code provided that persons with two prior felony convictions would automatically receive twenty five years to life in prison upon conviction of any third felony. Prop 36 changed this sentencing scheme by providing that only individuals whose third felony is a "serious or violent offense" receive the mandatory twenty-five to life sentence.

<sup>37</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>38</sup> CAL. PENAL CODE § 1054.9 (West 2015).

<sup>39</sup> *In re Scott*, 61 P.3d 402, 417-18 (Cal. 2003) (reiterating that the nature and scope of discovery is generally resolved on a case by case basis).

<sup>40</sup> *Stone v. Powell*, 428 U.S. 465 (1976) (holding that Fourth Amendment claims are not viable on habeas corpus). See Justin F. Marceau, *Un-Incorporating the Bill of Rights: the Tension Between the Fourteenth Amendment and the Federalism Concerns That Underlie Modern Criminal Procedure Reform*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1240 (2008); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 997-99 (2012).

prosecution's failure to disclose exculpatory and impeachment evidence in compliance with *Brady v. Maryland*<sup>41</sup> and its progeny; (3) ineffective assistance of counsel; and (4) actual innocence. By their nature, these claims put prosecutors in the delicate position of having to investigate either their own conduct or that of someone they worked with. For more senior prosecutors, there may be a long-term working relationship with the prosecutor whose conduct is at issue in the habeas petition. Any type of habeas challenge, including actual innocence claims, pose a challenge for seasoned prosecutors. First, they are put in the position of determining that a colleague was responsible for denying a person his or her freedom, possibly for many decades.<sup>42</sup> Second, if there was misconduct underlying the petition, seasoned prosecutors realize their colleagues may be subject to disciplinary actions and even lawsuits.<sup>43</sup>

Young prosecutors may be hyper-vigilant, but more seasoned prosecutors have developed relationships that can complicate their decision-making in habeas cases. In defending the actions of their office, it becomes difficult for them to work cooperatively to investigate and resolve claims of wrongful conviction. The more senior prosecutors may not be as naïve and impetuous as their younger counterparts, but they can be more invested in retaining the conviction. "Simply put,

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<sup>41</sup> *Brady v. Maryland*, 373 U.S. 83 (1963). These challenges may also include the prosecution's failure to disclose impeachment materials as required by *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>42</sup> See Sean Gardiner, *Dynamics of Righting a Wrong: The DA's Role in Reversals*, NEWSDAY, Dec. 10, 2012, at 25; See also Green & Yaroshefsky, *supra* note 27, at 489-90 ("A prosecutor will tend to view a conviction as a confirmation that his initial charging decision was correct and will naturally discount new evidence of innocence. These tendencies will be most pronounced for the particular prosecutors who had the responsibility for investigating and trying a case, but it will also inhere for the district attorney or other prosecutor in charge of the office that obtained the conviction, in its supervisory prosecutors, and in others who identify with the office and its work." (emphasis added)).

<sup>43</sup> While individual prosecutors usually enjoy absolute immunity, the courts are currently considering the extent to which office practices and policies, including *Brady* policies, expose prosecution offices, and the leadership of those offices, to liability. In *Connick v. Thompson*, 563 U.S. 51 (2011), the Supreme Court rejected liability for a single *Brady* violation. However, courts are now finding new theories to resurrect defendants' abilities to sue. See *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir. 2013). Similarly, seasoned prosecutors might find themselves at risk of civil lawsuit for abusive investigations that led to a wrongful conviction. See *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014). In addition to these negative consequences, there is also political fallout for elected prosecutors and tarnish to the reputation of a prosecutorial office. See *Medwed, The Zeal Deal*, *supra* note 33, 151-156.

prosecutors may perceive (or fear the public will perceive) the post-conviction exoneration of an innocent prisoner as undermining the credibility of the office—and the person—that prosecuted the defendant.”<sup>44</sup>

Much has been written about the cognitive bias of prosecutors.<sup>45</sup> It arises in many areas of their work, from the decision of who they will prosecute,<sup>46</sup> to how to approach their discovery obligations,<sup>47</sup> to assessing the credibility of informants,<sup>48</sup> to deciding whether to accept a defendant’s confessions, and, of course, to evaluating claims of innocence.<sup>49</sup> Tunnel vision does not end after conviction; it intensifies.<sup>50</sup> Because of “innate cognitive biases, institutional pressures, and normative features of the criminal justice system,”<sup>51</sup> senior prosecutors may be even more reluctant to reassess old cases than their younger counterparts.

Ironically, some of the proposed cures for “Young Prosecutors’ Syndrome” actually create even more problems for dealing with the cynicism of senior prosecutors. Consider, for example, Professor Wright’s description of younger prosecutors’ hostile view of defense counsel.<sup>52</sup> When they are young, new prosecutors see defense lawyers as doing more harm than good.<sup>53</sup> Young prosecutors complain that defense lawyers are over-zealous in their defenses. “Defense lawyer attempts to test . . . pre-vetted cases . . . involve a lot of flimsy argument and wasted effort.”<sup>54</sup> Over time, prosecutors become more accepting of defense

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<sup>44</sup> Medwed, *The Zeal Deal*, *supra* note 33, at 136.

<sup>45</sup> See *supra* note 12. See also Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L. J. 475 (2006).

<sup>46</sup> See Sofia Yakren, *Removing the Malice from Federal “Malicious Prosecution What Cognitive Science Can Teach Lawyers About Reform*, 50 HARV. C.R.-C.L. L. REV. 359 (2015).

<sup>47</sup> See Daniel S. Medwed, *Prosecutorial Power: A Transnational Symposium: Brady’s Brunch of Flaws*, 67 WASH & LEE L. REV. 1533, 1543 (2010).

<sup>48</sup> See Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431 (2014).

<sup>49</sup> See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

<sup>50</sup> *Id.* at 348.

<sup>51</sup> *Id.* at 354.

<sup>52</sup> Wright & Levine, *The Cure for Young Prosecutors’ Syndrome*, *supra* note 3, at 1091.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

lawyers and tend to develop a respect for them.<sup>55</sup> They also realize how difficult defense counsel's job may be, which makes it more likely that the prosecutor will excuse claims of ineffective assistance of counsel as the best efforts of defense lawyers who are often put in an impossible situation.<sup>56</sup>

Overall, new and seasoned prosecutors consistently state that they are guided by their core values in the work they do. They openly eschew zealots, yet they will rarely admit that they carry those zealous tendencies. Whatever their tendencies, "experience does not always temper one's judgment or approach to the job."<sup>57</sup> In other words, there is no guarantee that a prosecutor will mellow with age or experience. There is also no guarantee that as a prosecutor moves from trial work to defending post-conviction claims, any leniency developed for pretrial cases will influence evaluation of post-conviction challenges. If anything, a prosecutor's confidence grows and over time they believe they are a better judge of defendants and cases. Confidence can be a good quality, but it can also give prosecutors a false sense of security in their judgments.<sup>58</sup> To the extent that additional confidence allows prosecutors to take risks in their charging and trial decisions, there is no data that indicates that prosecutors are willing to take risks in reevaluating cases after a conviction has been obtained. In fact, the data suggests to the contrary. As noted by others, "[prosecutors are] not only coldly unresponsive to [post-conviction innocence claims] but they quickly act to suppress or stamp them out."<sup>59</sup> For example, prosecutors routinely oppose post-conviction DNA testing, even though it can definitively determine whether there has been a wrongful conviction.<sup>60</sup> "[The] qualitative evidence of prosecutorial indifference and, on occasion, hostility to even the most meritorious of post-conviction innocence claims is alarming."<sup>61</sup> Prosecutors are driven by principles of finality that are disrupted by post-conviction claims of wrongful

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<sup>55</sup> *Id.*

<sup>56</sup> See Interview by Ronald F. Wright & Kay L. Levine, Interview 123, *supra* note 2 (research on file with author) [hereinafter Wright & Levine, Interview 123].

<sup>57</sup> *Id.* at 33.

<sup>58</sup> See Smith, *supra* note 29, at 376 (discussing how prosecutors develop a sense of self-righteousness in believing that they are always "doing justice").

<sup>59</sup> James McCloskey, Commentary, *Convicting the Innocent*, 8 CRIM. JUST. ETHICS 2, 56 (1989).

<sup>60</sup> See Medwed, *supra* note 33, at 127-29.

<sup>61</sup> *Id.* at 129.

conviction.<sup>62</sup>

There is another danger for seasoned prosecutors. Experience may teach that if there is a weak case, it will be ferreted out during the trial phase and only the truly guilty will be convicted. As one seasoned prosecutor phrased it, “If we don’t see the weaknesses in our cases, when we try to take them across the street to try them, we are going to get the rug pulled out from underneath us.”<sup>63</sup> If anything, this perception makes it less likely for seasoned prosecutors to agree to post-conviction relief.<sup>64</sup> Prosecutors tend to “presume that convicted defendants have received a fair trial and have been punished appropriately.”<sup>65</sup>

Finally, as Professor Wright’s study documents, as prosecutors age, they generally develop more empathy for those whom they prosecute.<sup>66</sup> Yet, empathy for a person charged with a crime may be easier to summon than empathy for a defendant who has already been convicted and exhausted his appeals. In the latter, a judge has already considered the defendant’s background and life experiences in assessing the punishment that should be imposed. Prosecutors generally have limited exposure to defendants; when they do, it is ordinarily in coming to know the defendant’s criminal record and prior misdeeds.<sup>67</sup> Prosecutors do not become softies over time. If anything, they tend to develop thick skins as they handle more cases.<sup>68</sup> The more they work with law enforcement, the more prosecutors may identify with a culture that is oriented toward “getting the bad guys.”<sup>69</sup> Odds are that, like the

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<sup>62</sup> Laurie L. Levenson, *Searching for Injustice: The Challenge of Post-Conviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 546 (2014) [hereinafter Levenson, *Searching for Injustice*]; Green & Yaroshefsky, *supra* note 27, at 475.

<sup>63</sup> Wright & Levine, Interview 123, *supra* note 58. See also Goldberg & Siegel, *supra* note 25, at 409 (“Prosecutors may be perceived as being ‘soft’ on crime or sympathetic towards defendants if they assist with, or fail to object to, postconviction testing.”).

<sup>64</sup> See Medwed, *The Zeal Deal*, *supra* note 33, at 143.

<sup>65</sup> Fred C. Zacharias, *supra* note 25, at 175. Prosecutors, in general, carry a confirmation bias that contributes to their resistance to innocence claims. See DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 127 (2012) [Hereinafter MEDWED, PROSECUTION COMPLEX].

<sup>66</sup> Wright & Levine, Interview 123, *supra* note 58, at 46.

<sup>67</sup> Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 208 (1988). Prosecutors even change how they refer to defendants once they are convinced of their guilt. They can dehumanize them by using derogatory labels, like “scum” or “perp.” See Cummings, *supra* note 20, at 2154.

<sup>68</sup> Wright & Levine, Interview 123, *supra* note 58, at 47.

<sup>69</sup> Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103

police, prosecutors have heard many prior claims of innocence and wrongful conviction, but seen relatively few of these substantiated.<sup>70</sup> They also know that if they reopen a matter, they will have to be accountable to the victims in the case, a group to whom they feel much greater affinity to than to the defendant.<sup>71</sup>

As a result of these experiences, senior prosecutors, like younger prosecutors, can develop a variety of attitudes toward habeas claims, including a suspicion of post-conviction innocence claims.<sup>72</sup> It is not unusual for them to characterize such claims, especially if submitted pro se, as desperate attempts by people who have nothing better to do in prison than write letters to the court.<sup>73</sup> Indeed, there is a misconception that everyone in prison claims they are innocent. Surveys of sentenced inmates indicate that it is relatively rare for convicted inmates to claim they are actually innocent.<sup>74</sup> Yet, seasoned prosecutors will not hesitate to characterize innocence claims as searching for a “needle in a haystack” in a system where “[f]rivolous claims of innocence burn up scarce resources and detract attention from the prosecution of new crimes.”<sup>75</sup> The problem is not that prosecutors are wrong in observing that guilty people might still try to secure post-conviction release. Defense lawyers see the same phenomenon. The problem is that

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COLUM. L. REV. 749, 792 (2003). See also David M. Lerman, *Forgiveness in the Criminal Justice System: If it Belongs, Then Why is it so Hard to Find?*, 27 *FORDHAM URB. L.J.* 1662, 1670 (2000) (stating that prosecutor culture advances notion that all offenders are bad people; “You get a mind-set that everybody’s bad, everybody’s guilty, and everything is wrong. Everyone is a liar. Everybody is corrupt. Law does that [to] you anyway, but it’s worse as a prosecutor.”).

<sup>70</sup> See Cummings, *supra* note 20, at 2155 (“In your day-to-day work as a prosecutor, defendant sob stories about growing up in foster care, getting beat up by the police, or not being able to afford rehab [are seen as] obstacles to [a prosecutor’s] success.” (internal citation omitted)).

<sup>71</sup> Medwed, *The Zeal Deal*, *supra* note 33, at 145-46.

<sup>72</sup> Professor Daniel Medwed refers to this as the “needle-in-a-haystack dilemma.” MEDWED, PROSECUTION COMPLEX, *supra* note 65, at 127 (“The deluge of post-conviction petitions filed by inmates each year contains only a few meritorious claims. This imbalance between frivolous and the legitimate makes it easy for prosecutors to feel contempt for innocence claims overall. It also creates a disincentive to review each claim thoroughly.”).

<sup>73</sup> One senior prosecutor characterized her experience with habeas motions as a “steady trickle of deceitful and sadistic motions [where] . . . the defendant knows he is guilty . . . and he wants to play the lottery.” Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, *N.Y. TIMES*, Feb. 24, 2003, at A1.

<sup>74</sup> See SURVEY OF CONVICTED INMATES, CALIPATRIA (2014).

<sup>75</sup> Medwed, *The Zeal Deal*, *supra* note 33, at 149.

prosecutors often become so jaded that they are unwilling or unable to ferret out the meritorious claims.

**B. The Problems with the “Tools” Used by Senior Prosecutors to Evaluate Post-conviction Challenges**

Because of their initial suspicions of habeas claims and eagerness to refute those challenges, more senior prosecutors tend to use the following questionable tools to evaluate habeas claims:

1. Did the defendant give a statement to the officers? If a defendant did not give a statement, even after being advised of *Miranda*, prosecutors believe it is more likely than not that the defendant was guilty.
2. Has the defendant submitted to a polygraph? The reluctance of a petitioner to submit to a lie detector examination, by an examiner selected by the prosecution, is a further indicator that the petitioner was guilty.
3. Did the defendant seek parole, rather than assert his innocence? In many parole systems, a defendant must show “remorse” in order to seek parole. From the seasoned prosecutor’s perspective, “truly innocent persons would rather do their time than falsely show remorse.”
4. What evidence can the petitioner present to show the identity of the real perpetrator of the crime? Mere claims that the defendant was not responsible for the offense or unfairly convicted gain little or no traction. To obtain exoneration, the defendant must prove, or at least have a strong theory, as to who committed the offense. Prosecutors feel this way even though for a defendant who had nothing to do with a crime, and little resources to investigate it, it may be a daunting or impossible task to produce the real culprit.
5. Does the physical evidence support defendant’s claim of innocence? Obviously, in cases where there is DNA, defendants have a much greater chance of satisfying this concern. However, since most cases do not have DNA evidence, the best a defendant can often say is that the physical evidence is inconsistent with guilt.

6. If there is a claim of misconduct, how will conceding the issue demean the reputation of someone who was seen as a good prosecutor? Seasoned prosecutors feel like they “know” which prosecutors were likely to make mistakes and if an ordinarily competent prosecutor is charged with misconduct, it is harder to believe the claim.<sup>76</sup> Similarly, how will conceding a misconduct issue affect law enforcement? This factor regularly comes into play because law enforcement enjoys only qualified immunity from civil cases that are likely to follow exoneration.

7. What does that prosecutor’s gut and experience tell him or her about the petitioner’s claims? This type of gestalt reaction to a case would most likely not be tolerated if demonstrated by junior colleagues. However, in the realm of post-conviction challenges, prosecutors are unabashed about relying on their “experience” to summarily reject a habeas claim.

8. How will admitting a *Brady* violation affect them on other cases? Prosecutors worry about whether a concession made in one post-conviction case will lead to a cascade of other challenges and allow the defense more access to prosecution files than their office policy would like to permit.<sup>77</sup>

9. How does conceding a post-conviction case undermine the use of an informant in that case and, quite possibly, in other cases in which the informant participated?<sup>78</sup>

10. Will the petitioner waive all privileges so that his or her lawyer can personally guarantee that the petitioner never indicated that he or she had reservations about their innocence?<sup>79</sup>

None of these tools are particularly helpful in fairly assessing a

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<sup>76</sup> For example, in the case of *In re Kash Register*, the habeas prosecutors initially refused to turn over a death penalty memorandum prepared decades before by the prosecutor (who had since been elevated to the bench), even though the memorandum plainly stated that the eyewitnesses could not identify the defendant and the memorandum had not been disclosed at the time of trial. As the habeas prosecutor explained, “He must have had his reasons. Maybe it was protected by work product.”

<sup>77</sup> Obviously, this is not a problem in offices with “open file” discovery.

<sup>78</sup> See Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 109-110 (2006); Alexandra Natapoff, *Snitching: the Institutional and Communal Consequences*, 73 U. CIN. L. REV. 670 (2004).

<sup>79</sup> See discussion *infra* at 367.

post-conviction claim of innocence. Rather, they are the old “tricks” of prosecutors who vainly believe they have a special sense that will allow them to discern when there is a righteous claim of wrongful conviction. They represent a range of obstacles—from pseudo-legal conclusions to institutional barriers—that impede the work of prosecutors in properly handling post-conviction cases. Let’s consider each:

1. “No DNA, No Innocence.”

DNA testing is both a blessing and a curse. In cases where DNA is available and can definitively identify the culprit of a crime, DNA results are a blessing. Not only can they exclude a person who claims his or her innocence, but they can also lead prosecutors to the person responsible for the crime.<sup>80</sup> In fact, in approximately eighty percent of all cases involving serious felonies, there is no biological material left behind to test.<sup>81</sup>

Therefore, if prosecutors are going to demand DNA results in order to accede to a wrongful conviction claim, many defendants will be out of luck simply because there is no DNA available in their cases.<sup>82</sup> For these defendants, the focus on DNA is a curse because it leaves them without the best evidence available to exonerate them. This is particularly frustrating when it was the police or prosecutor who actually destroyed the evidence that could have been tested for DNA.<sup>83</sup> In non-

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<sup>80</sup> See Naseam Rachel Behrouzfar, *Strengths, Limitations, and Controversies of DNA Evidence*, 1 S. NEW ENGLAND ROUNDTABLE SYMP. L. J. 110 (2006).

<sup>81</sup> John T. Rago, *Truth or Consequences and Post-Conviction DNA Testing: Have You Reached Your Verdict?*, 107 DICK. L. REV. 845, 852 (2003); see also EDWARD CONNORS ET AL., U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxiii (1996), <https://www.ncjrs.gov/pdffiles/dnaevid.pdf> (stating it is unlikely that the perpetrator of a crime will leave biological material at the crime scene in cases other than sexual assault); Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, 75 WIS. L. REV. 20, 22 (2002) (stating in most cases the perpetrator does not leave biological evidence that can be tested).

<sup>82</sup> See Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656-57 (2005) (“Evidence suitable for DNA testing, however, exists only in a smattering of criminal cases: an estimated 80-90% of cases do not have any biological evidence.”); see also Nic Caine, *Factually Innocent Without DNA? An Analysis of Utah’s Factual Innocence Statute*, 2013 UTAH L. REV. ONLAW 258, 259 (2013) (even if biological evidence is present at beginning of investigation, it may be degraded or destroyed, or contaminated by time of testing).

<sup>83</sup> Many states do not require the preservation of evidence that may have DNA. As a result, large quantities of evidence may be destroyed before it can be tested or retested.

DNA cases, petitioners face an uphill battle of demonstrating a wrongful conviction by relying “upon recantations, unreliable forensic science evidence, ineffective assistance of counsel, and prosecutorial misconduct—none of which conclusively prove that the defendant is innocent. . . . [These cases] often require cumbersome investigations, including finding and re-interviewing witnesses or poring over thick files to find anything vital that a trial lawyer might have missed.”<sup>84</sup> Without the quick answer of DNA results, it becomes particularly difficult to convince prosecutors that a defendant should be exonerated.<sup>85</sup>

Second, not all prosecutors are open to DNA testing.<sup>86</sup> According to one study, prosecutors consented to DNA testing in less than half of the cases in which the individual was later exonerated through DNA.<sup>87</sup> Moreover, even when prosecutors are inclined to consent to testing, many states have statutes that pose considerable procedural hurdles for petitioners, including filing requirements, standards of proof, statutes of limitation, and other prerequisites to obtaining testing.<sup>88</sup>

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*See Preservation of Evidence*, INNOCENCE PROJECT (JUNE 4, 2015, 10:40 AM), [http://www.innocenceproject.org/Content/Preservation\\_Of\\_Evidence.php](http://www.innocenceproject.org/Content/Preservation_Of_Evidence.php); *see also* Levenson, *Searching for Injustice*, *supra* note 62, at 564-66.

<sup>84</sup> Caine, *supra* note 82, at 260.

<sup>85</sup> While one would expect prosecutors to be more sophisticated in their understanding of when DNA will be available to assist in resolving a claim of wrongful conviction, juror polls indicate that there is generally an unrealistic expectation that there will be some type of “physical evidence” that will unerringly point to a defendant’s innocence. One study in Michigan indicated that 46% of jurors expect to see some kind of scientific evidence in every criminal case and 22% expect to see DNA evidence in every criminal case. Rick Visser & Dr. Greg Hampikian, *When DNA Won’t Work*, 49 IDAHO L. REV. 39, 46 n.80 (2012) (citing Donald Shelton, *The CSI Effect: Does it Really Exist?*, 259 NAT’L INST. JUST. J. (2008), <https://www.ncjrs.gov/pdffiles1/nij/221500.pdf>).

<sup>86</sup> Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond*, 7 OHIO ST. J. CRIM. L. 771, 778 (2010) (“Often the prosecutor is, as a practical matter, the sole arbiter of whether a defendant has access to potentially exculpatory material, including DNA, and the prosecutor’s support or opposition may make or break the defendant’s chance at exoneration. . . .”).

<sup>87</sup> *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1672 n. 200 (2008); *see also* Wayne D. Garris, Jr., *Model Rule of Professional Conduct 3.8: The ABA Takes a Stand Against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829, 840 (2009) (reporting on study by Benjamin Cardozo School of Law Innocence Project).

<sup>88</sup> *See* Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 356-82 (2002); *see also* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1635 (2008).

Finally, prosecutors do not always accept DNA results as definitive. Perhaps one of the most remarkable examples of this occurred in the case of Roy Wayne Criner.<sup>89</sup> In 1990, Criner was convicted and sentenced to 99 years in prison for the rape of a young girl who was found beaten and stabbed to death.<sup>90</sup> In 1997, DNA testing established conclusively that Criner was not the source of semen recovered from the victim. Prosecutors argued, however, that a new trial was not warranted because Criner might have used a condom when he raped and killed the victim, and that the DNA that was tested came from a previous “unindicted co-ejaculator.”<sup>91</sup> The Texas Court of Criminal Appeals agreed.<sup>92</sup> Eventually, Criner was pardoned, but prosecutors continued to argue that the DNA tests should not be relied upon to exonerate the defendant.<sup>93</sup>

Prosecutors should be wary about how they factor in DNA evidence in evaluating a claim of wrongful conviction. Senior prosecutors, as much as their young counterparts, may want physical evidence to guide their decisions, but DNA testing is not a magic tool for resolving claims of wrongful conviction.<sup>94</sup>

## 2. *The Truth About Lie Detectors*

It is somewhat ironic that prosecutors want to rely on polygraph

<sup>89</sup> See *Criner v. State*, 860 S.W.2d 84 (Tex. Crim. App. 1992); Orenstein, *supra* note 1, at 413–14 (discussing *Criner*); Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. REV. 1643, 1681 n.281 (2013) (discussing various postconviction DNA testing cases, including *Criner*).

<sup>90</sup> See *Criner*, 860 S.W.2d at 84.

<sup>91</sup> See *Ron Wayne Criner*, CENTER ON WRONGFUL CONVICTIONS: BLUHM LEGAL CLINIC, NORTHWESTERN LAW, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/tx/roy-wayne-criner.html> (last visited Nov. 14, 2015).

<sup>92</sup> *Id.*

<sup>93</sup> As noted by Professor Aviva Orenstein, “there may be legitimate reasons for prosecutors to deny access to DNA to every prisoner who requests it. Less easy to understand, however, are the confabulations and attenuated scenarios some prosecutors posit to argue that the accused is guilty despite DNA evidence. . . .” Orenstein, *supra* note 1, at 402.

<sup>94</sup> Lisa R. Kreeger & Danielle M. Weiss, *Forensic DNA Fundamentals for the Prosecutor: Be Not Afraid*, APRI (2003), [http://www.ndaa.org/pdf/forensic\\_dna\\_fundamentals.pdf](http://www.ndaa.org/pdf/forensic_dna_fundamentals.pdf); Lisa R. Kreeger & Danielle M. Weiss, *DNA Evidence Policy Considerations for the Prosecutor*, APRI (2004), [http://www.ndaa.org/pdf/dna\\_evidence\\_policy\\_considerations\\_2004.pdf](http://www.ndaa.org/pdf/dna_evidence_policy_considerations_2004.pdf); Todd W. Bille, *Guns and the DNA Left Behind*, 4 SWIFT & CERTAIN 1 (2007), [http://www.ndaa.org/pdf/swift\\_certain\\_volume\\_4\\_number\\_1\\_07.pdf](http://www.ndaa.org/pdf/swift_certain_volume_4_number_1_07.pdf).

tests to decide whether a petitioner has a legitimate claim of innocence when they generally resist a defendant's use of such tests during criminal trials.<sup>95</sup> In opposing the use of polygraph results by criminal defendants at trial, prosecutors frequently point to the volumes of literature documenting the problematic accuracy of polygraph tests.<sup>96</sup> The American Psychological Association has noted that "[t]here is no evidence that any pattern of physiological reactions is unique to deception. An honest person may be nervous when answering truthfully and a dishonest person may be non-anxious."<sup>97</sup> The bottom line, "[i]n real-world situations, it's very difficult to know what the truth is."<sup>98</sup> It is, therefore, troublesome that senior prosecutors will demand that a habeas petitioner take a polygraph test to support his or her claim of innocence.

### 3. *Hobson Choice: Miranda or Else*

I have to admit that I was visibly shocked when the chief prosecutor openly stated that he did not believe a petitioner was innocent because he chose to invoke his *Miranda*<sup>99</sup> rights. While I appreciated the prosecutor's candor and suspect that he was just articulating what many prosecutors think, it was a troubling remark by a very senior prosecutor whose decisions would have a great impact on a man seeking exoneration. The senior prosecutor had been approached to work collaboratively with habeas counsel to investigate the case because the prosecution's own detective came forward with an affidavit stating that he believed that the defendant was imprisoned for a crime he did not

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<sup>95</sup> See, e.g., *United States v. Scheffer*, 523 U.S. 303, 307-309 (1998) (holding that per se inadmissibility of polygraph evidence in military court martial proceedings violates neither the Fifth nor Sixth Amendments).

<sup>96</sup> See NAT'L RES. COUNCIL OF THE NAT'L ACADS., *THE POLYGRAPH AND LIE DETECTION 2* (2003); Shelley Gupta, *A Polygraph Test Wouldn't Know The Truth if it Hit it With a Brick: Perpetuation of the Normalization of Violence Against Women*, 34 WOMEN'S RTS. L. REP. 282 (2013); Douglas C. Maloney, Comment, *Lies, Damn Lies, and Polygraphs: The Problematic Role of Polygraphs on Postconviction Sex Offender Treatment (PCSOT)*, 84 TEMP. L. REV. 903 (2012); Ewout H. Meijer & Bruno Verschuere, *The Polygraph and the Detection of Deception*, 10 J. FORENSIC PSYCHOL. PRAC. 325, 327 (2010) ("[T]he accuracy of the [polygraph] test depends largely on the skills of the polygrapher rather than on the test itself."); Timothy B. Henseler, Comment, *A Critical Look at the Admissibility of Polygraph Evidence in the Wake of Daubert: The Lie Detector Fails the Test*, 46 CATH. U.L. REV. 1247 (1997).

<sup>97</sup> *The Truth About Lie Detectors (aka Polygraph Tests)*, *supra* note 19.

<sup>98</sup> *Id.*

<sup>99</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

commit and that he was convicted as the result of a faulty eyewitness identification.<sup>100</sup> Yet, the senior prosecutor could see no farther than the defendant's assertion of his *Miranda* rights when he was arrested.

Because senior prosecutors use such assumptions to make key decisions in post-conviction cases, it is important to identify why these assumptions are wrong and injurious. First, it is entirely understandable why an innocent person might assert his *Miranda* rights. After all, it should not be surprising that a person, who has just been told that he has the right not to answer questions, chooses not to answer questions. It is bizarre to think that anyone who believes he has been erroneously arrested should automatically disregard his rights and try to appeal to the people who just effected the arrest. While most defendants do waive their *Miranda* rights, a person who truly believes he has been improperly arrested for a serious crime might actually decide that he needs the assistance of counsel before interacting further with the police.

Studies regarding the waiver of *Miranda* rights indicate that while innocent detainees might more readily waive their *Miranda* rights because they naively believe in the power of their innocence to set them free,<sup>101</sup> those innocent people who do not have confidence in the criminal justice system are less likely to waive.<sup>102</sup> In fact, as studies have shown, guilty suspects may be more likely to waive *Miranda* rights when they have strong world beliefs that cause them to comply with social standards.<sup>103</sup> For a suspect who believes that he has been wrongfully arrested and does not have confidence in the criminal justice system, it is perfectly consistent with his claim of innocence to decline to waive his *Miranda* rights. He is wary of the ploys that the interrogators might use and rightfully chooses to have the assistance of counsel during the interrogation.<sup>104</sup> Second, it likely violates due process

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<sup>100</sup> In an affidavit for the John Doe case, the investigating Detective stated that he "now believes [the defendant was] innocent" and that he "remain[s] concerned that John Doe is the wrong man and is imprisoned for a crime he did not commit." He further stated, "I believe John Doe was not the real shooter and that he was convicted as the result of a faulty eyewitness identification." Detective Reynolds Aff. ¶10, July 15, 1998 (on file with author).

<sup>101</sup> See Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 LAW AND HUM. BEHAV. 211 (2004).

<sup>102</sup> Kyle C. Sherr & Andrew S. Franks, *The World is Not Fair: An Examination of Innocent and Guilty Suspects' Waiver Decisions*, 39 LAW AND HUM. BEHAV. 142 (2015).

<sup>103</sup> *Id.* at 148.

<sup>104</sup> See generally, Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely:*

for the government to punish a defendant at any time for asserting his Fifth Amendment rights. While the Fifth Amendment privilege focuses exclusively on whether improper testimony is used against a defendant at trial,<sup>105</sup> due process takes a broader approach and bans a defendant for being sanctioned for exercising a constitutional right. In *Doyle v. Ohio*, the Supreme Court held that it violates due process for a prosecutor to seek to cross-examine a defendant about his failure to tell the police, after he was read his *Miranda* rights, the same exculpatory story he testified to during trial.<sup>106</sup> The Supreme Court's decision was based upon due process, not a violation of Fifth Amendment rights.<sup>107</sup> Writing for the Court, Justice Powell wrote, "the use . . . of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment."<sup>108</sup> Citing Justice White's concurrence in *United States v. Hale*,<sup>109</sup> the Court wrote:

[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution . . . to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him . . . . Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case.<sup>110</sup>

For prosecutors to penalize a defendant post-trial because he believed

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*Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997). The decision not to waive *Miranda* rights is not an indication that a suspect is guilty; rather, it may be more of an indication that the suspect is not naive to police attitudes and interrogation tactics. See Gregory P. Scholand, *Re-Punishing the Innocent: False Confession as an Unjust Obstacle to Compensation for the Wrongfully Convicted*, 63 CASE W. RES. L. REV. 1393, 1404 (2013).

<sup>105</sup> *Chavez v. Martinez*, 538 U.S. 760 (2003).

<sup>106</sup> *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).

<sup>107</sup> *But see* *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) ("In the absence of . . . *Miranda* warnings, we do not believe that it violates due process of law for a state to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand.") (per curiam); *Salinas v. Texas*, 133 S.Ct. 2174, 2178 (2013) (finding that prosecutors use of pre-*Miranda* silence does not violate Fifth Amendment).

<sup>108</sup> *Doyle*, 426 U.S. at 619.

<sup>109</sup> *United States v. Hale*, 422 U.S. 171 (1975).

<sup>110</sup> *Doyle*, 426 U.S. at 619.

the prosecution's promise not to use his silence against him once he was informed that he had the right to remain silent and chose to invoke that right, violates the very concept of due process. It also raises serious equal protection and ethical issues.

Equal protection requires that defendants not be discriminated against based upon their exercise of a constitutional right unless there is a compelling reason for the state to do so.<sup>111</sup> It is alarming that a seasoned prosecutor would openly admit that he treats defendants who exercise their *Miranda* rights differently—for no good reason other than it is his practice. Prosecutors should be committed to upholding the law, not circumventing it. In the trial setting, it is expressly unprofessional for a prosecutor to knowingly bring inadmissible evidence to the attention of the decision maker.<sup>112</sup> Silence after invocation of *Miranda* rights is inadmissible evidence. It should not be used for any purposes, including post-conviction discretionary calls by prosecutors.

If the senior prosecutor's dilemma includes prosecutors whose experience or gut feelings tell them that a petitioner is only innocent if he waived his *Miranda* rights and provided a statement at the time of his arrest, then there needs to be a concerted effort to address the problems with this approach.

#### 4. *Damned if you do; damned if you don't: Asking for Parole*

Some senior prosecutors will consider whether a defendant has sought parole in deciding whether a claim of innocence is sincere. If a defendant has asked for parole, the prosecutor may intuit that the defendant was really guilty because a request for parole must inevitably be joined by a showing of remorse.<sup>113</sup> In a prosecutor's mind, the model

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<sup>111</sup> *McLaughlin v. Florida*, 379 U.S. 184, 193-96 (1964); *Baluyut v. Superior Court*, 911 P.2d 1, 4-5 (Cal. 1996); *Mitchell v. Adams*, No. CIV S-06-2321, 2010 U.S. Dist. LEXIS 75764, 2010 WL 2976073 (E.D. Cal. July 26, 2010); *In re Nisperos*, 471 F. Supp. 296, 298 (C.D. Cal. 1979) (citing *Graham v. Richardson*, 403 U.S. 365 (1971)); *In re Antazo*, 473 P.2d 999 (Cal. 1970); *Hawkins v. Shaw*, 437 F.2d 1286 (5th Cir. 1971).

<sup>112</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION STANDARD 3-5.6(b).

<sup>113</sup> The parole process begins when a defendant serving an indeterminate sentence confronts the parole board to determine whether public safety weighs in favor of longer incarceration. If the panel decides to grant parole, the review board has 120 days to affirm or deny the panel's decision. In determining an inmates parole suitability, the panel considers relevant, reliable information, such as the prisoner's social history and past criminal history. The panel must also consider circumstances that indicate

innocent defendant would rather rot in prison for a lifetime than claim regret for a crime he did not commit.<sup>114</sup>

While there certainly are such brave, principled individuals,<sup>115</sup> a defendant who is facing a chance for release, even by admitting to crimes he did not commit, may choose that option out of frustration with the habeas process and the overall criminal justice system. Therefore, it does not necessarily follow that a defendant who seeks parole does not have a valid claim of wrongful conviction. Moreover, some prosecutors can view the exact same circumstances and come to the opposite conclusion. One prosecutor might believe that an inmate who does not seek parole is really guilty because he has come to terms with his misdeed and realizes that a parole board will reject his efforts. However, another prosecutor might understand that the inmate does not want to seek parole because he believes he is innocent and cannot show contrition for a crime he did not commit.

Young prosecutors who have not yet had experience yet with parole boards may be less likely to turn to such instincts in making their decisions. The problem with more senior prosecutors is that they assume their experiences provide a sufficient guide in discovering which habeas

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unsuitability, such as the heinous nature of the offense and past violent behavior. Finally, the panel should consider those circumstances that show suitability, such as signs of remorse where the prisoner seeks help to relieve suffering for the victim. Cal. PENAL CODE § 3041 (West 2015); CAL. CODE REGS. tit 15, § 2411 (1990); *In re Rosenkrantz*, 59 P.3d 174 (Cal. 2002); *In re Dannenberg*, 104 P.3d 783 (Cal. 2005); Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 500 (2008) [hereinafter Medwed, *The Innocent Prisoner's Dilemma*]; Daniel Weiss, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1586-92 (2005).

<sup>114</sup> For example, Petitioner Kash Register spent 34 years in prison after being wrongfully convicted of murder. "At 11 parole hearings over the next two decades, he proclaimed his innocence. 'A mistake has been made here, and no one wants to correct it[.]' [At one point he stated], 'I have been incarcerated for 33 years of my life for a crime I didn't commit.'" See Lara Bazelon, *A Mistake Has Been Made Here, and No One Wants to Correct It*, SLATE (Dec. 17, 2013, 7:27 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/12/the\\_exoneration\\_of\\_kash\\_register\\_and\\_the\\_problem\\_of\\_false\\_eyewitness\\_testimony.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/12/the_exoneration_of_kash_register_and_the_problem_of_false_eyewitness_testimony.html).

<sup>115</sup> Kash Register, whose habeas proceedings are discussed *supra* at note 114, appeared at ten parole hearings between March 1997, and April 2012. At each hearing, Mr. Register steadfastly maintained his innocence, despite knowing that if he showed remorse and apologized for a crime he did not commit, his chances of release on parole would rise substantially. Traverse for Petitioner at 15, *In re Kash Delano Register*, No. A078883 (Cal. 2013).

petitions are legitimate and which are not. Yet, at best, they are guided by anecdotal evidence.

### 5. *Finding the real culprit.*

It is no surprise that the one situation where prosecutors will be open to claims of wrongful conviction is when the petitioner can present the prosecution with the actual perpetrator of the offense. Yet, except in DNA cases, this is extremely difficult to accomplish.<sup>116</sup> There are several reasons for this. First, petitioners do not have the investigative tools to conduct the type of comprehensive investigation that is likely to find the actual perpetrator. Rarely will a third-person step forward to take the petitioner's place in prison. Petitioners may suggest why the evidence points to another person having committed the crime, but often it is only the prosecution that has access to witnesses and physical evidence that can support that claim.

Second, the natural reaction of prosecutors is to resist a suggestion that a third party was responsible for the crime because such a showing almost always will mean that the police and prosecutor ignored key evidence in steamrolling the defendant. If there is a thorough investigation, a new perpetrator should rarely pop up out of nowhere several years after the crime. Suggestions of third-party culpability are viewed with great suspicion before and during trial, let alone after trial.<sup>117</sup> While senior prosecutors should know better than to expect the petitioner to instantly produce the real culprit of the crime, this litmus test dramatically reduces the number of habeas petitions they must take seriously.

### 6. *Circling the Wagons: Senior Prosecutors*

Habeas claims of prosecutorial misconduct are particularly troublesome for older prosecutors. Unless an office has established an independent integrity unit, experienced prosecutors will be placed in the position of evaluating the conduct of a current or former colleague. It is not unusual in habeas cases for the trial prosecutor accused of

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<sup>116</sup> In only 36% of misidentification cases, the real perpetrator was discovered using DNA evidence. REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION, INNOCENCE PROJECT 4 (2009), [http://www.innocenceproject.org/files/imported/eyewitness\\_id\\_report-5.pdf](http://www.innocenceproject.org/files/imported/eyewitness_id_report-5.pdf).

<sup>117</sup> *United States v. Wright*, 625 F.3d 583 (9th Cir. 2010); *Territory of Guam v. Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993); *see also* *People v. Hall*, 396 P.2d 700 (Cal. 1964).

misconduct to now be a bench officer. Senior prosecutors are more likely than young prosecutors to have conflicts of interests that can impede their objective evaluation of a case. These conflicts may be based upon personal relationships with the prosecutor whose conduct is being attacked; senior prosecutors often assume that the trial prosecutor they know and have worked with must have obtained a valid conviction.<sup>118</sup>

One indication that a senior prosecutor has simply become cynical is the veneer of “toughness, even cynicism”<sup>119</sup> that permeates prosecutors at the most senior level. “[P]rosecutors perceived by their colleagues as amenable to entertaining post-conviction innocence claims [can] be dubbed ‘soft’ on crime or sympathetic toward defendants.”<sup>120</sup> While those prosecutors specifically assigned to evaluate post-conviction challenges should not fall prey to such attitudes, it is difficult to rewire prosecutors who have operated for decades in a particular culture.

Habeas prosecutors must constantly struggle against the perception that they are undermining the good work and success of the trial prosecutor and police. The personal relationships that prosecutors develop with police over time pose as much of a conflict in evaluating post-conviction challenges as their relationships with other prosecutors. When prosecutorial misconduct is alleged in a post-conviction challenge, it frequently involves the police withholding evidence or improperly influencing witnesses.

Thus, even though senior prosecutors may genuinely attempt to remain objective when evaluating a case, it is extremely difficult for them to forget the opinions they have developed over time about fellow prosecutors and police officers. If those opinions are favorable, a wall of incredulity may make it difficult for the habeas prosecutor to fairly evaluate a habeas petition. Additionally, prosecutors are regularly reminded by the police that concessions in a habeas petition may result in discipline or civil liability for law enforcement officers. Unlike prosecutors who generally enjoy absolute immunity,<sup>121</sup> police officers

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<sup>118</sup> Green & Yaroshefsky, *supra* note 27, at 509 n.250 (2009) (noting the irony that senior prosecutors are more likely to rely on conviction rates as a measure of prosecutorial performance because they have more information as to which prosecutors were successful).

<sup>119</sup> Medwed, *The Zeal Deal*, *supra* note 33, at 140.

<sup>120</sup> *Id.*

<sup>121</sup> *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

are at risk for civil liability if their misconduct contributed to a wrongful conviction. Thus, even when a prosecutor personally believes that a petition has merit, there are tremendous personal and political pressures on the prosecutor to defend the original investigation and conviction.

### 7. *Relying on your gut*

One of the biggest problems for more senior prosecutors is that they believe they have earned the right to make decisions based upon the instincts they have developed over their years as a prosecutor.<sup>122</sup> This “thinking from the gut” occurs regularly in habeas cases, even when those same prosecutors would never permit their young prosecutors to use the same intuition in deciding whether to prosecute a case.<sup>123</sup> One of the many problems of a prosecutor relying on her gut to decide whether to oppose a habeas petition is that the prosecutor develops tunnel vision in evaluating the evidence that is presented to him.<sup>124</sup> Senior prosecutors, like members of parole boards, cannot help but start from a position of thinking that a conviction is just, notwithstanding whatever new evidence is presented.<sup>125</sup> This cognitive bias has been well documented.<sup>126</sup> Moreover, it is politically too inviting for senior prosecutors to abstain from moving forward to help a petitioner seeking exoneration when they can easily shift the decision to the court by simply allowing the case to “take its course.”

A senior prosecutor may tell habeas counsel that he has doubts about a conviction, but that it is important for the victim and police to

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<sup>122</sup> “Prosecutors have a tendency to see things as black and white, right or wrong, guilty or not guilty.” Smith *supra* note 29, at 380.

<sup>123</sup> Unguided discretion is a problem for all prosecutors, “[I]f prosecutors are left to weigh justice for themselves, their sense of ‘right’ and their beliefs about the wisest course to follow will inevitably depend on infinite, opaque factors, many probably unknowable and unidentifiable even to the prosecutors themselves. When left unguided about its meaning, a prosecutor’s sense of justice will be impacted by her personal ambitions, life experiences, religious beliefs, history (if any) as a victim of crime, degree of cynicism about the world, peer pressures in the office (whether conscious or subconscious), attitudes of the leaders within her office, pressures from the defense bar, and the list goes on.” Melanie D. Wilson, *Prosecutors “Doing Justice” Through Osmosis – Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 85-86 (2008). Among the many problems created by unguided discretion is the lack of consistency in handling of case and the arbitrariness by which critical decisions are made in pre- and post-conviction cases.

<sup>124</sup> See Bandes, *supra* note 45, at 479; Findley & Scott, *supra* note 49, at 309, 328.

<sup>125</sup> Medwed, *The Innocent Prisoner’s Dilemma*, *supra* note 113, at 494.

<sup>126</sup> See *supra* note 12.

require a full and often lengthy evidentiary hearing so that they will not believe that the prosecutor acted precipitously. Young prosecutors may act rashly; senior prosecutors act deliberately. Both approaches, however, can compound injustice.

#### 8. *Setting Precedent*

Prosecutors, especially senior prosecutors, like to be in control. Conceding a *Brady* violation, or allowing a peek at the prosecutors' files to determine whether there has been a *Brady* violation, raises the specter that prosecutors will lose control of their files. Consider, for example, the frequent scenario where prosecutors have internal memoranda that seem to indicate that a witness they have used is unreliable or has been easily impeached. A common response by senior prosecutors is that such memoranda are not discoverable because they are attorney work product. This argument is raised even though *Brady* obligations trump any claims of work product. However, prosecutors are so concerned the defense camp may open a permanent door into the operations of the prosecution's office, they reflexively argue internal memoranda, in which prosecutors themselves note problems in their cases or problems with the credibility of witnesses, are off-limits to the defense.<sup>127</sup>

As the movement toward open file pretrial discovery grows, there needs to be comparable movement toward open post-conviction discovery practices. Just as open file discovery may not be a practice that is comfortable for prosecutors who spent most of their careers providing parsimonious discovery before trial, post-conviction prosecutors are often ready to hide behind claims of privilege and work product doctrine to prevent petitioners from accessing information that may assist in their habeas petitions.

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<sup>127</sup> For instance, in one case, prosecutors within a district attorney's office wrote and maintained a number of memoranda discussing the problems with one of the experts they had used to testify in multiple homicide cases. These memoranda, written by prosecutors who had relied on the expert's testimony, were meant to caution other prosecutors that the expert was unreliable. For example, a prosecutor might write, "In my opinion, Dr. [Smith's] credibility has been completely destroyed," while another declared that "the materials regarding [Dr. Smith] are *Brady* material and must be turned over to defense counsel." Nonetheless, prosecutors resisted disclosure of these memoranda to a habeas petitioner, claiming that they are protected by the work-product doctrine. See Letter from Karen Tandler, Deputy District Attorney, Los Angeles County District Attorney's Office, to Lara Bazelon, Habeas Counsel (Sept. 30, 2014) (on file with author).

### 9. *Trusting Informants*

Prosecutors tend to think that they have better information than anyone else, including the court and defense counsel, in determining whether the defendant was guilty of the offense for which he was convicted. One of the reasons prosecutors think this way is that they use informants in identifying suspects and obtaining evidence to use for convictions. Prosecutors are reluctant to concede that their informants are either lying or misinformed. To do so is to invalidate a valuable prosecution tool for not just the case under review, but other cases as well.

### 10. *Guarantees from Defense Counsel*

Last, prosecutors want assurances that the defendant has never admitted to any of his lawyers or investigators that he was involved in the case. In order to bring a habeas claim, even in the most egregious of cases, prosecutors want an unobstructed view of the defense team's original handling of the case. While a defendant who claims ineffective assistance of counsel generally waives the attorney-client privilege as to conversations regarding questionable strategic calls in a case, other habeas claims do not waive the privilege. Nevertheless, senior prosecutors in particular often want personal assurances that the defendant always maintained his innocence in his interactions with defense counsel.

### C. **Thumbs on the Post-Conviction Scales of Justice**

Overall, post-conviction decision-making is particularly susceptible to the problems of cynical prosecutors because prosecutors have more discretion and less supervision in these cases.<sup>128</sup> Prosecutors have the discretion to decide how extensively to investigate a post-conviction claim of innocence. Unless commanded by statute, they have the discretion to determine whether to provide discovery of any or all of the prosecution files to a petitioner seeking post-conviction release. They have discretion to file an opposition to a petition for habeas corpus. They have discretion to determine whether to oppose requests for evidentiary hearings. They have discretion to decide how much pressure they will put on recanting witnesses to stick with their original testimony. They have the discretion to decide whether they will throw the full resources of their office into opposing a petitioner's claim for

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<sup>128</sup> See generally, Pecker, *supra* note 16, at 1620.

relief.

Because of interests in finality, there is an intentional thumb on the post-conviction scale of justice.<sup>129</sup> The thumb weighs in favor of maintaining a conviction. Judges are actually fairly limited in what steps they can take to assist a petitioner when their case is opposed by the prosecution. From the standard of proof in habeas claims, to the extensive procedural obstacles, to political pressure on elected judges not to release convicted defendants, even judges who have a gut feeling that a defendant was wrongfully convicted must proceed cautiously in habeas cases.<sup>130</sup> When a senior member of a prosecutor's office staunchly tells the court that he or she opposes the motion, the chances for exoneration decline precipitously.<sup>131</sup>

One of the concerns with the attitudes of senior prosecutors must be the strong ties they have to members of the bench.<sup>132</sup> It is no secret that in many jurisdictions, the surest path from lawyer to bench officer is through a prosecutor's office.<sup>133</sup> The dominance of former prosecutors on the bench poses significant problems for post-conviction petitioners. First, while bench officers might strive to be impartial, it is naïve to believe that they easily or completely shed all of their past biases once they are appointed to the bench. Like any other bench officer, former prosecutors tend to see cases through the eyes of their experience. As former prosecutors, judges may intellectually understand that mistakes can occur during trials, but their objectivity is strongly tested if a habeas case was handled by one of their former colleagues. Judges tend to believe that because they have worked as prosecutors and believe that they understand even better than the litigants how a matter should have

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<sup>129</sup> See Levenson, Searching for Injustice, *supra* note 62, at 552-53.

<sup>130</sup> *Id.* at 570.

<sup>131</sup> See Medwed, The Zeal Deal, *supra* note 33, at 128 n.14 (judges react to signals by prosecutors as to the legitimacy of a habeas petition in deciding whether to grant an evidentiary hearing; if a prosecutor supports the hearing, the petitioner has an enhanced likelihood of being vindicated).

<sup>132</sup> See *supra* note 19.

<sup>133</sup> "Among President Obama's judicial nominees: 118 out of 283 district court nominees (41.7%) have been state or federal prosecutors. [However, only] [f]orty-four out of 283 (15.5%) have been state or federal public defenders, [and] 60 out of 283 (21.2%) have been private criminal defense attorneys. 23 of 61 circuit court nominees (37.7%) have been prosecutors. Eleven of 61 (18%) have been private criminal defense attorneys, and five of 61 (6.8%) have been public defenders. Only two nominees, Jane Kelly and L. Felipe Restrepo, have been federal defenders." Broadening the Bench: Professional Diversity and Judicial Nominations, Alliance for Justice 9 (2014), <http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf>

been handled.

Second, older prosecutors understand the politics of the criminal justice system. Volumes have been written about the political pressures on judges who must run for reelection.<sup>134</sup> Not only do judges know fellow prosecutors who were instrumental in getting them on the bench, but they also realize law enforcement and prosecutors have the power to cut judicial careers short. Without saying a word, most senior prosecutors know that they have enhanced credibility in front of the court. This added influence raises an additional concern about the impact of cynical prosecutors.

### III. INTRODUCING A NEW PARADIGM FOR POST-CONVICTION PROSECUTORS

Recognizing how senior prosecutors might be overly cynical is just the first step in preventing that cynicism from prolonging injustice. It is also important to establish a healthy model for handling post-conviction matters that will prevent these parochial attitudes from impeding with efforts to cure injustices. Certainly, it is not as simple as saying to older prosecutors that their ways are antiquated and out-of-touch. Older prosecutors must be convinced that it is best for them to embrace new approaches to post-conviction litigation. They must be committed to the new paradigm for post-conviction cases: instead of looking for ways to deny petitions, they must be open to joining the search to determine whether there has been an injustice.<sup>135</sup> This section addresses how prosecutors should approach post-conviction litigation today. Senior prosecutors formed their instincts for handling post-conviction cases based upon the laws and ethical rules in effect at the time they began their legal careers. For years, their work reinforced those standards. It is, therefore, particularly challenging when there are significant changes in not only controlling legal and ethical standards, but even the adversarial role, which affect their practice. In the last decade, there have been dramatic changes to the substantive laws and ethical rules affecting post-conviction litigation. Prosecutorial standards

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<sup>134</sup> See, e.g., Amanda Frost & Stefanie A. Lindquist, Countering The Majoritarian Difficulty, 96 Va. L. Rev. 719 (2010); Joanna M. Shepherd, Money, Politics, and Impartial Justice, 58 Duke L.J. 623 (2009); Joanna M. Shepherd, The Influence of Retention Politics on Judges' Voting, 38 J. Legal Stud. 169 (2009).

<sup>135</sup> Petitions for collateral review may include petitions for writ of habeas corpus, petitions for coram nobis, review under 28 U.S.C. § 2254 (1996) and 28 U.S.C. § 2255 (2008).

have been revamped.<sup>136</sup> New laws have been passed to allow defendants greater access to evidence to prove their innocence.<sup>137</sup> Five years ago, it was virtually unheard of for prosecution offices to have independent conviction integrity units.<sup>138</sup> Now, both state and federal prosecutors are beginning to use this approach.<sup>139</sup>

<sup>136</sup> Model Rules of Prof'l Conduct r. 3.8 (Am. Bar Ass'n 2015).

<sup>137</sup> See Cal. Penal Code § 1405 (revamping standards for DNA testing, threshold for innocence claims, and rules for destroying evidence).

<sup>138</sup> A Conviction Integrity Unit ("CIU") is a unit of a prosecutor's office dedicated toward reexamining post-conviction claims of innocence. For a general report on the formation and operation of CIUs, see Center on The Administration of Criminal Law, *Establishing Conviction Integrity Programs in Prosecutors' Offices: A Report of the Center on the Administration of Criminal Law's Conviction Integrity Project* (NYU School of Law 2012), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Establishing\\_Conviction\\_Integrity\\_Programs\\_FinalReport\\_ecm\\_pro\\_073583.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf) [hereinafter *Establishing Conviction Integrity Programs in Prosecutors' Offices*]. The first Conviction Integrity Unit appeared less than ten years ago. In 2007, the Dallas County District Attorney's Office, under newly elected district attorney, Craig Watkins, formed a Conviction Integrity Unit ("CIU"), drafting former criminal defense attorney, Michael Ware, to work with first assistant, Terri Moore, in addressing the problem of wrongful convictions in that district. See Moore, *supra* note 28; Ware, *supra* note 29.

<sup>139</sup> Since 2007, at least sixteen more District Attorney's Offices have created CIUs. The latest report regarding Conviction Integrity Units can be found in the CENTER FOR PROSECUTOR INTEGRITY, *CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM* (Dec. 4, 2014), <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Conviction-Integrity-Units.pdf>. These integrity units have reviewed over 7,000 cases, resulting in 61 exonerations.

UNITED STATES CONVICTION INTEGRITY UNITS & INNOCENCE COMMISSIONS 2015

	State	Location/Office
1.	Arizona	Pima County DA
2.	California	Santa Clara County DA
3.	California	Los Angeles County DA
4.	Colorado	Colorado Justice Review Project—Colorado Attorney General
5.	Illinois	Cook County Conviction Integrity Unit (State's Attorney)
6.	Louisiana	Orleans Parish DA
7.	Maryland	Maryland State's Attorney Office
8.	Michigan	Wayne County Prosecutor
9.	New York	New York County DA's Office
10.	New York	Oneida County
11.	New York	Brooklyn County, DA's Office
12.	North Carolina	Innocence Inquiry Commission (state agency/Administrative Office of the Courts)

There are many new approaches to creating units to deal with post-convictions claims of innocence. Some have proposed that post-conviction prosecutorial functions be assigned to separate prosecutorial offices, like a State Attorney General Office,<sup>140</sup> others have proposed that criminal law specialists be recruited to handle such cases.<sup>141</sup> Some states, like North Carolina, have gone outside of the prosecutors' offices and adopted "innocence Commissions" to investigate and determine the credibility of factual innocence claims.<sup>142</sup> Whatever the structural change, at the heart of all reforms must be a commitment to involving prosecutors who are not inherently cynical to claims of innocence.

### A. Updating Senior Prosecutors' Understanding of Their Ethical Obligations

In the last ten years, the American Bar Association adopted new provisions specifically addressing prosecutors' duties in post-conviction cases.<sup>143</sup> The rules are so new that state bars are still in the process of adopting these new rules.<sup>144</sup> ABA Rule 3.8(g), adopted in 2010, now

13.	Ohio	Cuyahoga County DA
14.	Oregon	Multnomah County DA
15.	Pennsylvania	Philadelphia
16.	Texas	Dallas County DA's Office
17.	Texas	Harris County
18.	Washington DC	US Attorney's Office

There are many strong arguments for Conviction Integrity Units or Best Practices Committees for prosecution offices, although a full discussion of these proposals is beyond the scope of this article. For more regarding the operation, benefits and challenges of post-conviction integrity units, see Zacharias, *supra* note 26; See also Ginsburg & Hunt, *supra* note 86; Green & Yaroshefsky, *supra* note 27; Medwed, *The Zeal Deal*, *supra* note 33.

<sup>140</sup> See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 454-55 (1992).

<sup>141</sup> See GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* 190-91 (2008).

<sup>142</sup> See David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1032, 1046 (2010).

<sup>143</sup> Many of these changes are due to the fine work of scholars who have written in the field of postconviction ethical responsibilities. See Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 175 (2005); see also Douglas H. Ginsburg & Hulan Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond*, 7 OHIO ST. J. CRIM. L. 771 (201); Green & Yaroshefsky, *supra* note 27; Medwed, *supra* note 33.

<sup>144</sup> Only thirteen state bars have adopted Model Rules 3.8(g) and (h). Idaho and West Virginia adopted the rule without modification; Alaska, Arizona, Colorado, Delaware,

places an affirmative duty on prosecutors to promptly notify both the court and the defendant of newly discovered credible and material evidence that might exonerate the defendant. Such a rule did not exist during the tenure of many senior prosecutors. Moreover, ABA Rule 3.8(h) places an affirmative duty on prosecutors to help defendants they know to have been wrongfully convicted. Thus, prosecutors who may have become accustomed to serving as “opposing counsel” in criminal cases, are expected to cross the great adversarial divide and actually team up with the defense to help the wrongfully convicted. It is no longer a matter of prosecutors showing mercy for an individual in the criminal justice system. That may be the role of a prosecutor in a charging or plea bargaining situation. But in post-conviction work, prosecutors now have an affirmative obligation to work for the defendant’s exoneration. Because these new provisions were not in effect during much of these senior prosecutors’ careers, older prosecutors may demonstrate some resistance to them.

Specifically, Rule 3.8(g) provides:

When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court authority, and (2) if the conviction was obtained in the prosecutor’s jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

The key to fulfilling this ethical duty is a prosecutor’s ability to recognize, and willingness to accept, there is evidence that can exonerate the defendant. While the rule dictates that prosecutors must take note of new evidence that may exonerate a defendant, it says very little about

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Hawaii, New York, North Dakota, Tennessee, Washington, Wisconsin, and Wyoming have adopted modified versions of the rule. *See* ABA CPR Policy Implementation Comm., Variations of the ABA Model Rules of Professional Conduct 3.8(g) and (h), at 1 (2015), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8\\_g\\_h.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.authcheckdam.pdf) [hereinafter “ABA Report”]. New York also adopted a modified form of the rules; *see* N.Y. UNIFIED COURT SYS., COURT NOTICES 119 (2012), <http://www.daasny.org/Court%20Notices%20rule%203.8.pdf>. California, the District of Columbia, Nebraska, New Hampshire, Pennsylvania and Vermont are continuing to study the rule. ABA Report, *supra*.

how prosecutors are to evaluate whether the evidence presented is “credible and material.”<sup>145</sup>

Seasoned prosecutors, as much or more than their younger colleagues, must be open to seeing how evidence will undermine a conviction.<sup>146</sup> A jaded senior prosecutor<sup>147</sup> might be less willing to engage in this practice than her younger colleague who has a more open mind, and more concern, about how new evidence could help the defense.<sup>148</sup> If anything, since seasoned prosecutors have weathered more attacks on their cases by claims of new evidence, they can be more resistant to the claim that there is material new evidence undermining the prosecution’s case. After a career of having their convictions mostly affirmed,<sup>149</sup> it is easy for a senior prosecutor to write off claims that there has been a wrongful conviction. Moreover, seasoned prosecutors are more likely to be in decision-making positions in which they must allocate the limited resources of their office. Some refer to this as the new “‘prosecutors’ dilemma’; how to honor the prosecutor’s commitment to doing justice by identifying the convicted innocent, without wasting precious resources on largely frivolous petitions.”<sup>150</sup>

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<sup>145</sup> MODEL RULES OF PROF’L CONDUCT r. 3.8(g) (AM. BAR ASS’N 2015).

<sup>146</sup> Overall, prosecutors are likely to discount any new evidence as not sufficiently exculpatory to warrant reopening a case. “Because the prosecutor believes that the defendant is guilty, she is likely to weigh the evidence against him as strong. In contrast, she likely to view evidence that might be helpful to the defendant’s lawyer as unreliable, distracting or immaterial. As a consequence, she may conclude that the evidence is not material and exculpatory, or perhaps not even exculpatory at all.” Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2219, 2135 (2010).

<sup>147</sup> For more regarding prosecutors’ cognitive biases, see Pecker, *supra* note 16; Burke, *Neutralizing Cognitive Bias*, *supra* note 12, at 515.

<sup>148</sup> Given the reaction to the addition of Rule 3.8(g) and (h), as well as similar state rules, there is a reason to be concerned about how senior prosecutors react to such a duty. Many senior prosecutor representatives reacted to the new rule with strong anti-regulatory rhetoric. See Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 889-93 (2012) [hereinafter Green, *Prosecutors and Professional Regulation*].

<sup>149</sup> The reversal rate for convictions in the federal courts of appeals was 5.8% in 2011, and between 2011-2013, 94% of criminal convictions appealed by defendants were affirmed in California courts. See ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUD. BUS. (SEPT. 30, 2011) tbl.B-5, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/B05Sep11.pdf>; JUDICIAL COUNSEL OF CAL., 2014 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2003-2004 THROUGH 2012-2013 (2014), available at <http://www.courts.ca.gov/documents/2014-Court-StatisticsReport.pdf>.

<sup>150</sup> See Boehm, *supra* note 28, at 617.

Thus, while seasoned prosecutors have handled many cases, they are in a new era where they must determine what constitutes a “reasonable effort to cause an investigation.”<sup>151</sup> The rule’s language is vague and prosecutors can be easily influenced by their past practices. Prosecutors who have previously treated habeas petitions in a perfunctory manner may consider minimum effort to be “reasonable” given that the rules themselves do not dictate a set protocol for post-conviction investigations.<sup>152</sup>

Similarly, ABA Rule 3.8(h) provides: “When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecution’s jurisdiction, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.” Again, the key issue is how a prosecutor’s experience will play a part in her analysis of whether new evidence is “clear and convincing.”<sup>153</sup> Prosecutors can set a high bar for “clear and convincing evidence” of innocence.<sup>154</sup> Because the ethical rule is a relatively new one, seasoned prosecutors may believe it should only be applied in the rarest of cases where it is obvious to them that an injustice was committed.

Due in part to the recent spotlight on overcharging<sup>155</sup> and over-

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<sup>151</sup> MODEL RULES OF PROF’L CONDUCT r. 3.8(g) (AM. BAR ASS’N 2015).

<sup>152</sup> Just now, scholars are beginning to suggest the framework prosecutors should use for conducting investigations and responding to innocence claims. Green & Yaroshefsky, *supra* note 28, at 471-72. Their ideas vary. Dana Carver Boehm call for management-level prosecutors to direct the review of innocence claim, reviews by someone other than the original prosecutor, and cooperation with DNA testing. Boehm, *supra* note 29, at 617. *See also* Levenson, *Searching for Injustice*, *supra* note 62.

<sup>153</sup> Scholars continue to address the shortcomings of Rule 3.8(g) and (h). *See, e.g.*, Green, *Prosecutors and Professional Regulation*, *supra* note 151; David Keenan et al., *The Myth of Prosecutorial Accountability after Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011); Bruce A. Green, *Prosecutors’ Ethical Duty of Disclosure In Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 57 (2011).

<sup>154</sup> Green & Yaroshefsky, *supra* note 27, at 471-72.

<sup>155</sup> The Supreme Court has noted the continuing problem of overcharging and abuse of prosecutorial discretion. In the recent cases of *Bond v. United States*, 572 U.S. \_\_\_\_ (2014) and *United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013), *rev’d*, 574 U.S. \_\_\_\_ (2015), the Court has had to address federal prosecutors’ use of felony statutes to prosecute what might otherwise be viewed as minor offenses. This practice led conservative member of the Court, Justice Antonin Scalia, to comment during oral argument in *Yates* when the Government tried to defend its charges under the law: “What kind of sensible prosecutor does that?” Lyle Denniston, *Argument Analysis: Building to a Scalia Crescendo*, SCOTUSBLOG (Nov. 5, 2014),

incarceration,<sup>156</sup> prosecutors at all levels are coming to appreciate that they have the power, and perhaps the ethical responsibility, to show appropriate leniency and to individualize justice.<sup>157</sup> However, post-conviction matters rarely invoke the same sentiment. The claim that “[m]ore mature prosecutors recognize that consulting the codebook is only the starting point for weighing a defendant’s case,”<sup>158</sup> does not fit as well in habeas proceedings. By the time of a post-conviction challenge, prosecutors believe they have checked the codebook, the judge and the jury, and are entitled to defend the conviction unless there is a compelling showing that an injustice has been committed. Prosecutors operate with a reflexive resistance to claims of wrongful conviction.<sup>159</sup> After facing massive numbers of post-conviction challenges, it is perhaps no surprise that many prosecutors fully expect the next challenge they evaluate will be frivolous.<sup>160</sup> Additionally, seasoned prosecutors may also have tried cases during a time when evidence like eyewitness identifications or confessions were considered to be solid evidence for a conviction. To embrace their role as post-conviction prosecutors, seasoned prosecutors must begin to question the type of evidence they relied upon to secure convictions<sup>161</sup> and to use the

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<http://www.scotusblog.com/2014/11/argument-analysis-building-to-a-scalia-crescendo>.

<sup>156</sup> See Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 105 (2013) (opining that the recent tendency of prosecutors to overcharge is the result of incentives to overcharge and a lack of incentives to exercise restraint); Russell D. Covey, *Fixed Justice: Reforming Plea-Bargaining With Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254 (2008) (“[P]rosecutors can be expected to, and do routinely, overcharge because overcharging gives prosecutors bargaining leverage.”); Melissa Hamilton, *Prison-by-Default: Challenging the Federal Sentencing Policy’s Presumption of Incarceration*, 51 HOUS. L. REV. 1271, 1272 (“Recent measures show that, per 100,000 persons in the national population, *America’s incarceration rate is 716 . . . while the median for Western European countries is 98.*” (emphasis added)).

<sup>157</sup> See U.S. DEP’T OF JUSTICE, U.S. ATTY’S MANUAL SEC. 9-27.300, SELECTING AND CHARGING THE MOST SERIOUS OFFENSES, U.S. ATTY’S MANUAL SEC. 9-27.300 (2009); Memorandum from Att’y Gen. Eric Holder to All Federal Prosecutors (May 19, 2010), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

<sup>158</sup> Wright & Levine, *The Cure for Young Prosecutors’ Syndrome*, *supra* note 3, at 1085.

<sup>159</sup> Boehm, *supra* note 28, at 616; Medwed, *The Zeal Deal*, *supra* note 33, at 129-30.

<sup>160</sup> Medwed, *supra* note 65, at 127.

<sup>161</sup> For more information regarding the common causes of wrongful conviction, see BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 165-79 (2011); Gross & Shaffer, *supra* note 9, at 40.

same type of evidentiary scrutiny as they profess to use when they make initial charging decisions.<sup>162</sup>

As discussed in Part IV, the crucial component for ensuring that old prosecutors conduct the type of objective review of post-conviction claims that is likely to reveal wrongful convictions is the adoption of a culture where senior prosecutors approach their post-conviction work with enthusiasm and not cynicism. Embracing new ethical standards for post-conviction work is one step toward demonstrating that senior prosecutors are committed to the post-conviction work to which they are assigned.

### B. Placing Substance Over Procedure

Senior prosecutors often know better than their junior colleagues which procedural maneuvers will quickly dispose of post-conviction petitions.<sup>163</sup> For senior prosecutors, the focus is frequently on finality, even if there is some chance that there has been a wrongful conviction. As Professor Medwed has aptly put it, “the post-conviction road to freedom is strewn with procedural potholes” and “[a] crucial factor in a defendant’s ability to make any progress with a post-conviction innocence claim is the nature of the prosecution’s reaction.”<sup>164</sup>

Both state and federal rules governing habeas petitions provide ample procedural obstacles to post-conviction challenges.<sup>165</sup> Typically,

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<sup>162</sup> An open approach to evaluating post-conviction claims of innocence is one of the key guides for Conviction Integrity Units. As described by Dana Boehm:

Reinvestigations are conducted much like initial investigations. Though with the passage of ten, twenty, or thirty years, the investigation is far more difficult. The reviewing prosecutor looks for the same things she would have in a reconviction review of the case: consistency or inconsistency in witness accounts, whether the offender’s account is credible and genuine, and whether there is physical evidence (DNA or otherwise) that was not tested contemporaneously but that might have become testable since or requires retesting. Just as with the initial charging decision, the prosecutor is instructed to review the case with no presumption of the suspect’s guilt, [although] she does weigh to some degree the fact that the individual has been convicted by a jury [and has had the conviction upheld on appeal].

Boehm, *supra* note 28, at 644.

<sup>163</sup> See Levenson, *Searching for Injustice*, *supra* note 62, at 570 (“Most of habeas litigation is not about the merits of a case. Rather, it is a morass of procedural rules designed to limit convicted defendants’ access to the courts for postconviction relief.”).

<sup>164</sup> MEDWED, PROSECUTION COMPLEX, *supra* note 65, at 125-27.

<sup>165</sup> See, e.g., 28 U.S.C. §§ 2244 (2015) (rules against successive petitions), 2241(d)(1) (2015) (statute of limitations rules), 2253 (2015) (rules for appellate review); See also *In re Clark*, 855 P.2d 729, 737-40 (Cal. 1993) (listing various procedural bars to California habeas corpus relief).

these hurdles involve the timely filing of petitions supported by admissible evidence, with little allowance made for the fact that the petitioner is frequently incarcerated with limited access to investigative resources. Petitioners must also identify specific constitutional violations and explain why contrary rulings when their convictions were appealed do not bar the claims in their petitions.<sup>166</sup>

Federal habeas corpus petitions are governed by the Antiterrorism and Effective Death Penalty Act (“AEDPA”).<sup>167</sup> Generally, petitions must be filed within one year from the final judgment on direct review or the expiration of the time for seeking such review,<sup>168</sup> or the emergence or recognition of any new facts supporting petitioner’s claim that could not have been discovered through the exercise of due diligence.<sup>169</sup> The petition must be filed in the district in which the prisoner is incarcerated or in which the prisoner was convicted and sentenced.<sup>170</sup> Only limited constitutional claims may be raised, ordinarily focused on *Brady* violations, ineffective assistance of counsel, presentation of false evidence, or claims of actual innocence.<sup>171</sup> Habeas relief is not available for any claim adjudicated in state court unless the decision was: “(1) contrary to, or involved an unreasonable application of federal law clearly established by the Supreme Court, or (2) based on an unreasonable determination of the facts.”<sup>172</sup> A state prisoner must exhaust his state remedies before seeking federal habeas corpus relief.<sup>173</sup> If a state prisoner stumbles and procedurally defaults his claim in state court, the state court’s decision will be upheld as long as there are “adequate and independent state grounds” for its rulings.<sup>174</sup> Finally, there are bars on successive petitions. A petitioner filing a second or successive petition must move for an authorization order before a three-judge panel in the appropriate court of appeals before the

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<sup>166</sup> LAURIE LEVENSON, FEDERAL CRIMINAL RULES HANDBOOK 735 (2014 ed.).

<sup>167</sup> For a brief history and overview of AEDPA, see Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J. C.R. & C.L. 55, 56, 67-70 (2014).

<sup>168</sup> 28 U.S.C. § 2254(d) (1996).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See LEVENSON, *supra* note 166, at Part VII (discussing limitations on ways habeas corpus challenges may be brought); Levenson, *Searching for Injustice*, *supra* note 62.

<sup>172</sup> 28 U.S.C. § 2254(d)(1),(2).

<sup>173</sup> 28 U.S.C. § 2254(b)(1)(A).

<sup>174</sup> See *Harris v. Reed*, 489 U.S. 255, 262 (1989).

petition may be heard by the district court.<sup>175</sup>

Accordingly, it is not at all difficult for most prosecutors to find procedural grounds to block a petition for writ of habeas corpus.<sup>176</sup> Although some prosecutors admirably focus on the substance of a post-conviction claim of innocence, many senior prosecutors rely heavily on these procedural rules in defending against habeas petitions.<sup>177</sup> Form responses routinely begin with such argument and they are often made in opposition to petitions. These claims may range from allegations that the petition is untimely to arguments that there has been a failure to exhaust other remedies. Senior prosecutors may be curious about some habeas claims, but they feel duty-bound to adhere to all of the procedural obstacles petitioners face in raising these claims. They would rather leave it to the court to decide that there are exceptions to the procedural rules that would allow full litigation of the case.

While procedural requirements are important, reliance on them when it is apparent that there may have been a wrongful conviction undermines the goal of habeas litigation. If the goal is to provide an avenue of relief for defendants who have been wrongfully convicted, prosecutors should not be slaves to procedural hurdles.<sup>178</sup> There are exceptions to these hurdles. It is much easier for a court to invoke these exceptions, like equitable tolling, if there has not been a pro forma objection by the prosecution. Similarly, prosecutors can waive such procedural objections when they are aware of an injustice. Under extraordinary circumstances, the prosecutors themselves may file the petitions for habeas relief.<sup>179</sup>

Thus, if the problem with cynical prosecutors is going to be remedied, then prosecutors must have an interest in reaching a just result in a case, not just the most expedient conclusion to it. Before slavishly invoking procedural hurdles, prosecutors should consider the substance

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<sup>175</sup> 28 U.S.C. § 2254(b)(3)(A),(B).

<sup>176</sup> For criticisms of AEDPA and the obstacles it poses to habeas relief, *see* Hartung, *supra* note 167, at 75-82.

<sup>177</sup> MEDWED, PROSECUTORIAL COMPLEX, *supra* note 65, at 126.

<sup>178</sup> *See, e.g.,* McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) (prosecutors argued that statute of limitations barred habeas claim even though petitioner submitted three affidavits by key government witnesses that demonstrated that petitioner had been wrongfully convicted).

<sup>179</sup> *See* Rick Young, *The Outcome of the Rampart Scandal Investigations*, FRONTLINE (July 2008), <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/late/outcome.html> (The District Attorney's office "... filed [sixty-four] writs and attorneys ... filed [twenty-two] others that, unopposed by the DA's office, [were] granted by the Court.").

of the claim. While the court must abide by procedural rules, there is flexibility in those rules if a prosecutor is truly concerned that there has been a wrongful conviction.

### C. Encouraging Collaborative Working Relationships

Third, the new paradigm for senior post-conviction prosecutors is to embrace a working relationship with individuals who were not the type of defense counsel against whom the prosecutors generally litigated during their tenure. Senior prosecutors will often speak of their glory days—major trials or appeals against some of the most notable lawyers in the jurisdiction. Habeas litigation involves a very different Bar. The overwhelming number of habeas petitions are filed initially by pro se prisoners.<sup>180</sup> Almost immediately, such petitions are derided as nuisance petitions by nuisance plaintiffs who have nothing better to do than to claim they are innocent. Even if habeas prosecutors are not antagonistic toward their habeas adversaries, they are dismissive of their claims. It takes an extreme case for a habeas prosecutor, young or old, to be open to the claim that there has been a wrongful conviction. It may take a prosecutor having a direct experience with an exoneree for him or her to become receptive to the idea that there may have been other wrongful convictions.<sup>181</sup>

The challenge for experienced prosecutors is learning to advocate fairly and respectfully against all types of habeas representations—including pro se defendants, jailhouse lawyers, students in post-conviction litigation clinics, or family members of the accused. Prosecutors must also prepare themselves to deal with family members of the victim who may feel betrayed by a prosecutor's decision to reinvestigate a case. It can be a lonely job being a habeas prosecutor. Typically, law enforcement will be annoyed that a case must be reinvestigated. Fellow prosecutors in the office view with some suspicion the actions of their colleagues. Even judges resent that a case they handled may have resulted in an injustice.

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<sup>180</sup> Inmate was without legal counsel (pro se) in 93% of the sampled habeas corpus petitions. U.S. DEP'T OF JUSTICE, NCJ-155540, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14 (Sept. 1995). In 2010, nearly 73,000 people filed civil cases in federal courts pro se and around 2/3 of such pro se cases filed were done so by prisoners. Also in 2010, the Central District of California had the highest number of pro se cases filed amongst all federal district courts." *Leveling the Playing Field: Help for Self-Filers*, 43 THE THIRD BRANCH 1 (July 2011), [http://issuu.com/uscourts/docs/2011-07\\_jul](http://issuu.com/uscourts/docs/2011-07_jul).

<sup>181</sup> See Interview with Brent Ferreira, *supra* note 8.

While age and experience in a prosecutor's office are two factors that can affect how a prosecutor approaches a post-conviction matter, the key factor at play is the extent to which a habeas prosecutor feels independent in his or her judgment. It is remarkable how often a prosecutor handling a habeas evidentiary hearing will secretly whisper to petitioner's counsel that while the prosecutor believes the petitioner is innocent, "this is not the kind of case where I, as the prosecutor, can just concede."<sup>182</sup> Why is the prosecutor not ready to concede? Because the prosecutor is concerned with backlash from law enforcement, supervisors, or the public. An evidentiary hearing gives prosecutors cover. It is not the prosecutor who is admitting error and releasing a person who was convicted. It is the court.<sup>183</sup>

Properly understood, a habeas prosecutor should be someone who wants to do habeas work because he or she realizes that courts make mistakes. The habeas prosecutor needs to be the watchdog for the criminal justice system. In recognition of this goal, several prosecution offices around the country have created independent conviction integrity units.<sup>184</sup> Currently, such units exist in California, Colorado, Illinois, Louisiana, Maryland, Michigan, New York and North Carolina. As discussed in Part IV, these Units can provide a better home for senior prosecutors than a post-conviction unit that is integrated into an office. The more independence a senior prosecutor has, the more open that individual is to claims of innocence.

#### **D. Ending Bad Habits in Post-Conviction Discovery and Investigation**

Finally, and perhaps most challenging, senior prosecutors can have a hard time setting aside old discovery habits that have long been

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<sup>182</sup> *See id.*

<sup>183</sup> In an interview, a postconviction prosecutor admitted his colleagues have handled cases where they were prepared to concede, but in order to maintain good relations with law enforcement, they went to hearing and allowed the court to make the decision. In doing so, they even subtly assisted the petitioner in proving his innocence. *Id.*; *see also Innocent Man Free After 20 Years Behind Bars*, KTLA (Mar. 16, 2011), <http://truthinjustice.org/carillo.htm>; *Francisco Carrillo 'Not Angry' After 20 Year Wrongful Conviction*, HUFFINGTON POST (Mar. 16, 2011), [http://www.huffingtonpost.com/2011/03/16/francisco-carrillo-not-an\\_n\\_836844.html](http://www.huffingtonpost.com/2011/03/16/francisco-carrillo-not-an_n_836844.html).

<sup>184</sup> *See Boehm, supra* note 28, at 648 ("District attorneys signal to the office and the public their commitment to innocence through whom they choose to lead their conviction integrity efforts and by how they integrate a postconviction review process into their office's existent operations.").

used to block post-conviction petitions.<sup>185</sup> Two examples readily come to mind. First, with the advent of “open file” discovery,<sup>186</sup> prosecutors now readily argue that there cannot be *Brady* violations because all of the materials were provided to the defense. This argument has superficial appeal. *Brady* requires the disclosure of exculpatory and impeachment materials to the defense.<sup>187</sup> The Supreme Court has never required prosecutors to specifically identify why they believe a particular witness or piece of evidence works in the defendant’s behavior. However, senior prosecutors in particular must realize that a “document dump”<sup>188</sup> may superficially comply with the discovery rules, but it will do little to help the defense actually find and use evidence it might need for the defendant’s exoneration. Senior prosecutors should not confuse begrudging fulfillment of legal responsibilities with a real dedication to ensuring that there is not a wrongful conviction. The cure for “Cynical Prosecutors’ Syndrome” is to point out that discovery practices serve a critical role in ensuring just outcomes to cases. The mere fact that a prosecutor complied with office policy, even a policy they created, does not mean that the defendant received a fair trial.

Second, experienced prosecutors must use their seniority to discipline law enforcement during post-conviction investigations. Some of the tactics used by prosecutors and their investigators during post-conviction proceedings are shocking. These tactics frequently include retaliation against recanting witnesses, including threatening witnesses with prosecution if they do not stand behind testimony that they now claim is false.<sup>189</sup> Cynical prosecutors will frequently defer to police

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<sup>185</sup> For a general discussion of the need for set, open discovery policies, see Levenson, *Searching for Injustice*, *supra* note 62, at 578-80.

<sup>186</sup> Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution’s Files*, THE CHAMPION, May 2013, at 106; Brian Gregory, Comment, *Brady is the Problem: Wrongful Convictions and the Case for “Open File” Discovery*, 46 U.S.F. L. REV. 819 (2012); Yaroshefsky, *supra* note 29, at 350.

<sup>187</sup> Laurie Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L. REV. DISCOURSE 74 (2013).

<sup>188</sup> A “document dump” is when an adversary responds to a request for information during the discovery phase of litigation by sending mass quantities of paperwork in reply. The intent is to make it difficult for the requestor to find material evidence in support of his or her case. See generally Eugene Meehan, *Using Civility as a Tactical Tool in Litigation*, 34 BRIEF 62 (2005); Kirby Drake, *Ethical Issues in Discovery*, 19 TEX WESLEYAN L. REV. 899 (2012).

<sup>189</sup> See, e.g., Petitioner’s Motion to Exclude Investigators Joe Vita, Detective Rolando Rodriguez, and Investigator Curtis Mclean from Evidentiary Hearing, at 11 n.6, *In re* Kash Register, No. A078883 (2013) (discussing how investigators repeatedly reminded

officers in the post-conviction investigations, especially if those officers previously worked with them. One cure for this problem is to use special investigators to do the post-conviction investigation and not those investigators who had anything to do with the original conviction or their colleagues at the same law enforcement agency.<sup>190</sup> However, if that is not feasible, at minimum, prosecutors must ensure that their investigators are not harassing witnesses.<sup>191</sup> They should also abide by their ethical duty not to contact witnesses who are represented by counsel.<sup>192</sup> Some post-conviction investigators are notorious for strong-arming witnesses by threatening them charges with being accessories after the fact or with perjury if they refuse to implicate the petitioner.<sup>193</sup> These investigators will also ignore demands that they contact a witness only through counsel. Rather than arguing whether a witness is entitled to counsel during an investigation,<sup>194</sup> post-conviction investigators

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witnesses of potential perjury prosecutions if they changed their stories); Plaintiff's *Ex Parte* Application for Interim Order Pending Hearing on Motion to Prevent Further Abusive and Coercive Investigative Conduct by the LASD and to Schedule Hearing for Equitable Relief and Sanctions, No. 13-01905-MWF (2014). Witness tampering is a violation of prosecutorial ethical standards whether it happens before trial, see H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 63-64 (2013), or in post-conviction investigations.

<sup>190</sup> See Moore, *supra* note 29; Boehm, *supra* note 29; See also Laurie L. Levenson, *Post-Conviction Death Penalty Investigations: The Need for Independent Investigators*, 44 LOY. L. REV. 225 (2012).

<sup>191</sup> Levenson, *Searching for Injustice*, *supra* note 62, at 234.

<sup>192</sup> Rule 2-100 of the California Rules of Professional Conduct prohibits communication between a member of the bar and a represented party. The Rule was enacted to prohibit the intrusion into the attorney-client relationship. *Abeles v. State Bar*, 9 Cal.3d 603, 609 (1973); *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993). The Rule imposes an affirmative ethical duty on prosecutors and those associated with the prosecution team. *Lopez*, 4 F.3d at 1462 ("The rule against communicating with represented parties is fundamentally concerned with the *duties* of attorneys not with the *rights* of parties.") (emphasis in original). The Rule is focused on "policing clear misconduct while keeping in mind that prosecutors are authorized by law to employ legitimate investigative techniques in conducting or supervising criminal investigations." *United States v. Talao*, 222 F.3d 1133, 1139 (9th Cir. 2000).

<sup>193</sup> "The federal witness tampering statute criminalizes the use of intimidation or physical force with the intent to influence the testimony of a witness in any court proceeding. Acting with intent to influence a witness's testimony means to act for the purpose of persuading the witness to change, color, or shade his testimony in some way." Caldwell, *supra* note 189, at 63.

<sup>194</sup> Some prosecutors will argue that they do not need to abide by the "no-contact" ethical rule for represented parties because a witness in a habeas proceeding is not technically a "party" to the litigation. However, "represented party" under Rule 2-

should work with the witness's counsel to gain their cooperation in the investigation.

The new paradigm for post-conviction investigations should include prosecutors who are not inclined to use their experience to defeat post-conviction innocence claims. Rather, senior prosecutors in particular must monitor every aspect of the post-conviction investigation to ensure that those who are doing the investigating are also intent on getting to the truth and not just preserving old convictions.

### E. Preventing Cynicism

It is unlikely to stop all cynicism by prosecutors, especially since so many can readily point to meritless claims of wrongful conviction. Sadly, this may mean that some prosecutors have become so set in their ways that they are unlikely to embrace a new model for handling post-conviction matters. However, as Part IV describes, there are ways to prevent prosecutors from becoming so consumed by cynicism that they will not be able to do a proper job in evaluating post-conviction petitions. Part IV will suggest some possible avenues for addressing the problem. These suggestions range from additional training for senior prosecutors regarding post-conviction work<sup>195</sup> to transitioning senior prosecutors from the adversarial arenas in which they have succeeded to collaborative working environments with which they may not be as familiar.

## IV. REMEDIES AND PREVENTIONS

The remedy for cynical prosecutors is both surprisingly simple and deceptively complex. On a macro level, prosecutors must examine

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100 of the California Rules of Professional Conduct "is not limited to litigants." *Jackson v. Ingersoll-Rand Company*, 42 Cal. App. 4th 1163, 1167 (1996). Moreover, Rule 2-100 applies to "government prosecutors *and investigators*" unless there is an express statutory scheme in place or "decisional law" to override it. CAL. RULES OF PROF'L CONDUCT, Rule 2-100 cmt. (emphasis added). In *Lopez*, 4 F.3d at 1460, the Ninth Circuit rejected the distinction between pre-indictments and post-indictment investigation, stating that "the Sixth Amendment guarantee would be rendered fustian if one of its 'critical components,' a lawyer-client 'relationship characterized by trust and confidence,' could be circumvented by the prosecutor under the guise of pursuing a criminal investigation."

<sup>195</sup> As suggested by Professors Wright and Levine, a critical element of this training may be story-telling. Wright & Levine, *The Cure for Young Prosecutors' Syndrome*, *supra* note 3, at 1113 n.271. Indeed, in the area of post-conviction work, one of the most powerful tools in teaching prosecutors is having them interact directly with exonerees.

themselves to determine whether they are prepared to perform the role of a post-conviction prosecutor. They must determine whether they are committed to proper procedures and due process, regardless of their personal feelings regarding the culpability of the defendant.<sup>196</sup> “One of the first reforms that district attorneys should implement is establishing the right tone regarding the ethical and professional duties expected of all prosecutors in their office.”<sup>197</sup> On a micro, detailed level, prosecutors should adopt a set of standards in the handling of post-conviction investigations, discovery, and litigation.

### A. Creating a Healthy Atmosphere for Post-Conviction Prosecutors

The most drastic change that must be made is for prosecutors to see their role as one of helping to remedy wrongful convictions.<sup>198</sup> That is not the traditional role for prosecutors, senior or junior. While senior prosecutors will readily admit that their role is to obtain a fair verdict, they do not jump at the opportunity to determine whether a prosecutor before them may have mishandled a case. Although there has been some recognition lately of prosecutors who have cooperated in the release of wrongfully convicted individuals,<sup>199</sup> prosecutors who handle post-

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<sup>196</sup> See *The 25 Greatest: Terri Moore*, TEXAS LAWYER, June 28, 2010 (Prosecutor Terri Moore emphasizes that “[p]rosecuting criminals is important, . . . but sending the right ones to prison is even more so. ‘The ends don’t justify the means. We have a real emphasis on due process – the way you get to the end is just as important as the outcome.’”).

<sup>197</sup> *Establishing Conviction Integrity Programs*, *supra* note 138, at 14.

<sup>198</sup> Professor Daniel Medwed refers to this role as prosecutors as “minister[s] of justice.” Medwed, *Prosecutor as Minister of Justice*, *supra* note 28. See also Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversarialness: Endorsing Candor, Cooperation and Civility in Relationships Between Prosecutors and Defense Counsel*, 38 HASTINGS CONST. L.Q. 845, 850 (2011).

<sup>199</sup> Mary Harris & Colleen Williams, *Freed after 20 years wrongly imprisoned, Franky Carrillo hits the books*, NBC NEWS (Mar. 16, 2012, 6:37 PM), [http://usnews.nbcnews.com/\\_news/2012/03/16/10722742-freed-after-20-years-wrongly-imprisoned-franky-carrillo-hits-the-books?lite](http://usnews.nbcnews.com/_news/2012/03/16/10722742-freed-after-20-years-wrongly-imprisoned-franky-carrillo-hits-the-books?lite); *Innocent Man to be Freed After Spending 20 Years Behind Bars*, *supra* note 186. See also *New Jersey Prosecutor Agrees to Reverse the Conviction of New Jersey Man Who Served 19 Years for a Murder that New DNA Evidence Shows He Didn’t Commit*, INNOCENCE PROJECT (Oct. 24, 2013, 12:00 AM), [http://www.innocenceproject.org/Content/New\\_Jersey\\_Prosecutor\\_Agrees\\_to\\_Reverse\\_the\\_Conviction\\_of\\_New\\_Jersey\\_Man\\_Who\\_Served\\_19\\_Years\\_for\\_a\\_Murder\\_that\\_New\\_DNA\\_Evidence\\_Shows\\_He\\_Didnt\\_Commit.php](http://www.innocenceproject.org/Content/New_Jersey_Prosecutor_Agrees_to_Reverse_the_Conviction_of_New_Jersey_Man_Who_Served_19_Years_for_a_Murder_that_New_DNA_Evidence_Shows_He_Didnt_Commit.php) (New York Prosecutor filed a motion to concede that Gerald Richardson’s murder conviction should be reversed after

conviction matters cannot expect the type of fawning publicity that trial prosecutors receive when they win a big case.

Senior prosecutors who handle post-conviction matters must feel valued. For years, placement in post-conviction units was not considered to be a coveted assignment. Rather, they were viewed as dead-end positions for senior prosecutors, whose glory days were gone, or, even worse, the home for those prosecutors who had fallen into disfavor with the office. If senior prosecutors are going to show the type of enthusiasm for post-conviction work that they did as trial prosecutors, it must be considered a prized position for a prosecutor to handle cases involving claims of wrongful conviction.<sup>200</sup> The model adopted from many of the successful conviction integrity units has been to install high-ranking, long-time, respected prosecutors to oversee post-conviction efforts.<sup>201</sup> These individuals have the credibility, power, and experience to ensure that post-conviction cases will be handled fairly and ethically.<sup>202</sup> Equally important, their appointment signals that the work of prosecutors in the unit is of high priority to the office.

Other commentators have made similar suggestions. In her recent article, Dana Carver Boehm, argues that a prosecution office should “foster an office culture of seeking innocence.”<sup>203</sup> This recommendation is undoubtedly correct, but it might not go far enough. Prosecutors will occasionally rally behind a defendant who is unquestionably innocent, but the fixation on a petitioner’s innocence can also lead prosecutors to ignore cases where there were serious errors during the trial that call into question a petitioner’s innocence. The hard work of a post-conviction prosecutor is in assessing whether there were

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he served 19 years in prison); Oren Yaniv, *Brooklyn Brothers Cleared, After One Spent 3 Decades in Prison, in Wrongful Murder Convictions*, NY DAILY NEWS (May 6, 2014), <http://www.nydailynews.com/new-york/nyc-crime/brothers-cleared-wrongful-murder-convictions-article-1.1781869> (Prosecution dismisses murder charges against three brothers who had spent decades in prison for murders they did not commit.).

<sup>200</sup> See generally Boehm, *supra* note 28, at 637-40 (detailing senior officials assigned to run successful conviction integrity units); see also *Establishing Conviction Integrity Programs*, *supra* note 138, at 31-32 (discussing “buy in” efforts that must be made to promote value of conviction integrity reforms).

<sup>201</sup> The Santa Clara County District Attorney’s Office adopted this model in 2011. See Tracey Kaplan, *David Angel – Prosecutor Relights County’s Conviction Integrity Unit*, SAN JOSE MERCURY NEWS (Mar. 27, 2011), [http://www.mercurynews.com/ci\\_17714460](http://www.mercurynews.com/ci_17714460).

<sup>202</sup> Boehm, *supra* note 28, at 639, 648 (describing David Angel’s appointment to run post-conviction unit and ethical standards he set for day-to-day operations of the office).

<sup>203</sup> *Id.* at 647.

constitutional violations that call into question the validity of a conviction, regardless of whether the petitioner can prove his innocence. In cases that lack exonerating DNA evidence, or the confession of another suspect, it is all too easy for prosecutors to disregard egregious violations by trial prosecutors by rationalizing that there was ultimately sufficient evidence for the jury to find the defendant guilty.

The legal standards applicable to the most common post-conviction challenges—*Brady* violations and claims of ineffective assistance of counsel—misdirect prosecutors into focusing on whether there was “prejudice” from violations of a defendant’s rights at trial. For example, a *Brady* claim requires that the petitioner prove not only that the prosecution failed to provide exculpatory or impeachment evidence, but also that this failure had a “reasonable probability of affecting the outcome of the verdict.”<sup>204</sup> Prosecutors can avoid the troubling question of whether the prosecution failed to disclose potentially exculpatory evidence by focusing instead on what evidence was disclosed. The prosecutor may then discount the usefulness of the information that was not disclosed and simply state that the defendant was probably guilty regardless of the discovery violations. The problem with taking such an approach is that even a career prosecutor may not appreciate how the defense might have used the undisclosed information at trial. To be a good habeas prosecutor, a prosecutor must think like a defense lawyer. He or she must be able to contemplate how information that would not necessarily exonerate a defendant, could lead to evidence that would help in his defense.

It is only when a prosecutor understands that there is little way to know whether a defendant was prejudiced, unless the defendant receives a trial where he is represented by competent counsel and has access to exculpatory evidence that a prosecutor will begin to look at post-conviction claims with the objectivity required to properly assess them. Consider this example. In the case of *In re Kash Register*, the petitioner Kash Register spent thirty-four years in prison for a murder he claimed he had not committed.<sup>205</sup> The conviction had been based upon the testimony of two alleged eyewitnesses.<sup>206</sup> At the time of trial, the

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<sup>204</sup> See *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984); *Williams v. Taylor*, 529 U.S. 362, 396-99 (2000); *Cullen v. Pinholster*, 563 U.S. 170 (2011).

<sup>205</sup> See generally, Bazon, *supra* note 114; Ashley Powers, *Witness’s Sister Helps Free Man Convicted in 1979 Killing*, L.A. TIMES (Nov. 7, 2013), <http://articles.latimes.com/2013/nov/07/local/la-me-innocence-hearing-20131108>.

<sup>206</sup> *Id.*

prosecutors did not disclose that they had an internal memorandum regarding whether they should seek the death penalty.<sup>207</sup> In that memorandum, it noted one of the complications in the case was that “the eyewitnesses cannot identify the suspect.”<sup>208</sup> At trial, the so-called eyewitnesses testified that they could identify Mr. Register as the assailant. No mention was made of the prior memorandum until one week before Mr. Register’s habeas evidentiary proceeding.<sup>209</sup> At that point, a new prosecutor assigned to defend the habeas petition sheepishly turned over the memorandum to petitioner’s counsel, simply stating, “maybe you should have this.”<sup>210</sup>

Clearly, this was one of those situations where the trial prosecutor either did not recognize what would constitute exculpatory or impeachment evidence, or intentionally hid it. The trial prosecutor did not consider the memorandum to be exculpatory because he was able to meet with the witnesses and, at that time, they said their memories were refreshed and they were then prepared to testify at trial that Register was the shooter. In the prosecutor’s mind, there had been no prejudice to the defense from non-disclosure because the witnesses were certain by the time of trial of their identifications and had corroborated each other. Defense counsel, would have seen the exculpatory value of such statements regardless of what the witnesses said at trial and, even if there was minimal physical evidence to corroborate the prosecution’s theory.

Similarly, habeas challenges based upon ineffective assistance of counsel require that a defendant demonstrate not only that defense counsel acted below professional standards, but also that the defendant was prejudiced by counsel’s mistakes. Once again, petitioner must show that there was a “reasonable probability that but for defense counsel’s errors, the verdict would have been different.”<sup>211</sup> Habeas prosecutors may admit that there has been a *Brady* error or ineffective assistance of counsel, but argue against granting a new trial because the defendant has not demonstrated he was probably innocent.

Sadly, there are many examples to demonstrate this phenomenon

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See Mem. of P. & A. in Supp. of Petitioner’s Mot. for Reconsideration of His Request to Review the Sealed Portion of Trial Prosecutor’s File at 687-92, *In re* Kash Register No. A078883 (2013).

<sup>211</sup> *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984).

as well. Consider the case of Mr. Kash Register. His counsel regularly appeared in the criminal court. Defense counsel presented expert testimony, cross-examined the prosecution's witnesses, and filed appropriate pretrial motions. Given the minimal level of competence required under the Supreme Court's decision in *Strickland v. Washington*,<sup>212</sup> a prosecutor could easily argue that there was no Sixth Amendment violation. However, a prosecutor who was truly concerned about whether Register received a fair trial might focus on the shortcomings in counsel's representation. For example, by failing to interview all possible witnesses, he failed to learn that the prosecution's so-called eyewitness had not even witnessed the murder, but had chosen to testify in order to protect his pregnant wife from being called as a witness.<sup>213</sup>

Senior prosecutors have seen a wide range of competence in opposing counsel. They must resist the temptation to quickly determine that a habeas petitioner's counsel was not as bad as others in assessing a claim of ineffective assistance of counsel. Experience can lead prosecutors to embrace the most mediocre standard of defense lawyering in assessing Sixth Amendment challenges based upon ineffective assistance of counsel. To remedy this problem, senior prosecutors must recapture their idealism and the level of competency they would prefer, not that which they typically see, in the criminal justice system.

Professor Charles Weisselberg has perceptively noted that the obsession today with innocence claims has had the unfortunate side effect of diminishing interest in whether defendants receive fair trials.<sup>214</sup> Senior prosecutors can be particularly prone to this effect because it is likely they have relied on prejudice arguments to defend challenges in their prior cases.

The antidote to this problem is weaning prosecutors away from the current approach of focusing on prejudice and getting them to embrace the value in scrutinizing trials to determine whether they complied with basic rules for fair proceedings. In other words, habeas prosecutors must care as much about the process that led to a conviction as they do about the result that was obtained.<sup>215</sup> While this does not

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<sup>212</sup> *Id.*

<sup>213</sup> See Traverse for Petitioner at 115, *In re Kash Delano Register*, No. A078883 (Cal. 2013).

<sup>214</sup> CHARLES D. WEISSELBERG, *Against Innocence*, in *THE INTEGRITY OF CRIMINAL PROCESS—FROM THEORY TO PRACTICE* 29 (J. Hunter et al. eds., 2015).

<sup>215</sup> The District Attorneys Association of the State of New York framed this issue as:

mean that prosecutors should concede a habeas petition in every case where there was a violation, prosecutors should be willing to join in requests for new trials, even when there has not been a showing of actual innocence. Prosecutors have been known to concede privately to defense counsel that they think there was a constitutional violation and that the court is likely to grant a habeas petition, but the prosecution still cannot concede the petition because the investigators are not convinced that the defendant is innocent. In a culture where the focus is on the fairness of a trial, as opposed to exclusively on whether the defendant is innocent, prosecutors should feel empowered to join in petitions that demonstrate that there was an unfair trial. It should not be embarrassing or demeaning for a prosecutor to insist that a conviction be based upon procedural fairness, even if their investigators are assuring them that justice has been done.

### B. Specific Standards for Post-Conviction Prosecutors

The ABA Model Rules have taken a conservative approach to imposing obligations on prosecutors in post-conviction cases.<sup>216</sup> By their nature, the rules seek to set minimum standards for ethical conduct by lawyers.<sup>217</sup> However, the fact that the ABA has not yet adopted additional standards does not mean that such standards should not be embraced. Here are some remedies to consider:

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["Doing the right thing"] means we seek the truth, tell the truth, and let the chips fall where they may. We serve the client's interest when we respect the rights of the accused, when we leave no stone unturned in our search for the truth, and when the jury's verdict reflects the available evidence. When we win, we sleep at night because the outcome—with its awesome consequences—is the product of our best effort and the fairest system humans have devised. When we lose, we can sleep at night for the same reason.

It means we succeed when the innocent are exonerated, as well as when the guilty are convicted.

THE RIGHT THING: ETHICAL GUIDELINES FOR PROSECUTORS, DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK (2015), *available at* <http://www.daasny.com/wp-content/uploads/2015/07/2015-Ethics-Handbook.pdf>.

<sup>216</sup> Except for issues regarding post-conviction discovery obligations, the ABA Standards for Criminal Prosecutions do not address best practices for post-conviction prosecutorial work. Zacharias, *supra* note 25, at 174.

<sup>217</sup> See Jennifer K. Robbenolt, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1125 n.97 (2013) (citing MODEL RULES OF PROF'L CONDUCT Preamble & Scope (AM. BAR ASS'N 2010) ("Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.")).

### 1. Prosecutors Should Not Penalize Petitioners for Exercising Their Constitutional Rights

Post-conviction prosecutors have a bad habit of punishing petitioners who have exercised their constitutional rights. This can occur by prosecutors arbitrarily deciding that a petitioner must be guilty if he did not waive his *Miranda* rights when he was arrested or because the petitioner refused to testify or submit to a polygraph.

To be fair, senior prosecutors may have gone to law school long before today's understanding of the problems with police interrogations. Just twenty years ago, some Justices of the Supreme Court were continuing to insist that *Miranda* was not constitutionally required and that there should be freer rein in police interrogations.<sup>218</sup> However, assumptions of when innocent people will or will not waive their rights and provide a statement are unsupported. As research supports, a person who has been falsely convicted has good reason not to trust his interrogator and, therefore, not to waive his *Miranda* rights.<sup>219</sup> Prosecutors who assume the failure to give a statement or testify at trial is evidence of guilt are making unfounded assumptions regarding how innocent suspects act when arrested.<sup>220</sup> Senior prosecutors may stay current on cases discussing *Miranda*, but they may lag behind the science that helps us understand why suspects invoke their *Miranda* rights.<sup>221</sup>

### 2. Polygraphing

It is ironic that so many post-conviction prosecutors support the use of polygraphs to determine whether a petitioner or recanting witness is telling the truth. If, at the time of trial, the defense had tried to introduce a defendant's favorable polygraph results, the odds were that the prosecutor would strongly oppose such an effort.<sup>222</sup> Rather than

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<sup>218</sup> See *Dickerson v. United States*, 530 U.S. 428, 465-66 (2000) (Scalia, J., dissenting) ("Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid . . . of judicial arrogance.").

<sup>219</sup> See Sherr & Franks, *supra* note 102.

<sup>220</sup> Jane Elinor Notz, Comment, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. CHI. L. REV. 1009, 1010 (1997).

<sup>221</sup> Richard A. Leo, *Criminal Law: Inside the Interrogation Room*, 86 J. CRIM. & CRIMINOLOGY 266, 286 (1996); Michael L. Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967); David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103 (1974) (on the frequency of invoking *Miranda* rights).

<sup>222</sup> See *Houston v. Lockhart*, 9 F.3d 62 (8th Cir. 1993); *United States v. Beck*, 729 F.2d

having firsthand knowledge of the value of polygraphs, senior prosecutors tend to rely on the opinion of their investigative agents that such testing would be helpful in evaluating the credibility of witnesses and suspects.

Senior prosecutors should not become accustomed to using polygraphs as a shortcut method to determine the validity of a habeas petition. The same problems that exist for polygraphs before trial exist for post-conviction polygraphs. Innocent defendants can fail a polygraph.<sup>223</sup> In fact, there may be even more reason for an innocent defendant to perform poorly on a polygraph given how much pressure there is to pass the test.

### *3. Seeking Parole Should Not Disqualify Petitioner from Relief*

It is possible for senior prosecutors to believe that if a petitioner is innocent, he will never seek parole because the parole system generally requires that a petitioner express remorse.<sup>224</sup> However, there are some principled, innocent petitioners who will seek parole while still asserting their innocence even though they know that their refusal to accept responsibility will doom their chances at parole.<sup>225</sup> There are also innocent defendants who succumb to the pressures of the parole system and will fake remorse in order to enhance their chance at release.<sup>226</sup>

The focus of habeas work should be on whether the defendant

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1329, 1332 (11th Cir. 1984); *United States v. Pavlenko*, 845 F.Supp.2d 1321 (S.D. Fla. 2012); *United States v. Cordoba* 991 F. Supp. 1199 (C.D. Cal. 1998).

<sup>223</sup> See David L. Faigman et al., *The Limits of the Polygraph*, 20 ISSUES SCI. & TECH. 1 (2003).

<sup>224</sup> See William G. Otis, Editorial, *It's Perfectly Reasonable to Require an Admission for Parole*, N.Y. TIMES (Nov. 13, 2014), <http://www.nytimes.com/roomfordebate/2014/11/13/parole-when-innocence-is-claimed/its-perfectly-reasonable-to-require-an-admission-fo-for-parole>(spelling error of title in original) (spelling error of title in original).

<sup>225</sup> See *supra* note 115 (discussing petitioner Kash Register's failed attempts at parole because he continued to assert his innocence and refused to show remorse for a crime he did not commit).

<sup>226</sup> See Fernando Bermudez, *I Feared I'd Die in Prison for Maintaining My Innocence*, N.Y. TIMES (Nov. 13, 2014), <http://www.nytimes.com/roomfordebate/2014/11/13/parole-when-innocence-is-claimed/i-feared-id-die-in-prison-for-maintaining-my-innocence>. See generally, *The Parole Paradox*, N.Y. TIMES (Nov. 13, 2014), [http://www.nytimes.com/roomfordebate/2014/11/13/parole-when-innocence-is-claimed?emc=edit\\_th\\_20141114&nl=todaysheadlines&nliid=34712218](http://www.nytimes.com/roomfordebate/2014/11/13/parole-when-innocence-is-claimed?emc=edit_th_20141114&nl=todaysheadlines&nliid=34712218).

received a fair trial. Parole considerations are far removed from what happens in trial and even admissions by petitioners shed little light on whether the defendant should have been convicted in the first place.

#### 4. *Finding the Real Culprit*

The best chance a habeas petitioner has for securing relief is in finding the real culprit. Prosecutors are more likely to concede a habeas petition if they have an alternative defendant to prosecute.<sup>227</sup> Yet, as important as it is to hold the true offender responsible for a crime, the reality is that in a non-DNA case, it is often impossible for petitioners to meet this burden.

Prosecutors and defense lawyers often see the post-conviction process as having different goals. From the defense perspective, the purpose of post-conviction litigation is to ensure that a person who is wrongfully convicted has the opportunity for release or a new trial. From the prosecution's perspective, the goal is to remedy a bad conviction by substituting a good conviction. Thus, as important as it is to hold a perpetrator responsible for a crime, the prosecutor's goal is not legally tied to the role of a habeas petition. Regardless of whether prosecutors are able to apprehend the real culprit of a crime, the defendant is entitled to relief if he did not receive a fair trial.

#### 5. *Prosecutors Should Not Consider the Economic, Reputation or Other Collateral Effects of Post-Conviction Relief*

Prosecutors should set aside any concerns about the impact of exoneration on their office or investigating officers. Not infrequently, prosecutors will ask a petitioner to agree to relinquish any claims of police and prosecutorial misconduct in exchange for his release.<sup>228</sup> Although the ethical standards do not expressly disapprove of such waivers,<sup>229</sup> ABA Criminal Justice Standards, Rule 3.3(g), Prosecution

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<sup>227</sup> See Interview with Brent Ferreira, *supra* note 8.

<sup>228</sup> See Lance Lindsey, *In Memory of Arthur Carmona 1982-2008*, DEATH PENALTY FOCUS (Feb. 21 2008), <http://www.deathpenalty.org/article.php?id=197>; Nich Schou, *The Kid Is Dead: Arthur Carmona*, OC WEEKLY (Feb. 21, 2008), <http://www.ocweekly.com/2008-02-21/news/the-kid-is-dead/full>.

<sup>229</sup> As noted in the Comments to the Standards, the Supreme Court has held that "agreements in which a prosecutor agrees to dismiss charges in exchange for an accused person's promise not to sue law enforcement officers, the government entity, or other government officials, are not per se void as against public policy." AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.9 (citing *Town of Newton v.*

Function, provides: “The prosecutor should not condition a dismissal of charges, *nolle prosequi*, or similar action on the accused’s relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.”

Prosecutors should not put their interests ahead of those of the petitioner and the public. Hiding bad prosecutors or bad investigators behind the veil of a coerced agreement does a disservice to the public. Contesting a habeas petition merely to avoid the financial and reputation costs of a successful habeas petition is also an abuse of power.

Similarly, prosecutors should not contest *Brady* challenges simply because there might be more cases in which similar violations were committed. For example, the Los Angeles District Attorney’s Office faced the unfortunate scenario that one of the key experts it relied upon in Shaken Baby Syndrome cases was found not to be a credible witness.<sup>230</sup> Despite internal memoranda admitting the unreliability of this expert, the office continued to fight requests for documents regarding the expert, as well as petitions based upon false testimony and *Brady* violations.<sup>231</sup> Experienced prosecutors understand that an admission in one case can affect the outcomes of other pending petitions. Yet, this impact should not influence prosecutors to withhold discovery or admission of error. Justice must be done in each case. The

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Rumery, 480 U.S. 386 (1987)). Yet, the Court and standards also recognized that “such agreements can be used improperly, not to protect the community against unwarranted, time-consuming, and expensive lawsuits, but rather to cover up actual incidents of law enforcement or other governmental misconduct, including serious violations of individuals’ constitutional rights.” *Id.* In habeas actions, one of the most common basis for a petition is prosecutorial and police misconduct. Accordingly, it is even more likely that releases will impede proper efforts to ferret out individuals and policies that have resulted in a wrongful conviction.

<sup>230</sup> See *People v. Salazar*, 3 Cal .Rptr. 3d 262, 279 (Cal. Ct. App. 2003), *rev’d*, 35 Cal.4th 1031 (Cal. 2005) (“Had the jury been aware of Dr. Ribe’s credibility problems, which would have cast doubt on the prosecution’s investigation, the case would have been cast in a different light with a reasonable probability of a different result.”).

<sup>231</sup> In one post-conviction case, habeas counsel attempted to secure impeachment material regarding [“Dr. Smith”]. Specifically, habeas counsel sought to uncover the prosecution’s files in cases where “Dr. Smith” had changed his medical opinions entirely. See Letter from Lara Bazelon to Karen Tandler, Deputy District Attorney, Los Angeles County District Attorney’s Office (Sept. 10, 2014) (on file with author). The District Attorney’s Office, however, has continuously refused to produce these documents, claiming that the prosecution’s files are protected by the work product doctrine, and that the files are not *Brady* material. *Id.*

potential effect on other cases should increase disclosures of *Brady* violations or even concessions of the petition.

Many prosecutors consider the potential consequences of post-conviction cases on their professional and financial futures. Prosecutors who cannot handle post-conviction matters without being personally affected should be recused.<sup>232</sup>

#### 6. *Prosecutors Should Adopt Open Discovery Policies in Post-Conviction Cases*

Prosecutors should not destroy evidence, unless there is a compelling reason and only after there has been sufficient notice to the defense. Law enforcement, with or without the prosecutor's oversight, frequently destroys key evidence. Consequently, a petitioner seeking post-conviction relief will find it extremely difficult to obtain evidence that will support his or her claim.<sup>233</sup> At one time, a senior prosecutor would find evidence rooms so crowded that older cases needed to be purged. This is rarely the case today.<sup>234</sup> New laws require prosecutors to preserve evidence and to give sufficient notice before destroying evidence.<sup>235</sup> New technologies make it easier to preserve and store evidence for later testing.

Another obstacle for petitioners is attorney-client privilege, which prosecutors use to block access to government files. In post-conviction cases, there should be much less reason to invoke such a privilege. "Prosecutors interested in avoiding injustice [should establish] an office policy that prioritizes innocence seeking, opening their files to inmates in search of exoneration—even the guilty ones—should be an office priority."<sup>236</sup>

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<sup>232</sup> See AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-1.3(f) ("A prosecutor should not permit . . . her professional judgment or obligations to be affected by—her own political, financial, business, property or personal interests."). For a proposal to use recusals more aggressively to remove prosecutors who are perceived to have a conflict of interest, see Pecker, *supra* note 16, at 1642-48.

<sup>233</sup> Levenson, *supra* note 3, at 562-63.

<sup>234</sup> In the last five years, progress has been made in improving the preservation of evidence, especially biological evidence. States, such as Texas and California, have created systems that facilitate the storage of evidence, even by less-populated counties. See Judge Barbara Parker Hervey & D. Kaylyn Betts, *Beyond the Bench: The Texas Court of Criminal Appeals' Work to Improve the Criminal Justice System Outside the Box*, 73 TEX. B.J. 560 (2010); see also CAL. LEGIS. SERV. Ch. 554 (S.B. 980).

<sup>235</sup> CAL. PENAL CODE §§ 1405.1, 1417.9 (West 2015).

<sup>236</sup> Boehm, *supra* note 28, at 652.

Additionally, some prosecutors adopt an adversarial mindset when they decide whether to hand over discovery in post-conviction cases. In some states, there are specific laws dictating when there is a right to post-conviction discovery;<sup>237</sup> however, prosecutors fight tooth-and-nail to avoid venturing beyond those legal obligations. For instance, they employ a range of arguments to stop post-conviction DNA testing.<sup>238</sup> Interviews verify that senior prosecutors are generally less likely to provide full discovery of prosecution files than their junior counterparts. This is especially true when there is no specific case or statute requiring disclosure.<sup>239</sup>

### 7. *Senior Prosecutors Should Check Their Gut Reactions*

Most importantly, senior prosecutors must assess their intuitions about a case as critically as they would assess the decisions of less-experienced prosecutors. Senior prosecutors often feel that their years of experience give them better judgment. Consequently, they feel they make better decisions in a case.<sup>240</sup> One hopes this is true; however, other senior prosecutors admit that the longer they work on cases the more they learn about what can go wrong.<sup>241</sup> For some, working with post-conviction cases can offer a teachable moment to less senior prosecutors. These cases help them to learn from mistakes that were made in prior cases.<sup>242</sup> Humility, concern, and trepidation help

<sup>237</sup> See, e.g., CAL. PENAL CODE § 1054.9 (West 2015).

<sup>238</sup> See Keith Swisher, *Prosecutorial Conflicts of Interest in Post-Conviction Practice*, 41 HOFSTRA L. REV. 181, 198-99 (2012) (“Resistance to DNA testing is sometimes couched in sporting metaphors or grounded in unshakable belief in the accuracy of the guilty verdict.”).

<sup>239</sup> See Telephone Interview with Ronald F. Wright & Kay L. Levine, Interview 1280, Reference 2 (Dec. 17, 2014) (notes on file with author):

Interviewer: Do you feel like your philosophy about prosecution in particular has evolved over time?

Prosecutor: Yeah, I mean you know . . . Probably if you were to ask the prosecutor in 1982 what he thought about providing the contents of his file, which I would have said, “No, I am not required to by law. I don’t have to. I’m not going to.” The prosecutor of 2013 says, “Other than the attorney notes, what’s the harm? What are we doing?”

<sup>240</sup> As prosecutors become steeped in their “duty to seek justice,” they may begin to believe that they hold a monopoly on knowing what justice is. “[T]oo often righteousness becomes self-righteousness.” Smith, *supra* note 29, at 378.

<sup>241</sup> See Wilson, *supra* note 123, at 85-86

<sup>242</sup> See Green, *supra* note 29, at 2183-85; See also Bibas, *supra* note 12, at 999 (noting how younger prosecutors learn by listening to their superiors and looking to them as

prosecutors effectively assess whether there has been injustice in a case.<sup>243</sup>

Prosecutors operate with cognitive bias. They are biased toward maintaining convictions. They are biased toward the infallibility of jury and appellate courts. They feel that what few resources their offices have should be spent addressing their large trial caseloads instead of post-conviction cases.<sup>244</sup> Recognizing and overcoming these biases are the biggest challenges in changing the paradigm of the post-conviction process.

## V. CONCLUSION

Prosecutors have been under intense scrutiny by many scholars.<sup>245</sup> The focus has been on the problem with young prosecutors, suggesting that prosecutors get better with experience. However, in the area of post-conviction work, senior prosecutors may become more entrenched. A criminal justice system that values efforts to remedy wrongful convictions demands an attitude adjustment from its senior prosecutors.

Senior prosecutors should welcome rules that help guide them in some of the most important cases they will handle. Prosecutors have great ethical and legal responsibilities in post-conviction cases because petitioners are less likely to be represented by counsel in habeas matters. Thus, habeas petitioners require more empathy from prosecutors than other defendants.

The suggestions in this article are just that—suggestions. When faced with new rules, prosecutors often argue that, because of separation of powers, they have the authority to decide how they will handle cases.

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role models).

<sup>243</sup> As Bennett L. Gershman suggests, a prosecutor's obligation is to approach each case with "a healthy skepticism" and "to assume an active role in confirming the truth of the evidence and investigating contradictory evidence of innocence." Gershman, *supra* note 27, 342, 348. Professor Abbe Smith suggests the same by challenging prosecutors to reexamine their "smugness, self-importance, and lack of imagination." Abbe Smith, *Are Prosecutors Born or Made*, 25 GEO. J. LEGAL ETHICS 943, 949 (2012).

<sup>244</sup> See MEDWED, PROSECUTION COMPLEX, *supra* note 65, at 125-27, 129-30.

<sup>245</sup> See, e.g., Caldwell, *supra* note 189; Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in LAWYERS IN PRACTICE 47-60 (Leslie C. Levin & Lynn Mather eds. 2012); Paul Butler, Should Good People Be Prosecutors?, in BLIND GODDESS: A READER ON RACE AND JUSTICE 87-99 (Alexander Papachristou ed., 2011); Zacharias, *supra* note 25; Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002).

This may be true; however, the criminal justice system continues to be plagued by wrongful convictions, and the Constitution does not prohibit prosecutors, senior or junior, from looking in the mirror and asking whether they can take a more effective, fairer approach.

Prosecutors may experience far greater personal rewards when they help correct an injustice than through any of their previous convictions as a prosecutor.<sup>246</sup> Exonerations confirm the prosecutor's commitment to justice and rebuff frequent criticism that prosecutors are blind to the criminal justice system's problems. Prosecutors who have been involved in exonerations talk of their participation with pride. A First Assistant District Attorney summarized his work in the Dallas County Conviction Integrity Unit by saying, "It's truly what justice is about . . . It feels awesome."<sup>247</sup> The former Chief of the Los Angeles County District Attorney's Office echoed those sentiments. Although he found it difficult to confront his colleagues who did not share his belief that an innocent person had been convicted, he felt like he had "done his duty." "It's the right thing to do because these people did not do the crime. It is as simple as that."<sup>248</sup>

A positive effect of Conviction Integrity Units is that new and older lawyers, eager to make a contribution to the criminal justice system, apply to work as prosecutors who will reinvestigate claims of innocence.<sup>249</sup> Today, prosecutors seeking advancement may request placement in the habeas unit.<sup>250</sup>

Senior prosecutors must realize that their best professional years may lie ahead of them, when they can use their experience, wisdom and power to right an injustice. The psychic rewards of such an endeavor are

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<sup>246</sup> See Thomas Hoffman, TEXAS LAWYER (Mar. 26, 2013) ("For the past 10 years I have been involved in the difficult, anguishing but exhilarating work of exonerating those who have been wrongfully convicted. . . . The true greatness of a prosecutor is not only in obtaining a conviction but also in undoing injustices.").

<sup>247</sup> See Terri Moore First Assistant District Attorney Dallas County District Attorney's Office, 50 N.Y. L. J. (Sept. 29, 2008).

<sup>248</sup> Interview with Brent Ferreira, *supra* note 8.

<sup>249</sup> Moore, *supra* note 28, at 11. See also Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2115 (2010) ("Prosecutors should start to view the adoption of compliance programs as in their own interest. After all, the goal of law enforcement should be to prosecute people who have actually committed crimes. . . . [T]o the extent offices try to attract the best lawyers to join them, that is more likely to occur if the office can show a commitment to compliance with the law.").

<sup>250</sup> See Interview with Brent Ferreira, *supra* note 8.

beyond measure.<sup>251</sup>

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<sup>251</sup> For example, prosecutors who work on Conviction Integrity teams are often cheered in press releases and news stories accompanying the exonerations. *See, e.g., The Wright Stuff*, N.Y. L.J. (Nov. 2, 2009) (Innocence Clinic issued press relief discussing cooperation of District Attorney's Conviction Integrity Unit).