

# Legal and Ethical Implications of Post-Conviction DNA Exonerations

Peter Neufeld\*

Witnesses to crimes inject their own subjectivity and speculation about what really happened in a particular case and suppositions are floated everywhere. What we have been trying to do, with the advent of forensic DNA testing, is replace that kind of speculation, supposition, and subjectivity with hard science. This is the kind of revolution, I think, that has been spawned over the last two years since we have had this unprecedented wave of DNA exonerations.

Take the case of Chris Ochoa and Richard Danziger,<sup>1</sup> two men in Texas who were convicted of a serious crime more than a decade ago. One day, the manager of an Austin, Texas Pizza Hut was working alone in the back of the closed restaurant, when one or more persons, entered the back room, raped, robbed, and murdered her. A few days later, while the police detectives were investigating, some of the employees who were present noticed two men, Ochoa twenty one, and his younger roommate, Danziger, both of whom worked at another Pizza Hut, standing by the perimeter of the crime scene. An employee told the detectives he had suspicions concerning the two men being present at the scene. One detective found this observation most significant and sought out Chris Ochoa. Although the detective had a history of overreaching, he was nevertheless undeterred. The interrogation went on for hours. The detective showed Ochoa photographs of the death house and explained to him what a lethal

---

\* Peter Neufeld co-founded and directs *The Innocence Project*, which currently represents more than two hundred inmates seeking post-conviction release through DNA testing. In its nine years of existence, *The Innocence Project* has been responsible in whole or in part for exonerating more than fifty clients. Some of Mr. Neufeld's publications include: P.J. Neufeld & B.C. Scheck, *Forward to "DNA Exculpatory Cases Study Report," National Institute of Justice*, 1996; BARRY SCHECK, PETER NEUFELD, & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); BARRY SCHECK & PETER NEUFELD, DNA AND INNOCENCE SCHOLARSHIP WRONGLY CONVICTED: WHEN JUSTICE FAILS (2000); and P. Neufeld and N. Colman, *When Science Takes the Witness Stand*, 262 SCI. AM. 5, (May, 1990).

1. State v. Danziger, District Court of Travis County, 299th Judicial District, No. 94,518, Honorable Jon N. Wissner, Judge (1989); see also Alan Berlow, *Texas Justice* (visited Mar. 30, 2001) <<http://www.salon.com/politics/feature/2000/10/31/ochoa/print.html>>.

injection would feel like. Eventually, Chris Ochoa confessed that he had committed these crimes with his roommate, Richard Danziger.

Ochoa confessed and pled because he was told that a plea of guilty would spare him a death sentence. Danziger was also indicted, and Ochoa was the chief government witness against him. Ochoa testified falsely and withstood cross-examination. Danziger was convicted and sentenced to life imprisonment as well.

Fast forward a decade. An alcoholic, named Marino, attending a twelve step program in the Texas prison system, admitted that he was the one who had committed the Pizza Hut crimes. To clear his conscience and complete his conversion, he sent a letter to the police in Austin, confessing to the crime. He explained in the letter that evidence of the crime could be found in a closet at his mother's house. Two years later, having not heard a response from the police, he wrote another letter, this time to Governor George W. Bush. In the letter, he told Governor Bush that he had found God and he could not live with himself if two innocent people would be executed for something he did. Bush did nothing.

Finally, with the help of the Wisconsin Innocence Project, DNA testing on the post mortem rape kit cleared Ochoa and Danzinger and nailed Marino. If Chris Ochoa came to our *Innocence Project* and asked to have DNA testing, we probably would have turned him down. Given the criteria that Marjory (Fisher) spoke about being used in her office (the Special Victims Bureau in the Queens District Attorney's Office in New York), she also would have turned him down. After all, the man confessed, gave a full elocution, pled guilty, and testified against his cohort in a separate trial under oath.

Danziger and Ochoa will be walking out of jail, probably next week (Ochoa was freed in late fall, 2000 and Danzinger in spring, 2001). What is extraordinary about this case is that it blows the roof off many assumptions and presumptions about which cases warrant DNA testing and which ones do not. Marjory was talking about rejecting cases where a defendant was not saying "it was not me" but rather, it was a fabrication on the victim's part. Three of our DNA exonerations (there have been eighty-five post-conviction DNA exonerations as of March, 2001) involved cases in which the parties knew each other well, but nevertheless, the victim had falsely implicated the defendant. The point is that we cannot simply rely on victims' emotions and experiences to decide which cases are appropriate for DNA testing. The *Innocence Project* has shown that those preconceived notions are sometimes simply wrong.

Prosecutors consent to DNA testing, about half of the time we request it, but, in the other half of the cases, they refuse, forcing us to initiate court proceedings to request DNA testing. In court after court, prosecutors argued that the doctrine of finality (which provides that a case is over, once the jury has spoken and the appeals completed) was more important than an innocent person continuing to languish in prison, or even being

executed. However, with this wave of exonerations, (as of March, 2001, approaching one every three weeks) the finality argument has lost its currency. Increasingly, progressive minded prosecutors around the country are setting up their own "innocence projects."

In Austin, Texas, Ronnie Earl has already exonerated four different people (in George W. Bush's Texas where everybody who was executed deserved to be executed) during the first five months of his project. In California, several prosecutors, have decided to set up innocence units. They are screening old cases; no doubt more selectively than defense attorneys would.

So what happens now? Recently, the State of California passed legislation, which will not only require testing, but also the preservation of evidence. The *Innocence Project* has no choice but to close out seventy-five-percent of our cases simply because the critical evidence has been lost or destroyed. Marjory mentioned that New York has a statute requiring preservation; however, the law is routinely ignored. Currently, there are a half dozen cases in New York City where the prosecutors have cooperated and would have liked to do the testing. Unfortunately, no one can find the evidence. That is an unacceptable situation for people who may be in prison but may be stone cold innocent.

The San Diego District Attorney's (DA's) Office set up an "innocence project." The DA's offices in Orange County, San Bernadino and San Francisco County are also setting up their own "innocence projects." Although Marjory was modest about this, her office has a project, which is much more ambitious than these other DA sponsored projects. The Queens bureau is not limited to DNA cases. They reinvestigate old cases, even where there is no biological evidence, and if they find independently that the person is innocent, they will move to have the conviction set aside.

The wave of DNA exonerations is not simply changing the playing field when it comes to prosecution ethics. It is even changing the way we look at long established Supreme Court precedent. Professor Paul Giannelli talked about performing "postmortems," whenever there is an exoneration. This is the kind of analysis we perform whenever life and liberty is at stake in every other major institution when there has been some kind of disaster, whether it is a plane falling from the sky or some other serious mishap.

For example, I am on the board of trustees at a medical center in New York. When there is an unexpected death, an elaborate and exhaustive review proceeds. A review is not done to engage in finger pointing; we do it because we want to try and prevent it from happening again. The only institution in this country that does not have such a review is the criminal justice system. If each one of these cases were examined with that degree of rigor, it would be a gold mine of information and insight for the criminal justice system.

For instance, take the most recent case concerning Earl Washington. In 1982, in the semi-rural town of Culpepper, Virginia, a young white housewife, Rebecca Williams, was home alone with her three children. In the early morning, while her husband worked the graveyard shift at a nearby factory, a man broke into her home. He attacked Ms. Williams on her bed, stabbed her thirty-eight times, and raped her before fleeing. She then stumbled out the door and collapsed. Just before she died she told the police and her husband that her attacker was a lone black man with a beard. This is precisely the kind of case, that we call a "heater." The people of Culpepper wanted this case solved immediately, because they were scared. However, there was no immediate solution and, racial politics only exacerbated the collective anxiety.

Earl Washington, worked as a sharecropper, and lived in the adjoining county with his extended family. He had an I.Q. that, depending upon who did the testing, ranged between sixty-five and sixty-nine. One night, a year after Rebecca Williams was murdered, Earl, drunk, got into a fight with his brother. He went next door to his neighbor's house to get her gun. When she tried to prevent Earl from taking the gun off the top of the refrigerator, he hit her with a chair. He ran back to his house with the gun and, during a struggle, shot his brother in the foot, then fled into the woods, where he was apprehended by the police. His prior criminal record consisted of a single act of public intoxication.

The police brought him to the precinct, where he quickly confessed to assaulting his neighbor and to shooting his brother. The police also questioned Earl about two other unsolved rapes in the county. Again, he quickly confessed. The police then figured maybe Earl is responsible for that unsolved rape/murder in Culpepper. Hours of interrogation ensued. Whenever the mentally challenged Earl Washington gave the wrong answer, his inquisitors would impress on him the correct answer. Eventually, Earl "gave" a full confession, setting up his indictment for the Williams' rape and murder. He did not go to trial on the other two rapes since the victims told the police they had the wrong man. But, there was no eye witness alive in the Rebecca Williams case because she had died, so Earl was tried, convicted, and sentenced to death.

In 1985, when Earl was awaiting execution in Virginia, lawyers at the Paul Weiss' law firm in New York brought a class action suit on behalf of death row inmates in Virginia. At that time, in Virginia, once an indigent defendant was convicted and sentenced to death, and the conviction and sentence affirmed on direct appeal through the Virginia Supreme Court, should the convict choose to bring a post-conviction challenge, for example, to raise the issue of ineffective assistance of counsel at trial, the state would not provide for counsel to assist with the pleadings. Therefore, an inmate like Earl had to file his own papers and make his own oral argument before the trial court judge. Needless to say, in Earl's case no papers were filed, no argument was made; so Earl came within

five days of his execution.

Faced with Earl's imminent execution, the lawyers at the New York law firm felt compelled to take on Earl's case. The lawyers stopped the execution and began sorting through the paperwork. Meanwhile, the class action went up to the United States Supreme Court, which held that indigents were not necessarily entitled to counsel in post-conviction proceedings under either the Due Process or Equal Protection clauses.<sup>2</sup>

When the police did their investigation of the case, they found four white spots on the blanket that was on the bed where Rebecca Williams had been killed. Those four white spots had been examined in the laboratory back in 1982, when the crime was committed, and were determined to be semen. The police used a technique known as ABO typing, a technology that predated DNA. The police did the typing on the semen and the typing suggested that it was not Earl Washington's nor that of Rebecca Williams' husband. The lawyer who had tried the case missed this extraordinary fact; he did not understand the report; had never used the report and had never raised the issue of semen serology in a court of law.

In fact, one of the fundamental problems is that a lot of us who practice criminal defense decided to go to law school in the first place and become lawyers because we were petrified of science. That is what it was all about. I got a sixty-seven on my last chemistry test in the tenth grade, and never looked back. I do not know how many of you fall into that category, but I would say probably a fair percentage. That is the problem. Once we got our licenses to practice law, we did not want to deal with science. Prosecutors also do not want to deal with science. They like a good old-fashioned fact pattern without technical jargon; like we all do.

In this case, the trial lawyer just never addressed the issue. Once the Paul Weiss firm uncovered this explosive failure, they sought post-conviction relief in the federal courts. They argued that the previous lawyer had provided ineffective assistance of counsel, and that the ineffectiveness prejudiced Mr. Washington at trial. That issue went up to the Fourth Circuit Court of Appeals. The Fourth Circuit concluded that Earl was not really prejudiced by the ineffective assistance of trial counsel because, with the confession, there was overwhelming evidence of guilt. The court minimized the significance of the biological evidence. Washington was returned to death row. His attorneys could not do anything else in the courts, so in 1992 they went to the Governor.

When the attorneys went to Democratic Governor Wilder, they requested that the Governor order DNA testing. It was a new technology, one that might show that the semen taken from Rebecca Williams, and from the blanket on her bed, came from one person and that person is not Earl Washington. The Governor did the testing, but failed to promptly

---

2. See *Murray v. Giarratano*, 492 U.S. 1, 7, 12 (1989).

communicate the results. He told the lawyers that the evidence was suggestive of innocence, but if Earl had been an accomplice, then he could not completely rule him out. The Governor's theory simply ignored the fact that the victim stated unambiguously she was raped by one black man, acting alone.

In Virginia, there is a rule called the twenty-one-day rule. This rule states that after twenty-one days following conviction, you are barred from coming back into court; even if you have overwhelming new evidence of innocence. Thirty-three other states in this country have similar procedural barriers, but none as strict as Virginia's. Consequently, Earl and his attorneys were out of luck. The judicial process would not welcome them, and they were stuck with the Governor.

On his last day in office, the Governor agreed to commute Earl's sentence to life. If the defense chose to accept this offer, they had to agree, in writing, to give up the right to pursue relief in court for the remainder of Earl's life. If the defense chose to reject the offer on Governor Wilder's last day in office, then the new republican Governor, Allen, could simply proceed with the execution. The lawyers were faced with a Hobson's choice. Ultimately, they decided it was better to save Earl's life.

Over the next six years, DNA testing evolved and became more sophisticated. We went back to the Governor's office to try and get new typing. We failed and failed and failed. Locked out of the court of law, we had no choice but to turn to the court of public opinion. We literally got *ABC* and the *Washington Post* to camp out on the Governor's doorstep for weeks, until Governor Gilmore relented. This past summer the testing was finally completed. However, once again we were forced to turn to the media due to the Governor's continued refusal to announce the results. Ted Koppel did two shows in a row on Earl. Governor Gilmore announced that the results completely eliminated Earl as the source of any of the biological evidence. Governor Gilmore gave Earl an unconditional pardon, but was unwilling to apologize to Earl for the unimaginable deprivation he endured.

What is interesting about a case like Earl Washington's, is that in 1993, the same time that Earl's case was in front of the Fourth Circuit, the U.S. Supreme Court issued its opinion in *Herrera v. Collins*.<sup>3</sup> *Herrera* questioned whether a claim of innocence, standing alone, gives one a right to go back into court, unless another constitutional claim can be attached. It was the opinion of several justices that if you could not return to court, at least there was the safety valve of executive clemency; you can always go to the governor for a pardon.

However, Earl Washington's case illustrates that this right is completely hollow. An innocent person trying to have his day in court, if you will,

---

3. 506 U.S. 390 (1993)

before the Governor, was rejected for eight years before the truth finally prevailed. The case also demonstrates that innocent people falsely confess. In 22% of the unjust conviction cases, to be cleared by DNA evidence, false confessions were introduced against the defendants. Earl's case also reflects that the test announced in *Strickland v. Washington*<sup>4</sup> for determining ineffective assistance of counsel is fundamentally flawed. That test, for those of you who have not already studied it in law school, basically means you put a mirror under the nostrils of the lawyer, if it fogs up, the defendant had competent representation. In the cases that we looked at and studied, of the seventy-five people who have been exonerated, about one third of them had appallingly inadequate defense counsel. Yet in every instance but one, the appellate courts decided that the representation was adequate, or at least there had been no prejudice, and allowed the convictions to stand. How could there be no prejudice if the men were actually innocent? Certainly, it is time for a new Supreme Court test.

Look at the *Wade* hearings.<sup>5</sup> After *Wade* was eviscerated by cases like *Neal v. Biggins*<sup>6</sup> and *Manson v. Brathwaite*,<sup>7</sup> the linchpin of admissibility became reliability. Every judge, as the gatekeeper of identification testimony is supposed to determine whether or not the identification was reliable. In 82% of these unjust conviction cases, mistaken eyewitnesses played a critical role in the miscarriage of justice. Yet, in almost every one of those cases, a pre-trial motion was filed to keep the identification testimony out. In every one of those cases, a judge ruled that the identification was reliable. In every one of those cases, an appellate court sustained that finding. And in almost every one of those cases, the federal courts sustained that finding as well. We now know, through the window of DNA, that those identifications were not reliable; these people were completely innocent. We need to better incorporate social science research on suggestibility and misidentification and develop a new standard for evaluating eyewitness testimony.

In light of the overwhelming data produced by DNA exonerations, courts that previously declined to admit experts on eyewitness identification are reconsidering their objections and are now permitting the experts to testify.

---

4. See 466 U.S. 668 (1984).

5. See *United States v. Wade*, 388 U.S. 218 (1967). In *Wade*, the Supreme Court held that where defendant's counsel was not present at the lineup, the court could not strike the witness's courtroom identification of the defendant "without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." *Id.* at 240.

6. 824 S.W.2d 179 (1992).

7. 432 U.S. 98 (1977).

*Arizona v. Youngblood*,<sup>8</sup> which Paul (Professor Paul Giannelli) mentioned in his talk, is another case to be reconsidered in light of DNA. In 1983, a ten-year old boy was at a fair outside of Tucson with his mother. The child disappeared when his mother turned her head briefly. His kidnapper took him to an abandoned house and sexually molested him. When the boy returned to his mother, he was brought to the police with semen all over his clothes. The police officers neglected to process the clothing properly; they failed to refrigerate it. Instead, the clothing was left in a hot, humid locker, which degraded all the biological material so that no testing could be performed.

The following week Larry Youngblood, a middle-aged black man who met the general description of the perpetrator, was picked up by the police. When Youngblood said, "Hey, just test that material; test the semen on the clothes; you'll see it wasn't me," conventional serology testing could not be done because the biological evidence had been destroyed. Based on this destruction of evidence, Youngblood appealed his conviction. The state court of appeals overturned the conviction because of the improper processing and destruction of the evidence. When the case came before the U.S. Supreme Court in 1989, the Court reversed and reinstated the conviction. The Supreme Court held that unless the defendant could show bad faith by the prosecutor there is no reason to reverse a conviction based on the destruction of evidence. Justice Stevens commented that the evidence in question would not have amounted to anything anyway. Stevens went on to argue that the overwhelming evidence of guilt in this case, would have only been corroborated by the testing. Larry Youngblood remained in prison for many years. Following his parole and rearrest for failing to register as a sexual predator, this past summer, Mr. Youngblood's appellate attorneys discovered a swab of semen that had been retrieved from the victim's skin at the time the crime occurred. It had been separated from the clothing, initially, but due to its minute size, had never before been tested, using the then existing inferior technology. When the swab was tested last summer, Larry Youngblood was exonerated.

What is extraordinary about Mr. Youngblood's case is that the doctrine requiring a showing of "bad faith" withstood the test of time for more than a decade. Think about the irony. In law school, we have been taught that, absent bad faith, the destruction of critical evidence will not be deemed prejudicial. As a result, there has been no requirement that law enforcement agencies use due diligence to preserve evidence. This doctrine rested for more than a decade on the shoulders of an innocent man.

Once we prove with certainty, that a man languishing in prison awaiting execution is factually innocent, we can work backwards to examine the causes of wrongful convictions. This unprecedented perspective, afforded

---

8. 488 U.S. 51 (1988).

by forensic DNA testing, will have far reaching legal implications and will no doubt eventually remold the basic and core assumptions of criminal justice.