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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. JOSHUA VILLALOBOS, Defendant.	CR2004-005523-001 STATE'S RESPONSE TO MOTION TO DISMISS THE DEATH NOTICE (EVOLVING STANDARDS) (Assigned to the Honorable Sherry Stephens)

The State opposes Defendant's Motion to Dismiss the Death Notice. The State's position is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Reasonable people can, and have, disagreed for centuries on issues surrounding capital punishment. However, certain anti-death penalty activists have continued to wage a guerilla war[1] against the death penalty that includes the use of disinformation and false statistics. Unfortunately, this misinformation has slipped into the public and legal debate over capital punishment.

II. Under Evolving Standards of Decency, the Death Penalty Remains Constitutional.

The death penalty is undoubtedly constitutional. The U.S. Supreme Court has explained, "Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Glossip v. Gross*, 135 S. Ct. 2726, 2732, (2015)(citations omitted). Still, the defense Motion to Dismiss the Death Notice, filed on June 21, 2016, trots out the usual discredited arguments for why the death penalty should be declared unconstitutional.

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[1] This phrase was aptly used by Justice Scalia in his dissent in *Simmons v. S. Carolina*, 512 U.S. 154, 185, 114 S. Ct. 2187, 2205 (1994) and by Justice Alito who asked during oral argument in *Glossip v. Gross*, "Is it appropriate for the judiciary to countenance what amounts to a guerilla war against the death penalty?" (See page 14 of oral argument transcript available at //www.supremecourt.gov/oral_arguments/argument_transcripts/14-7955_1823.pdf.

A. The Death Penalty Is Still Supported by a Majority of Jurisdictions

The defense initially acknowledges that 31 states provide for the death penalty and 20 jurisdictions do not. From there, the defense changes the numbers. For example, the defense somehow thinks that because 6 states have not executed anyone in more than a decade, that those states have "effectively abolished the death penalty" and should now be counted among the non-death penalty states. (Motion, p. 3).

Has the defense researched the individual death sentences in those cases? Has the defense determined that *the reason* for not carrying out the death sentences is attributable to *a democratic majority of people* in those states no longer supporting the death penalty and "disallowing" the punishment? If not, the defense should withdraw its claim that "a majority of the jurisdictions in the United States now **do not accept** the death penalty as an acceptable form of punishment..." and that "29 states and the District of Columbia comprise a majority of jurisdictions that **disallow** the death penalty. (Motion, p. 4, emphasis added.) Justice Scalia's words to Justice Breyer are particularly appropriate here:

> (A caution to the reader: Do not use the creative arithmetic that Justice BREYER employs in counting the number of States that use the death penalty when you prepare your next tax return; outside the world of our Eighth Amendment abolitionist-inspired jurisprudence, it will be regarded as more misrepresentation than math.)

Glossip v. Gross, 135 S. Ct. 2726, 2749, (2015)(Scalia concurring).

There is a danger in trying to divine "evolving standards of decency" from jurisdictional numbers. Both statistics and anecdotes can be misleading by advocates in favor of and against the death penalty. For example, Dzhokhar Tsarnev, convicted in the

Boston Marathon bombing, was sentenced to death in federal court by a *Massachusetts* jury. However, the State would not deign to cite that single verdict of a "death qualified" jury to suggest that Massachusetts is now a pro-death penalty state. It clearly is not. Nor would the State cite to the fact that the democratically elected governor of Massachusetts has publicly stated his support for the death penalty to be available for those convicted of murdering a police officer. *See* *www.boston.com/news/politics/2016/05/25/charlie-baker-says-he-would-support-death-penalty-for-cop-killers*. The Boston Marathon Bombing verdict and the Massachusetts governor's stance do not prove that Massachusetts has "a consensus" *in favor* of the death penalty. For the same reasons, the actions of the governors in Colorado, Oregon, Pennsylvania, and Washington do not place those states in the anti-death penalty camp either.

The defense also cites to a recent initiative in California to abolish the death penalty. However, a similar initiative to abolish the death penalty was rejected by California voters in 2012 in a close vote.

B. The Death "Penalty" Is Not Unreliable. Efforts to Fix "Unreliability" Must Be Directed at the Trial Process, Not the Punishment.

The defense argues that the death penalty is "unreliable" and that the risk of executing an innocent person is too high. However the death penalty is a punishment. As a punishment, it is not "unreliable." As Justice Scalia noted,

> Even accepting Justice BREYER's rewriting of the Eighth Amendment, his argument is full of internal contradictions and (it must be said) gobbledy-gook. He says that the death penalty is cruel because it is unreliable; but it is *convictions,* not *punishments,* that are unreliable. Moreover, the "pressure on police, prosecutors,

> and jurors to secure a conviction," which he claims increases the risk of wrongful convictions in capital cases, flows from the nature of the crime, not the punishment that follows its commission.

Glossip v. Gross, 135 S. Ct. 2726, 2747(2015)(concurring opinion).

If wrongful *convictions* are the concern, then the efforts of the defense (or anti-death penalty activists) are better aimed at reforming the *trial process*, a process that arguably places too much emphasis on advocacy at the expense of accuracy. Perhaps then, another type of miscarriage of justice can also be remedied, that of *wrongful acquittals*. Regardless, both those in favor of and opposed to capital punishment ought to agree on an effort to improve the reliability of the American trial.

1. The Defense Should Withdraw Their Citation to Statistics from the Death Penalty Information Center (DPIC). The Statistics Are Inaccurate.

In arguing that the death penalty is "unreliable," the defense cites statistics on "exonerations" from an organization calling itself the Death Penalty Information Center ("DPIC"). The "156 people sentenced to death" and purportedly "exonerated" appear on DPIC's so called "innocence list." However, this "innocence list" is a bloated and inaccurate catalog of those who have supposedly been "exonerated."

Over a decade ago, a journalist had this to say about DPIC's list:

> It's not true. DPIC counts people as ''innocent'' when they were released from death row for reasons wholly unrelated to any belief that they did not commit the crime charged. A man could be convicted of murder and sentenced to death, have his conviction overturned because of a technicality and when walk free because witness had died in the interim. According to DPIC, he would be an ''innocent'' who was ''exonerated.'' Only a minority of the people on DPIC's list are innocent in any normal sense of the word.

See Exhibit 1, *Ramesh Ponnuru, Not So Innocent, National Review Online*. Another review of this list was conducted by California prosecutor Ward Campbell. At the time of Campbell's review, there were 102 names on DPIC's list. He concluded that "it is arguable that at least 68 of the 102 defendants on the List should not be on the list at all." **See Exhibit 2**. Ward A. Campbell, Supervising Deputy Attorney General, California Department of Justice, The Truth About Innocence, pp. 8–24 (June 19, 2002).

The State does not question that a number of those on the DPIC list may in fact be innocent. Wrongful convictions have occurred. But the DPIC list clearly includes those whose "innocence" has never been established and if, anything, are likely guilty. There are two examples worth mentioning.

One of the names on "The Innocence List" that should be familiar to practitioners in Maricopa County is Debra Milke. Milke is presented as "exoneration" number 151. Her inclusion on the list is peculiar given that even the Arizona Court of Appeals, who ordered that her case be dismissed, stated the following:

> Our analysis is based entirely on whether double jeopardy applies to bar Milke's retrial in this case, and **we express no opinion regarding her actual guilt or innocence**.

Milke v. Mroz, 236 Ariz. 276, 284, 339 P.3d 659, 667 (Ct. App. 2014), (emphasis added).

The list also contains the name Anthony Porter, number 76. The case of Anthony Porter was hailed by anti-death penalty activists in 1999 as a stunning story of an innocent man, on the verge of execution, only to be saved by a heroic team of Northwestern University journalism students and their professor, David Protess. Not

only did they claim to "exonerate" Anthony Porter, but they purportedly caught the "real" killer, a man named Alstory Simon who confessed on videotape. The story was so powerful it played a key role in then Illinois Governor George Ryan's decision to impose a moratorium on executions in Illinois. That story unraveled terribly.

Many now believe that Professor Protess, his investigator, and team of students freed a murderer and framed an innocent man. *See A Murder in the Park (2014)*, documentary directed by Christopher Rech, Brandon Kimber; *See also* Mills, Steve; Schmadeke, Steve; Hinkel, Dan (October 30, 2014). *"Prosecutors free inmate in pivotal Illinois death penalty case"*. Chicago Tribune.

Since the time of Anthony Porter's inclusion on the "innocence list," Alstory Simon was freed from prison. The star professor, David Protess, left Northwestern University in disgrace after he was caught making numerous false statements in connection with yet another case being championed by the Medill Innocence Project.

Whatever one chooses to believe about Anthony Porter's guilt or innocence, it is clear that he does not belong on a definitive "innocence list." It is also clear that the statistics from DPIC's "innocence list" are not trustworthy.

C. The Delays Associated With Capital Punishment Do Not Render the Punishment Cruel.

The defense cites Justice Breyer's dissent when arguing that the excessive delays render capital punishment unconstitutionally cruel in violation of the Eighth Amendment.

Part of the Defendant's argument is based on "the conditions of confinement." (Motion p. 6).

Interestingly, Joshua Villalobos' case is pending before Superior Court in Maricopa County, yet he has chosen to *stay on death row* rather than return to the Maricopa County Jail for the majority of his proceedings. If the conditions on Arizona's death row are so cruel, then one would have expected Defendant to have insisted on being present for his numerous court dates since the initiation of Rule 32 proceedings in 2011. Instead, he chose to not be present for the majority of the proceedings. *See e.g. Motion to Transport filed on 2/5/2014; Waiver of Presence for Evidentiary Hearing on the Dates of February 25, 26, and 28, 2014 filed on 2/12/2014; Waiver of Presence for Status Conference January 23, 2015 and Oral Argument February 6, 2015 filed 1/12/2016, Waiver of Presence for Status Conference Set for March 26, 2015 filed 3/3/2015, Waiver of Presence for Oral Argument Set for May 8, 2015 filed 3/4/2015, Waiver of Presence for Status Conference Set for May 21, 2015 filed 4/28/2015, Waiver of Presence for Status Conference Set for July 30, 2015 filed 7/20/2015, Waiver of Presence for Oral Argument Re: Trial Conflict Set for 2/19/16 filed 2/11/2016, Waiver of Presence for Status Conference Set on 3/30/2016 filed 3/22/2016, Waiver of Presence for Status Conference Set on 6/6/16 filed on May 6, 2016.*

The facts in this very case undermine the defense position. The same was true at the U.S. Supreme Court, when Justice Scalia responded to Justice Breyer's "delay" argument:

> Justice BREYER's third reason that the death penalty is cruel is that it entails delay, thereby (1) subjecting inmates to long periods on death row and (2) undermining the penological justifications of the death penalty. The first point is nonsense. Life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty. As for the argument that delay undermines the penological rationales for the death penalty: In insisting that "the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates," *post,* at 2767, Justice BREYER apparently forgets that one of the plaintiffs ***in this very case*** was already in prison when he committed the murder that landed him on death row. Justice BREYER further asserts that "whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole," *post,* at 2769. My goodness. If he thinks the death penalty not much more harsh (and hence not much more retributive), why is he so keen to get rid of it? With all due respect, whether the death penalty and life imprisonment constitute more-or-less equivalent retribution is a question far above the judiciary's pay grade. Perhaps Justice BREYER is more forgiving—or more enlightened—than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough.

Glossip v. Gross, 135 S. Ct. 2726, 2748 (2015)(emphasis added)(concurring opinion).

The defense has failed to show that "delay" in his case renders the imposition of the death penalty cruel in violation of the Eighth Amendment.

III. Conclusion

For the reasons above, the Defendant's Motion should be denied.

Submitted June 21, 2016.

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BY:/s/
/s/ Ryan Green
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Copy mailed\delivered
June 21 2016,
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EXHIBIT 1

Not So Innocent

The death penalty: an argument continued.

Over the last three decades, more than 100 innocent people have been released from death row. That's the claim that the Death Penalty Information Center makes, and it's gotten a lot of people, from liberal senators to conservative columnists, to buy it.

Death-penalty supporters have sometimes responded to this figure by saying that it shows that the system works. It does, in fact, prevent people from being wrongfully executed. But that response minimizes the horror of making an innocent man spend years with a death sentence hanging over him.

Besides, there is a more important reason to reject the over-100 claim: It's not true. DPIC counts people as "innocent" when they were released from death row for reasons wholly unrelated to any belief that they did not commit the crime charged. A man could be convicted of murder and sentenced to death, have his conviction overturned because of a technicality, and then walk free because witnesses had died in the interim. According to DPIC, he would be an "innocent" who was "exonerated." Only a minority of the people on DPIC's list are innocent in any normal sense of the word.

I made this point about DPIC's list in an article for *NR*'s Sept. 16 issue. My report drew a letter from Richard Dieter, the head of DPIC, in the following issue (with a reply from me). It has now drawn another letter from Charles Baird and Gerald Kogan, who are respectively a former Texas court-of-criminal-appeals judge and a former chief justice of the Florida supreme court. They are also, more pertinently, the cochairmen of the Constitution Project's Death Penalty Initiative.

(I've also received lengthy critiques of DPIC's list from Dudley Sharpe, who runs prodeathpenalty.com, and from Ward Campbell, who works for the state of California in death-penalty appeals. Their critiques helped steer me to some of the information on which I draw in what follows.)

Both Dieter's letter and that of Baird and Kogan make the same basic argument: By suggesting that many of these "exonerated" defendants may very well have been guilty of the crimes that got them on death row, I am trampling over — to quote Baird and Kogan — "the fundamental concept that a person is innocent until proven guilty." They add, "An individual is considered to be innocent if acquitted at trial or if the prosecution has decided to drop all the charges."

As the critics would have it, there is thus no distinction between the case of a man who was wrongly convicted of a crime that someone else committed and then cleared, and the case of a man who was eventually acquitted for wholly different reasons. Whether the man may actually have committed the crime, in other words, is beside the point.

The critics are fighting common sense here. They are also up against a legal system that is, in fact, perfectly capable of seeing that a person may not be legally guilty beyond a reasonable doubt of a crime without being

actually innocent of it either. See, for instance, the Supreme Court's remark in *Bousley* v. *United States* (1998) distinguishing between "factual innocence" and "mere legal insufficiency."

Or consult the case of Jay Smith, one of DPIC's "innocents." Smith was convicted and sentenced to death for killing a woman and her two children for money. Because the prosecution failed to disclose the existence of two grains of sand that might have lent credence to a farfetched defense theory, the Pennsylvania Supreme Court overturned the sentence — and found that no retrial was permissible under state law. Smith then sued the state for wrongful imprisonment. The appeals court ruled against him: "Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished. . ." Other DPIC "exonerees" have seen their lawsuits and financial claims against states treated similarly. (Notably Jeremy Sheets, whose case I reviewed in my original article.)

Death-penalty opponents themselves used to be capable of seeing that acquittal does not an innocent make. DPIC's list has its roots in a series of law-review articles and books by philosopher Hugo Adam Bedau and sociologist Michael Radelet, two death-penalty opponents. In their original 1987 article for *Stanford Law Review*, they wrote: "[W]e are primarily concerned with wrong-person mistakes — the conviction and execution of the factually 'innocent' — and not with the erroneous conviction of those who are legally innocent (as in cases of killing in self-defense). . . . We also do not consider a defendant innocent simply because he can demonstrate that, in a case of homicide, it was not he but a co-defendant who fired the fatal shot."

In a 1998 article, they conceded that "[p]rosecutors sometimes fail to retry [a] defendant after a reversal not because of doubt about the accused's guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty 'beyond a reasonable doubt,' but for reasons wholly unrelated to guilt or innocence (for example, the prosecution's chief witnesses may have died or disappeared)."

DPIC is less scrupulous than Bedau and Radelet were. Dieter's group counts as "innocent" people who get off death row based on self-defense claims (including one case where a Native American successfully argued that, given his cultural heritage, it was reasonable to assume that a police officer would kill him if he didn't shoot first). It counts people who got off death row because, while they were clearly involved in the murders for which they were charged, there is some dispute over who pulled the trigger. It counts every prosecutorial failure to retry after a reversal as an "exoneration." It counts people who pled to a lesser crime on retrial as innocent, too. And all of this is just fine as far as Messrs. Baird and Kogan are concerned.

It's important to remember the context for this debate about the meaning of the "presumption of innocence." I am not trying to put any of the people who have gotten off death row back on it. I am not saying that they should be held liable for monetary damages to the families of the victims of the crime even though they were acquitted (although such an outcome is by no means foreign to the law, as O. J. Simpson could tell you). I am not even saying that Dieter, Baird, or Kogan should be less than thrilled if one of their "innocents" were to move in next door.

DPIC is trying to use these cases to show that we have come close to executing innocent people. For this critique to make any sense, the claim has to be that we came close to executing people who were "innocent" in the naïve, common sense of the term (i.e., people who did not actually commit the crime for which they were charged). All I am saying is that it is not evidence for this claim every time someone on death row leaves it.

When someone leaves death row, it is not evidence that an injustice was done when he was put on it. Supporters of the death penalty may well think, in some of these cases, that the injustice was done when he was allowed off it. It follows from this possibility that the DPIC list does not prove what it purports to prove.

DPIC's critique would have no political force if it were not misleading. The over-100 claim shocks people's consciences because they think that it represents death-row inmates who were innocent or may well have been. If they were told that "over 100 people who were on the death row have been removed from it, some because they were innocent and others because they benefited from technicalities," nobody would much care. If "over 100" such cases were considered too many, the problem could be solved by simply refusing to take people off death row any more.

At the end of their letter, Baird and Kogan say that the exact number of erroneous convictions doesn't really matter. Numbers, schnumbers. Kogan has already demonstrated that he is basically indifferent to piddling questions of accuracy, having made claims even more outlandish than any DPIC makes. He said in 1998 that 75 people had been released from death row in the previous twelve years because DNA evidence cleared them, which is not even close to being true.

If all Baird and Kogan are saying is that there are problems in the administration of the death penalty and that things would be much better if we collected more data on its racial impact and had racially diverse juries — to mention two of their vaunted recommendations — then they should have written a letter in response to a different article. If their point was to support the federal Innocence Protection Act, which I criticized in my article, they should neither have wasted time defending the DPIC list nor rested their case for the act on two unsupported assertions.

If the numbers really don't matter, here's a piece of advice for Baird, Kogan, Dieter, and other death-penalty abolitionists and reformers: Stop using misleading ones.

EXHIBIT 2

ATTACHMENT—A

CRITIQUE OF DPIC LIST ("INNOCENCE: FREED FROM DEATH ROW")

(By Ward A. Campbell)[1]

The Death Penalty Information Center (DPIC) Innocence List ("Innocence: Freed from Death Row") is frequently cited as support for the claim that 102 innocent prisoners have been released from Death Rows across the nation.[2] This list is uncritically accepted as definitive. However, an examination of the premises and sources of the List raises serious questions about whether many of the allegedly innocent prisoners named on the List are actually innocent at all.

Analysis of the cases on the List suggests that the List exaggerates the number of inaccurate convictions. For many of its cases, the List jumps to conclusions and misstates the implications of what has happened in the various cases that it cites as involving "actually innocent" defendants. The DPIC "falsely exonerates" many of the former Death Row members on its List and misleads the public about the frequency of wrongful convictions in terms of appraising the current capital punishment system in this country.

In fact, it is arguable that at least 68 of the 102 defendants on the List should not be on the List at all—leaving only 34 released defendants with claims of actual innocence—less than ½ of 1% of the 6,930 defendants sentenced to death between 1973 and 2000.

A. BACKGROUND OF DPIC LIST

The year 1972 marks the beginning of modern death penalty jurisprudence in this country. That year, the United States Supreme Court declared all death penalty statutes unconstitutional. *Furman* v. *Georgia* 408 U.S. 238 (1972). The states immediately responded by enacting various statutes tailored to meet the concerns expressed in *Furman.* In 1976, the United States Supreme Court approved new death penalty laws that narrowed the class of murderers eligible for the death penalty and permitted the presentation of any mitigating evidence to justify a sentence less than death. The Court also abrogated so-called "mandatory statutes" that did not permit presentation of mitigating evidence. There is no proof that since the reinstatement of the death penalty in 1976 that an innocent person, convicted and sentenced under these statutes, has been executed. Not even the DPIC makes this claim.

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[1] Supervising Deputy Attorney General, State of California. Member, Association of Government Attorneys in Capital Litigation (AGACL). The writer represents the State in death penalty appeals and is a supporter of the death penalty. This paper was the basis for a presentation at an annual meeting of AGACL during 2002. However, this work represents solely the views of its author and is not an official publication of the California Department of Justice nor does it represent the views of AGACL.

[2] The DPIC List is located at its website: *http://www.deathpenaltyinfo.org/innoc.html*

Nonetheless, death penalty opponents claim that numerous innocent persons have been sentenced to death, only to escape that ultimate punishment when subsequently exonerated. The current source of this claim is the DPIC List. The DPIC describes itself as "a non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment." In actuality, the DPIC is an anti-death penalty organization that was established "to shape press coverage of the death penalty." The American Spectator, April 2000 at 21; Washington Post (12/9/98). Its Board of Directors is comprised of prominent anti-death penalty advocates and defense lawyers.

The DPIC now claims that its standard for including "innocent" capital defendants on its List "is to count those whose convictions are reversed and who are then either acquitted at retrial or have charges formally dismissed." The List also includes any cases in which a governor grants an absolute pardon. Under its current standards, the DPIC no longer lists defendants who plead guilty to lesser charges. Washington Times (9/12/99); The Record, Bergen County, N.J., (4/14/02). However, as will be shown, the DPIC's standards as a whole are inadequate and misleading.

The DPIC List was first assembled in 1993 at the request of the House Subcommittee on Civil and Constitutional Rights. The List has its roots in a series of studies beginning with Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stanford Law Rev. 21 (1987) [hereinafter Stanford]. This article was followed by the 1992 publication of the book, In Spite of Innocence, by Bedau, Radelet, and Putnam. The most recent article is Radelet, Lofquist, & Bedau, Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt, 13 T.M. Cooley L. Rev. 907 (1996) [hereinafter Cooley].

1. The Stanford study

The Stanford article presented 350 cases "in which defendants convicted of capital or potentially capital crimes in this century, and in many cases sentenced to death, have later been found to be innocent." Thus, the article included cases during the twentieth century in which the defendants were not actually sentenced to death. The Stanford authors acknowledged that their study was not definitive, but only based on their untested belief that a majority of neutral observers examining these cases would conclude the defendants were actually innocent. Stanford, at 23–24, 47–48, 74.

The article limited the cases it discussed to defendants in cases in which it was later determined no crime actually occurred or the defendants were both legally and physically uninvolved in the crimes. The focus was primarily on "wrong-person mistakes." The article did not include defendants acquitted on grounds of self-defense. Id. at 45. The article relied on a variety of sources, including the "unshaken conviction by the defense attorney * * *" that his or her client was innocent. Id. at 53.[3]

[3]The Stanford study includes historically controversial defendants such as Bruno Hauptmann, executed for the kidnapping and murder of the Lindbergh baby, and Dr. Sam Sheppard, ultimately acquitted on retrial for the murder of his wife, as examples of wrongfully convicted murderers. However, the most recent study of Hauptmann's case supports the evidence of his conviction. Fisher, The Ghosts of Hopewell (Southern Ill. Univ. Press 1999). Similarly, the most recent

The Stanford study was criticized in Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stanford L. Rev. 121 (1988). In a reply, Bedau and Radelet acknowledged that their analyses were not definitive. Bedau & Radelet, The Myth of Infallibility: A Reply to Markman and Cassell, 41 Stanford L. Rev. 161, 264 (1988) [hereinafter Stanford Reply].

2. In Spite of Innocence

The book which followed the Stanford study, In Spite of Innocence (1992), was a "less-academic" popularization of the cases presented in the Stanford article. The book purportedly corrected some unidentified errors from the Stanford article.

Significantly, In Spite of Innocence referred to the new post-*Furman* death penalty statutes and conceded that "[c]urrent capital punishment law already embodies several features that probably reduce the likelihood of executing the innocent. These include abolition of mandatory death penalties, bifurcation of the capital trial into two distinct phases (the first concerned solely with the guilt of the offender, and the second devoted to the issue of sentence), and the requirement of automatic appellate review of a capital conviction and sentence." Id. at 279.

3. The Cooley article

The recent Cooley article is the principal source for the DPIC List.[4] Two of its authors, Bedau & Radelet, also wrote the original Stanford study and In Spite of Innocence. The Cooley article ostensibly continued the Stanford focus of identifying "factually innocent" defendants—wrongly convicted persons who were not actually involved in the crime. Cooley, at 911.

Cooley, however, had a narrower time focus than the Stanford article or In Spite of Innocence. The Cooley list of 68 condemned, but allegedly innocent prisoners is supposedly limited "to cases since 1970 in which serious doubts about the guilt of a death row inmate have been acknowledged." Cooley, at 911. The "admittedly somewhat arbitrary" cutoff date of 1970 appears to be directed at eliminating cases that were disposed of no earlier than 1973, after *Furman* v. *Georgia*, 408 U.S. 238 (1972). Cooley, at 911 fn. 27. As the authors had indicated in their earlier book, In Spite of Innocence, current death penalty law included features that probably reduced the likelihood that an innocent person would be sentenced to death.

Accordingly, earlier cases under old statutes would not add much to analyzing the contemporary problem of "wrongful convictions." Nevertheless, the Cooley cutoff date of 1970 was still flawed for purposes of assessing our current capital punishment system since it still included prisoners convicted under the pre-1972, pre-*Furman* statutes.

The Cooley article purported not to include inmates released because of "due process errors" unrelated to allegations of innocence.

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civil litigation concerning the conviction of the late Dr. Sheppard rejected evidence of his innocence. Cleveland Plain Dealer (4/13/00).

[4] Cooley itself only lists 68 defendants. The DPIC does not explain how it has otherwise learned of the cases or defendants it has since added to its current list of 102 defendants.

Cooley, at 911–912. Finally, Cooley excluded inmates who were found to be guilty of lesser included homicides or not guilty by reason of mental defenses. Cooley, at 912–913.

However, Cooley expanded the original Stanford study to include allegedly "innocent" defendants who actually committed the crime or were involved in the murder. Unlike the Stanford article, Cooley included cases in which the defendant was ultimately acquitted on grounds of self defense. Cooley, at 913. The Cooley article also included cases in which defendants pled to lesser charges and were released "because of strong evidence of innocence." Id. at 914. The DPIC has since disavowed inclusion of cases in which prisoners pled to lesser charges, although it has not removed such prisoners from its List.

The Cooley article failed to mention at least one significant change from the previous studies—the inclusion of accomplices mistakenly convicted as actual perpetrators. The Stanford study excluded such defendants. "We also do not consider a defendant innocent simply because he can demonstrate, in a case of homicide, it was not he but a co-defendant who fired the fatal shot * * * because the law does not nullify the [accomplice's] culpability merely because he was not the triggerman, we do not treat him as innocent." Stanford, at 43. Cooley and the DPIC List abandoned that limitation and included supposedly innocent defendants who were still culpable as accomplices to the actual triggerman. Thus, unlike its predecessor studies, Cooley cited cases in which there were no actual "wrong person" mistakes—a practice which the DPIC has continued.

Finally, *and most importantly,* Cooley "includ[ed] cases where juries have acquitted, or state appellate courts have vacated, the convictions of defendants because of doubts about their guilt (*even if we personally believe the evidence of innocence is relatively weak*)." Cooley, at 914. [emphasis added]. However, except for defendant Samuel Poole, Cooley does not otherwise identify the defendants which the authors themselves believe have relatively weak evidence of innocence. Nevertheless, a comparison of the Cooley list with the names omitted from the Stanford study and In Spite of Innocence suggests which cases even the authors of the Cooley article believe only have "weak" evidence of innocence.

Thus, the Cooley article and the DPIC List differ from the original Stanford article and In Spite of Innocence because they both expand the categories of allegedly innocent defendants. The Stanford article was "primarily concerned with wrong-person mistakes" and only included defendants whom the authors believed were legally and physically uninvolved in the crimes. Stanford, at 45. As will be shown, neither Cooley nor the DPIC List conforms to these original limitations. The result is a padded list of allegedly innocent Death Row defendants that overstates the frequency of wrongful convictions in capital cases.

B. THE DPIC LIST: MISCARRIAGES OF JUSTICE OR MISCARRIAGES OF ANALYSES?

Using the Cooley article as a starting point, this paper explains that as many as 68 of the 102 names on the DPIC List (⅔ of the List as of September 17, 2002) should be eliminated. In several re-

spects, the methodology of the DPIC List as explained in the Cooley article is deficient. The premises used in selecting and pronouncing particular defendants as "actually innocent" do not in fact support that conclusion or do not assist in determining the actual number of allegedly mistaken convictions under current capital punishment jurisprudence.

1. Time frame: Relevance of DPIC list to current death penalty procedures

In terms of the risk of condemning the innocent to death, the "admittedly somewhat arbitrary" time frame used by the DPIC List of 1970 is over-inclusive. Although the United States Supreme Court's *Furman* decision did abrogate all of the completely discretionary, standardless death penalty statutes in 1972, it was not until 1976 that the Court upheld new death penalty statutes. As noted in the book In Spite of Innocence, numerous features of these new laws "probably reduce the likelihood of executing the innocent".

Among the features which decreased the likelihood that an innocent person would be sentenced the death, these statutes (1) narrowed the range of death penalty eligible defendants and (2) permitted convicted murderers to produce any relevant mitigating evidence supporting a penalty less than death. Mitigating evidence may frequently include evidence that will raise so-called "residual doubt" or "lingering doubt" about the defendant's guilt or otherwise raise doubts about a defendant's level of culpability due to mental impairment or some other factor.

In 1976, the Court abrogated statutes with so-called "mandatory" death penalties which did not permit consideration of mitigating evidence. As the Stanford study acknowledged, it has only been since those decisions that "juries have been permitted to hear any evidence concerning the nature of the crime or defendant that would mitigate the offense and warrant a sentence of life imprisonment." These mitigating factors include lingering doubt about guilt, mental impairments, and limited culpability. Stanford, at 81–83.

To the extent that the DPIC List includes defendants convicted and condemned under old statutes that did not meet the Court's 1976 standards, those defendants are irrelevant in terms of assessing contemporary capital punishment statutes and should be excluded from the List. Since those defendants were not tried under today's "guided discretion" laws, they were sentenced to death without the appropriate finding of eligibility or the opportunity to present mitigation. They were not provided the modern protections which "probably reduce the likelihood of executing the innocent." Their sentences are not reliable or pertinent indicators for evaluating the effect of today's statutes on the conviction and sentencing of the "actually innocent." There is no assurance they would have been sentenced to death under today's statutes.

Implicitly, the Cooley article accepted this premise by limiting its time frame to cases that were actually disposed of after the 1972 *Furman* decision. The mistake in Cooley, however, was in not further limiting the time frame to defendants sentenced to death after their state enacted the appropriate post-1972, post-*Furman* "guided discretion" statutes. See also Markman & Cassell, Protecting the

Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 147–152 (1988).

In addition, the United States Supreme Court has from time to time invalidated other state death penalty statutes or issued rulings which would have affected the penalty procedures in various states. To the extent that those changes affected the eligibility for or selection of the penalty, it is inappropriate to include inmates who may not have had the benefit of those procedures.[5]

2. The concept of "actual innocence"

To analyze the DPIC List, it is necessary to distinguish between the concepts of "actual innocence" and "legal innocence." The former is when the defendant is simply the "wrong person," not the actual perpetrator of the crime or otherwise culpable for the crime. The latter form of innocence means that the defendant cannot be legally convicted of the crime, even if that person was the actual perpetrator or somehow culpable for the offense.

The United States Supreme Court and appellate courts have discussed the concept of "actual innocence." "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley* v. *United States,* 523 U.S. 614 (1998). "Actual innocence" does not include claims based on intoxication or self defense. *Beavers* v. *Saffle,* 216 F.3d 918 (10th Cir. 2000). Proof of "actual innocence" also involves considering relevant evidence of guilt that was either excluded or unavailable at trial. *Schlup* v. *Delo,* 513 U.S. 298 (1995). At a minimum, any showing of actual innocence would have to be "extraordinarily high" or "truly persuasive." *Herrera* v. *Collins,* 506 U.S. 390 (1993).

Although the DPIC and the Cooley article purported to limit their lists of the "innocent" to defendants who were "actually innocent," not just "legally innocent," the available information from the case material and media accounts they rely upon indicate that many defendants on the List were not "actually innocent." These are not cases in which it can be concluded that the prosecution charged the "wrong person."

As noted, the DPIC currently limits the cases on the List to those in which a prisoner has been acquitted on retrial or charges have been formally dismissed. However, the DPIC List also includes other cases in which the conviction was reversed because of legally insufficient evidence or because the prisoner ultimately pled to a lesser charge. As will be shown, inserting these cases on the List is misleading in terms of assessing whether truly innocent defendants have been convicted and sentenced to death. In actuality, the DPIC List includes a number of "false exonerations".

To begin with, defendants are only convicted if a jury or court finds them guilty of murder "beyond a reasonable doubt." Implicit in the "reasonable doubt" standard, of course, is that a conviction does not require "absolute certainty" as to guilt. Equally implicit, however, is that many guilty defendants will be acquitted, rather

[5] For example, just recently the United States Supreme Court abrogated statutes in at least four states. *Ring* v. *Arizona,* ___U.S.___, 122 S. Ct. 2428 (2002). The Court also held that mentally retarded defendants could not be sentenced to death. *Atkins* v. *Virginia,* ___U.S.___, 122 S. Ct. 2242 (2002). For purposes of assessing whether innocent defendants have been sentenced to death, both of these cases may indicate that certain defendants currently on the DPIC List would not have been or should not have been eligible for the death penalty at all.

than convicted, because the proof does not eliminate all "reasonable doubt." *Smith* v. *Balkcom,* 660 F.2d 573, 580 (5th Cir. 1981).

An acquittal because the prosecution has not proven guilt beyond a reasonable doubt does not mean that the defendant did not actually commit the crime. *Dowling* v. *United States,* 493 U.S. 342, 249 (1990). Even an acquittal based on self defense does no more than demonstrate the jury's determination that there was a reasonable doubt about guilt, not that the defendant was actually innocent. *Martin* v. *Ohio,* 480 U.S. 228, 233–234 (1987). A jury must acquit "someone who is probably guilty but whose guilt is not established beyond a reasonable doubt." *Gregg* v. *Georgia,* 428 U.S. 153, 225 (1976) (White, J. conc.). An acquittal means that the defendant is "legally innocent", but not necessarily "actually innocent."

"Defendants are acquitted for many reasons, the least likely being innocence. A defendant may be acquitted even though almost every member of the jury is satisfied of his guilt if even one juror harbors a lingering doubt. A defendant may be acquitted if critical evidence of his guilt is inadmissible because the police violated the Constitution in obtaining the evidence by unlawful search or coercive interrogation * * * More remarkable is the spectacle of jury acquittal because the jury sympathizes with the defendant even though guilt clearly has been proven by the evidence according to the law set forth in the judge's instructions ." Schwartz, "Innocence"—A Dialogue with Professor Sundby, 41 Hast. L.J. 153, 154–155 (1989) cited in Bedau & Radelet, 1998 Law & Contemporary Problems 105, 106 fn. 9. As the authors of Stanford, In Spite of Innocence, and Cooley agree, reversals, acquittals on retrial, and prosecutorial decisions not to retry cases are not conclusive evidence of innocence. Stanford Reply at 162.

Modern examples of this distinction between acquittal and innocence (or between "actual" and "legal" innocence) include O.J. Simpson who was acquitted of criminal charges, but was later found responsible for his wife's and Ron Goldman's deaths in a civil proceeding in which it was only necessary to prove his responsibility by a preponderance of the evidence. Or, to cite another recent example, the acquittal of the police officers in the Rodney King beating case obviously did not establish their "actual innocence" given their subsequent conviction in federal court for violating King's constitutional rights. Or, as an Ohio jury just demonstrated in a civil case, Dr. Sam Sheppard's acquittal in the 1960's for murdering his wife did not mean he was actually innocent. Cleveland Plain-Dealer (4/13/00). The DPIC itself removed one case from its List when it was pointed out that a supposedly innocent defendant, Clarence Smith, was convicted in federal court of charges which included the murder for which he had been acquitted in the Louisiana state court.

No matter how overwhelming the evidence of a defendant's guilt, the prosecution cannot appeal if a jury finds the defendant "not guilty". Nor may the prosecution retry an acquitted defendant. *Jackson* v. *Virginia,* 443 U.S. 307, 317 fn. 10 (1979). Due to the Double Jeopardy Clause, the prosecutor does not get a "second chance" to improve his evidence or present newly discovered evidence of guilt. The defendant, no matter how guilty, goes free. The defendant is "legally innocent", but not "actually innocent".

Similarly, if an appeals court reverses a conviction because the evidence of guilt was legally insufficient to prove guilt beyond a reasonable doubt, then the state cannot retry the defendant under the Double Jeopardy Clause. *Burks* v. *United States,* 437 U.S. 1, 16–18 (1978). However, the judges on the appeals court cannot reverse or uphold convictions because they personally believe the convicted defendant is guilty or innocent. Ordinarily, the judges cannot substitute their opinion for the jury's guilty verdict. They cannot second guess how the jury resolved conflicts in the evidence or the inferences the jury drew from the evidence. *Jackson* v. *Virginia,* 443 U.S. at 319.[6]

Rather, when an appeals court finds that the evidence was legally insufficient, it is only finding as a matter of law, not fact, that the prosecution did not present enough evidence to prove guilt beyond a reasonable doubt, i.e. the evidence of guilt was not sufficient as a matter of law for a reasonable juror to find the defendant guilty beyond a reasonable doubt. *Burks* v. *United States,* at 16 fn. 10. Courts will frequently be compelled legally to reverse these cases, even if the evidence signals strongly that the defendant is guilty. The defendant is "legally innocent", but not "actually innocent".

As will be noted in the discussions of some of the various cases on the DPIC List, some individual states themselves have their own unique and more demanding standards for sufficiency of evidence or double jeopardy. Accordingly, a reversal in one state is not representative of the potential disposition of the case under the United States Constitution or other states' laws. In other words, a prisoner may have had his case reversed for insufficient evidence in one state when that conviction might have been upheld in federal court or another state.[7]

Thus, the "reasonable doubt" standard represents the determination that the prosecution will pay the price if the evidence is insufficient and that any errors in fact-finding in criminal cases will be in favor of the defendant, i.e., that the guilty will be acquitted because of insufficient proof. *Schlup* v. *Delo,* 513 U.S. 298, 325 (1995). Indeed, evidence of guilt is frequently excluded and never presented to the jury if the prosecution or police have violated the defendant's constitutional rights in obtaining that evidence even if the evidence proves the defendant's guilt. Id., at 327–328.

For instance, a technical violation of the rights under *Miranda* v. *Arizona,* 384 U.S. 436 (1966) may lead to the exclusion of powerful evidence of guilt such as a defendant's confession or other damaging statements. If evidence is seized from the defendant in violation of the Fourth Amendment's rule against unreasonable searches and seizures, the evidence which was taken will not be presented to the jury even though that evidence demonstrates the defendant's guilt. As a result, the jury may be deprived of sufficient convincing evidence of guilt even though the defendant is undoubt-

[6] As will be shown, in some states there are some exceptions to this general rule of appellate review which favor the defendant.

[7] An example of such a difference relates to convictions based on accomplice testimony. A conviction based solely on accomplice testimony is insufficient for a conviction of California unless it is corroborated by some other evidence. However, a conviction on accomplice testimony would be sufficient in federal court even without corroboration. *Laboa* v. *Calderon,* 224 F.3d 972 (9th Cir. 2000).

edly guilty or the prosecution may no longer have sufficient evidence to try the defendant.[8]

Finally, a prosecutor's decision whether to retry a case that has resulted in a "hung jury" or has been reversed on appeal (for reasons other than lack of sufficient evidence) is not necessarily motivated by a prosecutor's personal belief that a defendant is guilty or innocent. Prosecutorial discretion is an integral part of the criminal justice system. The decision not to retry is not ipso facto a concession that the defendant is actually innocent. Rather, it frequently represents the prosecutor's professional judgment that there is simply not enough evidence to persuade an entire jury that the defendant is guilty beyond a reasonable doubt or that for some other reason, such as the fact that the defendant is now serving time for other convictions, further prosecution is not appropriate. If an earlier trial has ended in a mistrial because the jury could not unanimously agree on guilt or innocence, the prosecutor may simply conclude as a practical matter that the evidence is insufficient to persuade a jury of guilt beyond a reasonable doubt.

Local prosecutors have discretion to decide whether to seek the death penalty. That discretion is motivated by such factors as the strength of the case, the likelihood of conviction, witness and evidence problems, potential legal issues, the character of the defendant, the case's value as a deterrent to future crime, and the Government's overall law enforcement priorities. *United States* v. *Armstrong,* 517 U.S. 456, 463–464 (1996); *Gregg* v. *Georgia,* 428 U.S. 153, 225 (1976) (White, J. conc.); *People* v. *Gephart,* 93 Cal.App.3d 989, 999–1000 (1979). Prosecutors have the discretion to decline to charge the defendant, to offer a plea bargain, or to decline to seek the death penalty in any particular case. *McCleskey* v. *Kemp,* 481 U.S. 279, 311–312 (1987.)

"Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or go to trial. Witness availability, credibility, and memory also influence the results of prosecutions." *McCleskey,* at 306–307 fn. 28. As even the authors of the Stanford study concede, "[p]rosecutors sometimes fail to retry the defendant after a reversal not because of doubt about the accused's guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty 'beyond a reasonable doubt', but for reasons wholly unrelated to guilt or innocence." 1998 Law & Contem-

[8] Furthermore, when a defendant secures a new trial on grounds of ineffective assistance of counsel or because the prosecution has improperly withheld material, exculpatory evidence, he is not required to prove that he is innocent or even that he would have been acquitted. In fact, he does not need to even prove that it is "more likely than not" that he would be acquitted—found not guilty under a "reasonable doubt" standard. He need only show a "reasonable probability" that the outcome would have been different—he need only undermine confidence in the guilt verdict in his case. *Strickland* v. *Washington,* 466 U.S. 668, 693–694 (1984); *United States* v. *Bagley,* 473 U.S. 667, 679–682 (1985). If a prosecutor presents perjured testimony, the conviction is reversed if there is any reasonable likelihood the verdict would be different. *Bagley,* at 679–680. Although a defendant may get a new trial because of these claims, none of these standards amount to a finding of the defendant's "actual innocence".

porary Problems at 106. When a conviction is reversed, this discretion will also be affected by the toll that the passage of time has taken on the witnesses and the evidence. *United States* v. *Mechanik,* 475 U.S. 66, 72 (1986).

C. CASES ON DPIC LIST: ACTUALLY INNOCENT OR FALSELY EXONERATED?

After examination of the DPIC List and available supporting materials including appellate opinions, newspaper reports, and academic articles, it is submitted that the following 68 defendants should be stricken from the current DPIC List of 102 allegedly innocent defendants "freed from Death Row."[9] The DPIC List fails to take into account many of the factors mentioned above that may lead to an acquittal or a prosecutorial decision not to retry a case even though a defendant is not actually innocent. As a result, it includes defendants whose guilt is debatable to say the least and whom it is hard to believe that a majority of neutral observers would conclude were innocent. The List also includes cases that should not be considered in terms of assessing the overall effectiveness of today's post-1972 death penalty procedures in reliably and accurately imposing the ultimate punishment on defendants who legitimately deserve that sanction, procedures that "probably reduce the likelihood of executing the innocent."

For ease of cross-referencing, the cases which should be omitted from the DPIC List are discussed in the same numerical order as they currently appear on the DPIC's website.[10]

1. David Keaton—Conviction and sentence occurred prior to 1972 (pre-modern death penalty statute era). *Anderson* v. *Florida,* 267 So.2d 8 (Fla. 1972).

2. Samuel A. Poole—Convicted of rape and sentenced under a defunct mandatory sentencing law which precluded consideration of mitigating evidence. *Woodson* v. *North Carolina* (1976) 428 U.S. 280. The United States Supreme Court has also declared the death penalty for rape to be cruel and unusual punishment. *Coker* v. *Georgia,* 433 U.S. 584 (1977). Moreover, Cooley concedes that evidence of Poole's innocence is "weak". Cooley, at 917.

3. Wilbur Lee.

4. Freddie Pitts—Conviction and sentence occurred prior to 1972. *In re Bernard R. Baker,* 267 So.2d 331 (Fla. 1972).

5. James Creamer-Creamer was mistakenly sentenced to death for a 1971 murder. According to Cobb County court records, his initial death sentence was imposed on February 4, 1973, but was then reduced to life on September 28, 1973. This reduction is understandable since the Georgia death penalty law had been declared unconstitutional in 1972 in *Furman* and could not be applied to offenses occurring prior to the passage of the new Georgia death pen-

[9] The author has also been aided by information recently compiled by the Florida Commission on Capital Crimes, the Journal of the DuPage County Bar Association, and the Philadelphia District Attorney's office.

[10] This study is not exhaustive, but is based on materials available to the author. These materials are cited in the summaries and also include the Stanford study, In Spite of Innocence, the Cooley article, and the summaries available on the DPIC website. It is not conceded that other defendants on the DPIC List who are not mentioned in this study are actually innocent. For that matter, the writer is always interested in additional information bearing on a defendant's claim of "actual innocence".

alty law in March, 1973. *Jackson* v. *State,* 195 S.E.2d 921 (Ga. 1973); *Clemmons* v. *State,* 210 S.E.2d 657 (Ga. 1974); *Creamer* v. *State,* 205 S.E.2d 240 (Ga. 1974) (Creamer sentenced to four consecutive life terms); *Emmett* v. *Ricketts,* 397 F.Supp. 1025 (N.D.Ga. 1975). By the time the case was appealed, Creamer was serving a life sentence. There was some initial confusion about the actual sentence in this case since the original Stanford study and the reviewing courts' decisions simply stated that Creamer had received a life sentence. Of course, Creamer's case is not relevant to assessing today's post-*Furman* capital punishment system.

6. Thomas Gladish.

7. Richard Greer.

8. Ronald Keine.

9. Clarence Smith—These four defendants were tried and convicted under New Mexico's invalid mandatory death penalty law which precluded consideration of mitigating evidence. *State* v. *Beaty,* 553 P.2d 688 (N.M.1976). It is complete speculation whether they would have been sentenced to death under a "guided discretion" statute.

10. Delbert Tibbs—*Tibbs* v. *State,* 337 So.2d 788 (Fla. 1976) (Tibbs I); *State* v. *Tibbs,* 370 So.2d 386 (Fla.App. 1979) (*Tibbs II*); *Tibbs* v. *State,* 397 So.2d 1120, 1123 (Fla. 1981) (*Tibbs III*); *Tibbs* v. *Florida,* 457 U.S. 31 (1982) (*Tibbs IV*). Tibbs was convicted of raping a woman and murdering her boyfriend. The chief witness was the surviving rape victim who identified Tibbs as her boyfriend's murderer.

Tibbs' conviction was reversed by a 4–3 vote of the Florida Supreme Court. The majority applied an anachronistic review standard that "carefully scrutinized" the testimony of the prosecutrix since she was the sole witness in the rape case "so as to avoid an unmerited conviction." *Tibbs I* at 790. The conviction was not even reversed because the Florida court found the evidence legally insufficient, but merely because the Florida court found the "weight" of the evidence was insubstantial. The court found the prosecutrix's testimony to be doubtful when compared with the lack of evidence (other than her eyewitness testimony) that Tibbs was in the area where the rape-murder occurred. Id. at 791.

Subsequently, in a later opinion, the Florida Supreme Court repudiated this "somewhat more subjective" rule that permitted an appellate court to reverse a conviction because of the weight of the evidence, rather than its sufficiency. In hindsight, the Florida Supreme Court candidly conceded that it should not have reversed Tibbs' conviction since the evidence was legally sufficient. *Tibbs III* at 1126. The old review standard applied to Tibbs' original case was a throwback to the long discarded rule that a rape conviction required corroboration of the rape victim's testimony—an unenlightened rule which inherently distrusted the testimony of the rape victim. Id. at 1129 fn. 3 (Sundberg, C.J. dis. & conc.); see e.g. *People* v. *Rincon-Pineda,* 14 Cal.3d 864 (Cal. 1975). The reversal of Tibbs' conviction was a windfall for Tibbs, not a finding of innocence.

Subsequently, a debate in the Florida courts as to whether or not Tibbs could be retried under the Double Jeopardy Clause made its way to the United States Supreme Court. Justice O'Connor's opin-

ion explained that the rape victim gave a detailed description of her assailant and his truck. Tibbs was stopped because he matched her description of the murderer. The victim had already viewed photos of several single suspects on three or four occasions and had not identified them. She examined several books of photos without identifying any suspects. However, when she saw Tibbs' photo, she did identify Tibbs as the rapist-murderer. She again identified Tibbs in a lineup and positively identified him at trial. *Tibbs IV* at 33 & fn. 2. At trial, the victim admitted drug use and that she used drugs "shortly" before the crimes occurred. She was confused as to the time of day that she first met Tibbs. Although not admitted as evidence, polygraphs showed however that the victim was truthful. Tibbs denied being in the area during the time of the offense and his testimony was partially corroborated. However, the prosecution introduced a card with Tibbs' signature which contradicted his testimony as to his location. Tibbs disputed that he had signed the card. Id. at 34–35. O'Connor's opinion also noted the evidence that the Florida Supreme Court had originally believed weakened the prosecution's case. However, since the evidence of guilt was not legally insufficient, the Double Jeopardy Clause did not bar Tibbs' retrial. Id. at 35.

Ultimately, due to the current status of the surviving victim—a lifelong drug addict—the original prosecutor concluded the evidence was too tainted for retrial. In Spite of Innocence, at 59. Nonetheless, the evidence recounted in the United States Supreme Court decision hardly supports a claim that Tibbs is actually innocent.

The state prosecutor who chose not to retry Tibbs recently explained to the Florida Commission on Capital Crimes that Tibbs "was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky and now he is free."

12. Jonathan Treadaway—*State* v. *Treadaway,* 568 P.2d 1061, 1063–1065 (Ariz. 1977); *State* v. *Corcoran (Treadaway I)* 583 P.2d 229 (Ariz. 1978) (*Treadaway II*). Treadaway was convicted of the sodomy and first degree murder of a young boy in the victim's bedroom. His conviction was reversed and he was acquitted on retrial.

Treadaway's two palmprints were found outside a locked bedroom window of the victim's home. When Treadaway was arrested, he had no explanation for these palmprints. Treadaway admitted being a peeping tom in the victim's neighborhood, but did not remember ever looking in the victim's house. He denied being at the victim's house the night of the murder. However, the victim's mother testified she washed the windows the day before the murder, "raising an inference that the palm prints found on the morning after the murder [were] fresh" and also raising the inference that Treadaway was lying. Pubic hairs on the victim's body were similar to Treadaway's. His conviction was reversed by the Arizona Supreme Court in a 3–2 decision because the trial court erroneously admitted evidence that Treadaway committed sex acts with a 13-year old boy three years before the murder.

When Treadaway's retrial began, the Arizona Supreme Court reviewed several pretrial evidentiary rulings. It admitted evidence that Treadaway sexually attacked and tried to strangle a boy three months before the murder at issue in the boy's bedroom. However, the court excluded the interrogation in which Treadaway failed to

explain his palmprints outside the victim's bedroom window, specifically refused to provide information any information, and made other incriminating statements. The exclusion was based on the police failure to comply with the technical requirements of the *Miranda* decision, not because Treadaway's statements or failure to explain the palmprints on the window were somehow unreliable or involuntary.

This decision to exclude Treadaway's interrogation was a crucial difference between his two trials. Although there was defense evidence that the victim died of natural causes, the jurors who acquitted Treadaway on retrial later stated that they were actually concerned about the lack of evidence that Treadaway had been inside the boy's home. Stanford, at 164; In Spite of Innocence, at 349. Therefore, Treadaway's failure to explain the palmprints at the window could have been critical evidence since those palmprints at the very least would have connected Treadaway with a location just outside the boy's home on the night of the murder. Treadaway's inability to explain the suspicious presence to the police of his fingerprints would ordinarily indicate a "consciousness of guilt" about his presence at the boy's home. However, the jury was never permitted to know that Treadaway had had no explanation for those palmprints—a circumstance consistent with his guilt. Thus, significant probative evidence of Treadaway's consciousness of guilt about the palmprints on the windowsill, directly relevant to the jury's concern about the case, was never disclosed to the jury at his second trial. Since it cannot be known what the impact of that excluded evidence would have been on the second jury, Treadaway's acquittal on retrial did not demonstrate that he was innocent.

Furthermore, in light of the recent United States Supreme Court decision in *Ring* v. *Arizona* it is speculation whether a jury would have found Treadaway eligible to be sentenced to death.

13. Gary Beeman—Convicted and sentenced under Ohio's invalid death penalty statute which limited mitigating evidence. *Lockett* v. *Ohio,* 438 U.S. 586 (1978). Accordingly, it is speculative that he would have received a death sentence under appropriate law.

16. Charles Ray Giddens—In 1981, the Oklahoma appellate court reversed Giddens' conviction for insufficient evidence, not actual innocence, because the testimony of his alleged accomplice was "replete with conflicts". In 1982, the state court held that retrial was barred under the Double Jeopardy Clause. In Spite of Innocence, at pp. 306–307. Thus, this was a case in which the evidence was found insufficient to prove guilt, not a case in which the defendant was exonerated.

17. Michael Linder—This defendant was acquitted on retrial based on grounds of self-defense. Cooley, at 948. Thus, this was not a case involving a "wrong person" mistake as originally defined in the Stanford study.

18. Johnny Ross—*People* v. *Ross,* 343 So.2d 722 (La. 1977). This defendant's name should be removed since he was sentenced under the unconstitutional mandatory Louisiana death penalty statute which precluded consideration of mitigating evidence.

19. Annibal Jaramillo—*Jaramillo* v. *State,* 417 So.2d 257 (Fla. 1982). This defendant's double murder conviction and death judgment were reversed for legal insufficiency of evidence. The male

victim had been bound with cord and then shot. Near the body was a coil of cord and near that coil was the packaging for a knife. Jaramillo's fingerprint was found on the packaging and the knife, but not on the knife wrapper. A nearby grocery bag had Jaramillo's fingerprint. Jaramillo testified that he was helping the victims' nephew stack boxes in the garage the day before the murder. He asked for a knife to help cut the boxes. The nephew directed him inside to a grocery bag with a knife. According to Jaramillo, he removed the knife from the wrapper and returned to the garage. He claimed he later left the knife on the dining room table where it was found after the murder. Thus, Jaramillo's testimony conveniently explained the fingerprints on the incriminating objects. According to the recent report of the Florida Commission on Capital Cases, the victims' nephew who could have either corroborated or contradicted Jaramillo's version of events was unavailable to testify at trial since his whereabouts were unknown.

Although there was circumstantial evidence of Jaramillo's guilt in the double murder, the conviction could not be sustained under Florida law unless the evidence was inconsistent with any reasonable hypothesis of innocence. Proof of Jaramillo's fingerprints on several items at the scene associated with the murder was not inconsistent with Jaramillo's reasonable explanation of the fingerprints (helping the nephew stack boxes in the garage).

This Florida case illustrates a key point about our federal-state criminal justice system. Florida's "sufficiency of evidence" rule in this case was more stringent than the standard required under the Federal Constitution and applied by the majority of other states. See, e.g., *Fox* v. *State,* 469 So.2d 800, 803 (Fla.App. 1985); *Geesa* v. *State,* 820 S.W.2d 154, 161 fn. 9 (Tex.Crim. 1991). Ordinarily, it is not necessary for the prosecution to eliminate every hypothesis other than guilt. *Jackson* v. *Virginia,* 443 U.S. 307, 326 (1979). Thus, in both federal court and the majority of states, the evidence would have been sufficient to support Jaramillo's conviction notwithstanding his alternative explanation for his fingerprints. The presence of Jaramillo's fingerprints on items associated with the murder would have been sufficient for conviction. See, e.g., *Taylor* v. *Stainer,* 31 F.3d 907 (9th Cir. 1994); *Schell* v. *Witek,* 218 F.3d 1017 (9th Cir. en banc 2000).

However, under Florida law, Jaramillo's innocent explanation was not inconsistent with the presence of the fingerprints on those objects. Accordingly, under state law, the conviction was reversed since Jaramillo's innocent explanation for the prints could not be eliminated. The Florida Commission on Capital Cases described this case as an "execution-style" robbery and noted information that Jaramillo was a Colombian "hitman". Jaramillo was subsequently deported to Colombia, where he was murdered. It was the opinion of local law enforcement that Jaramillo "got away with a double homicide."

20. Lawyer Johnson—Convicted under pre-*Furman* death penalty law in Massachusetts. *Stewart* v. *Massachusetts,* 408 U.S. 845 (1972); *Commonwealth* v. *O'Neal,* 339 N.E.2d 676 (Mass. 1975); *Limone* v. *Massachusetts,* 408 U.S. 936 (1972).

24. Joseph Green Brown—*Brown* v. *State,* 381 So.2d 690 (Fla. 1980); *Brown* v. *State,* 439 So.2d 872 (Fla. 1983); *Brown* v. *Wain-*

wright, 785 F.2d 1457 (11th Cir. 1986). Brown was convicted and sentenced to death based primarily on the testimony of potential accomplice Ronald Floyd, a witness who subsequently went through a series of recantations and retractions of his recantations. Associate Justice Brennan actually relied on Brown's case to note: "Recantation testimony is properly viewed with great suspicion." *Dobbert* v. *Wainwright,* 468 U.S. 1231 (1984) (Brennan, J. dis.) (citing *Brown* v. *State,* 381 So.2d 690). Brown was not granted a retrial because Floyd's testimony implicating Brown was false, but because Floyd and the prosecution did not disclose that Floyd was testifying in return for an agreement that he would not be prosecuted in the case. Floyd initially flunked a polygraph test about his general involvement in the murder, but then passed the test three times in terms of whether or not he was an actual perpetrator in the crime. However, Floyd also recanted his testimony implicating Brown, then recanted that recantation during an evidentiary hearing. Subsequently, Floyd again repudiated his initial trial testimony and the prosecution was unable to retry Brown. Given the inherent unreliability of the sequence of Floyd's multiple recantations (which are "properly viewed with great suspicion"), Brown cannot be deemed actually innocent.

27. Henry Drake—*Drake* v. *State,* 247 S.E.2d 57 (Ga. 1978); *Drake* v. *State,* 287 S.E.2d 180 (Ga. 1982); *Drake* v. *Francis,* 727 F.2d 990 (11th Cir. 1984); *Drake* v. *Kemp,* 762 F.2d 1449 (11th Cir. en banc 1985); *Campbell* v. *State,* 240 S.E.2d 828 (Ga. 1977). This case is yet another example of release due to witness recantation, not actual innocence. Drake and William Campbell were tried separately for the murder of a local barber.

The elderly barber was violently assaulted in his shop with a knife and a claw hammer. There were pools of blood and blood smears on the wall of his barber shop. There were two pocket knives on top of the blood on the floor. One of the knives was similar to one owned by Drake.

When first arrested, Campbell implicated Drake as the murderer and stated he (Campbell) was not present. Campbell then told his own attorney that he (Campbell) alone was guilty of the murder and that Drake was innocent. Campbell actually offered many different versions to his lawyer before settling on a story that did not implicate Drake. However, Campbell then took the stand at his own trial (which occurred before Drake's) and testified, to his attorney's surprise, that Drake attacked the barber while Campbell was getting a haircut. Campbell was nonetheless convicted of the barber's murder and sentenced to death.

Subsequently, Campbell reluctantly testified at Drake's trial and implicated Drake. The prosecution's theory was that Campbell, an older man in ill-health with emphysema, could not have murdered the barber by himself. After Drake was convicted and sentenced to death, Campbell recanted his testimony against Drake. However, his newest version of events also differed from Drake's own testimony. Furthermore, the testimony of Drake's girlfriend had also differed from Drake's testimony. The trial court rejected Campbell's recantation and Campbell died soon thereafter.

Drake's first conviction was reversed and in two subsequent retrials, two different juries heard Campbell's recantation and also

heard forensic evidence that was offered to contradict the prosecution's theory that the barber was attacked by two assailants. One jury hung in favor of acquittal, but a second jury convicted Drake again. Five former jurors from Drake's original trial also advised the parole board that Campbell's recantation would not have changed their verdict convicting Drake at his first trial. Nevertheless, in a decision uncritically accepted by the DPIC, the state parole board "simply decided Drake was innocent." Atlanta Journal-Constitution, 12/24/87; Los Angeles Times, 12/22/88, 12/23/88. Notwithstanding the parole board's decision, Campbell's numerous statements and recantations, which did not even always agree with Drake's version of events, do not establish Drake's actual innocence.

28. John Henry Knapp—Knapp had three trials for the house fire murder of his daughters. Knapp stood outside and cooly watched his daughters be incinerated while sipping hot coffee. In the first trial, the jury hung 7–5 for conviction. The second trial resulted in a conviction and death sentence, but was reversed because of newly-developed evidence that indicated that the fatal fire could have been accidentally set by his dead daughters. Nonetheless, the third trial still ended in a mistrial with the jury hung 7–5 for conviction. The evidence included Knapp's recanted confession which he claimed he made because he suffered a migraine headache and was trying to protect his wife.

Finally, the prosecution concluded that the evidence was insufficient to obtain a unanimous jury verdict of guilt or innocence. The case was 19 years old and there had been losses in "some key evidence and witnesses." Knapp then pled "no contest" to second degree murder and received a sentence of time served. The judge who presided at Knapp's first two trials indicated doubts about Knapp's guilt, but still said that the fire was purposely set by either Knapp or his wife. "Given the original evidence and subsequent proceedings in the case, we may never know if Knapp was guilty * * *". 33 Ariz.T.L.J. 665, 666 (2001). Under the DPIC's current standards, Knapp's name should not be on the DPIC List since he pled to a lesser offense. *Arizona Republic* (8/27/91,11/19/92, 11/20/92,8/11/96); Phoenix Gazette (12/6/91, 11/20/92); Associated Press (11/19/92).

Moreover, given the recent United States Supreme Court decision in *Ring* v. *Arizona,* it is speculative now whether a jury would have found Knapp death penalty eligible under the now applicable law.

29. Vernon McManus—*McManus* v. *State,* 591 S.W.2d 505 (Tex. 1980). McManus' conviction was reversed because of jury selection issues unrelated to his guilt or innocence. Ultimately, the prosecution chose not to retry the case, but there were no widespread allegations of innocence. Accordingly, his case was not even included in the Cooley article as an "actually innocent" defendant. Cooley, at 912. There is no explanation for its inclusion on the DPIC List. Dallas Morning News (6/4/00).

30. Anthony Ray Peek—*Peek* v. *State,* 488 So.2d 52 (Fla. 1986). Peek was acquitted after his two prior convictions for this 1977 murder were reversed for various evidentiary errors, including the admission of an unrelated rape. He was prosecuted for raping and

strangling to death an elderly woman in her home. She lived a mile from the halfway house where Peek resided. Her car was found also found abandoned even nearer the halfway house. Two of Peek's fingerprints were lifted from inside the victim's car window. Blood and seminal stains on the victim's bedclothes were consistent with Peek's identity as a type-O secretor. A hair with features similar to Peek's was recovered in a cut stocking in the victim's garage area. Peek claimed that his fingerprints got on the victim's car when he was out of his halfway house in the morning and tried to burglarize her abandoned car. Peek presented evidence that the periodic night checks at the halfway house did not indicate any unauthorized absences the night of the murder.

The acquittal represents a finding of reasonable doubt, not actual innocence. Prosecutors attributed the acquittal to the passage of time and loss of evidence. In particular, the state attorney told the Florida Commission on Capital Cases: "Mr. Peek is also on the List, as are several others from other circuits who got new trials and then were acquitted. I fail to see the rationale for including these people."

32. Robert Wallace—Acquitted on retrial based on either self defense or accidental shooting defense. Accordingly, this is not a "wrong person" mistake.

33. Richard Neal Jones—*Jones* v. *State,* 738 P.2d 525 (Okla.Crim. 1987). Jones' defense was that he was passed out in a car while three other men beat up the victim, shot him, and threw his weighted body in the river. Jones' conviction was reversed in a 2–1 decision because the trial court erroneously admitted incriminating post offense statements by Jones' non-testifying codefendants, a violation of the hearsay rule. The dissent noted that the only hearsay statement which actually implicated Jones should still should have been admitted as a prior consistent statement. At the very least, Jones was present at the murder scene and a party to the conspiracy leading to the murder. Accordingly, he would not have been considered "actually innocent" under the standards of the original Stanford study. His culpability would appear to be no less than that of the actual murderers. See *Mann* v. *State,* 749 P.2d 115 (1988); *Thompson* v. *Oklahoma,* 487 U.S. 815, 817, 859 (1988); *Thompson* v. *State,* 724 P.2d 780 (Okla. Crim. App. 1986) (separate trial of co-defendant with evidence directly implicating Jones).

34. Jerry Bigelow—*Bigelow* v. *Superior Court (People),* 204 Cal.App.3d 1127 (1988). Bigelow's conviction and death sentence were reversed for a reasons unrelated to his guilt. On retrial, the jury convicted Bigelow of robbery and kidnaping. The jury also found true that the murder occurred while Bigelow was committing or was an accomplice in the robbery and kidnaping of the victim. In short, the jury found true beyond a reasonable doubt all the facts necessary to convict Bigelow of first degree felony murder under California law. Nonetheless, the jury did not actually convict Bigelow of the separate charge of first degree murder. The trial judge made the mistake of excusing the jury without clarifying its inconsistent verdict. Therefore, under California law, the verdict had to be entered and Bigelow was not eligible for the death penalty. However, rather than establishing that Bigelow was innocent, the jury's verdicts still indicated that the jury totally rejected

Bigelow's defense and found that he was at least an accomplice to the murder. An inconsistent verdict, such as Bigelow's, is not an exoneration. "Inconsistent verdicts" are often a product of jury lenity, rather than a belief in innocence. The prosecution cannot appeal an inconsistent verdict. *United States* v. *Powell,* 469 U.S. 57, 65–66 (1984). As noted, the jury's verdict also indicates that, at a minimum, it believed that Bigelow was an accomplice to the murder. Originally, this factual distinction between actual perpetrator and accomplice was not considered proof of "actual innocence". Stanford, at 43.

35. Willie A. Brown.

36. Larry Troy—*Brown* v. *State* and *Troy* v. *State,* 515 So.2d 211 (Fla. 1987). This is a prison murder. Three inmates testified against Brown and Troy. At least one defense witness was impeached with prior statements implicating Brown and Troy. The convictions of these two defendants were reversed because of a prosecutorial discovery error—the failure to timely disclose a prior taped statement by a witness which contradicted another state witness. Ultimately, the state dropped charges because one of the prison witnesses recanted. However, the witness made the the offer to recant his testimony against Brown to Brown's girlfriend in return for $2000. Cooley, at 930. The "recantation for hire" hardly inspires confidence that Brown and Troy are "actually innocent."

37. William Jent.

38. Earnest Miller—These co-defendants entered pleas to lesser offenses of second degree murder and were sentenced to time served after their convictions were vacated because of the prosecution's failure to disclose exculpatory evidence. Although Jent and Miller proclaimed their innocence, they inconsistently asked for the "pardon" of the victim's family. It appears that the passage of time made a second trial problematic for both the prosecution and the defense. The prosecution had lost its key physical evidence and witnesses were scattered. Several witnesses had changed their testimony. Associated Press, 1/15/88, 1/16/88; St. Petersburg Times, 1/16/88, 1/19/88. Under the DPIC's current standards, these cases should not be on the DPIC List since the two men pled to lesser charges. In a statement to the Florida Commission on Capital Cases, the prosecution cited conflicting statements from Miller and Jent about their alibi to contradict assertions that the defendants did have an alibi for this murder.

40. Jesse Keith Brown—*State* v. *Brown,* 371 S.E.2d 523 (S.C. 1988). This defendant was acquitted at his second retrial because evidence also pointed to his half brother as the "actual killer". However, the jury also convicted Brown of armed robbery, grand larceny, and entering without breaking in connection with the homicide. The verdict indicates, therefore, that Brown was involved in the murder even if he was not actual perpetrator. Indeed, at his first trial he testified that he did not remember committing the murder, but was "sorry [if I've done anything]." At his second trial, on the other hand, he testified specifically that he was not involved in the murder. Brown's case was not included in In Spite of Innocence, thus this appears to be one of the unidentified cases in which the Cooley study considered the evidence of innocence to be "relatively weak." Cooley, at p. 914, 928–929.

41. Robert Cox—*Cox* v. *State,* 555 So.2d 352 (Fla. 1990). This first degree murder conviction was reversed for insufficient evidence, not because of innocence. "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime was not sufficient to support a conviction * * * Although state witnesses cast doubt on Cox' alibi, the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim." Again, this case is an example of a reversal due to Florida's more stingent legal sufficiency standard for proof beyond a reasonable doubt. The evidence obviously still indicated a "strong suspicion" of Cox's guilt.

43. James Richardson—*Richardson* v. *State,* 546 So.2d 1037 (Fla. 1989). Convicted and sentenced under invalid pre-*Furman* statute in Florida.

45. Patrick Croy—*People* v. *Croy,* 41 Cal.3d 1 (Cal. 1986). Croy was convicted of murdering a police officer in Yreka, California. The California Supreme Court reversed Croy's murder conviction for instructional error, but it affirmed his conviction for conspiracy to commit murder. His defense had been intoxication. Yet, on retrial, Croy claimed self-defense and was acquitted of murder. Thus, Croy was not "actually innocent" in the sense of being the wrong person.

There was no dispute Croy killed the police officer. However, he was acquitted on the basis of a controversial and legally questionable cultural defense based on his Native American heritage, i.e., that his background as a Native American led him to reasonably fear that the police officer intended to kill him. See, e.g., Comment, 99 Dick.L.Rev. 141 (1994); 13 Ariz.J.Int'l & Comp.L. 523 (1996); Note, 62 Ohio St. L.J. 1695 (2001); Note, 2001 Duke L.J. 1809 (2001).

By contrast (and inconsistently), at his first trial, Croy did not claim self-defense. Instead, he relied on an extensive intoxication defense and testified that he initially "became concerned when he saw the police because he was on probation and was afraid that he would be arrested for being drunk." He also claimed "he was startled when [the police officer/victim] appeared as he was trying to find safety in his grandmother's cabin, and that if he shot [the victim] he did not intend to." *People* v. *Croy* (1986) 41 Cal.3d 1, 16, 19, 21. The defenses Croy used at his first and second trials were inconsistent with each other.

Croy's testimony at his second trial was not all that impressive either. While he testified emotionally that he believed the police "were going to kill us all", other parts of his testimony sounded like a "prepared statement" and he was forced to admit that he had consumed an "impressive amount of liquor and marijuana" during the fateful weekend he confronted the police. Croy admitted lying at his first trial, but explained that he lied because did not believe he could win and he wanted to protect his friends. "All in all, Croy's performance was neither as commanding as [his attorney] hoped it would be, nor as damaging as the prosecution tried to make it. As the long trial drew to a close * * *, it seemed that victory * * * would depend less on [Croy's] courtroom 'vibrations',

than on the [defense] attorney's to indict Yreka as a racist community."

Croy's second trial was depicted as a political trial, not a trial about guilt or innocence. "What made * * * Croy worthy in his attorney's mind was not so much his innocence as his symbolic value as an aggrieved Indian [sic] * * *." More significantly, neither defense at Croy's two trials established that Croy was "actually innocent" or the "wrong person". Los Angeles Times (5/11/00); San Francisco Examiner (7/8/90); Santa Rosa Press Democrat (7/27/97)

46. John C. Skelton—*Skelton* v. *State,* 795 S.W.2d 162 (Tex.Crim.App. 1989). In a 2–1 split decision, the Texas appeals court was reversed the capital murder conviction for insufficient evidence of guilt beyond a reasonable doubt. The majority opinion believed there was a possibility that another person committed the murder. Nevertheless, the majority explained: "Although the evidence against appellant *leads to a strong suspicion or probability* that appellant committed the capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt * * * Although this Court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so." [emphasis added]. The dissent outlines the evidence of a "strong suspicion" of Skelton's guilt. Once again, this reversal is based on a stringent standard of evidentiary sufficiency not required by the United States Constitution and no longer even applied in Texas. This appears to be another of the "relatively weak" innocence cases not included in In Spite of Innocence. The reversal of Skelton's conviction was not a finding of "actual innocence".

47. Dale Johnston—*State* v. *Johnston,* 1986 WL 8798 (Oh.App. 1986) [2 unreported opinions]; *State* v. *Johnston,* 529 N.E.2d 898 (Ohio 1988); *State* v. *Johnston,* 580 N.E.2d 1162 (Ohio 1990). This defendant was convicted and sentenced to death for slaying his stepdaughter and her fiancé. The stepdaughter had publicly complained in the past about incestuous advances by Johnston. A witness who had been hypnotized to refresh his recollection testified as to his pre-hypnosis recollection that he identified Johnston angrily forcing a couple into his car on or about the day of the murders. Feedbags consistent with feedbags found on Johnston's farm were also found at the gravesite of the two victims. Some bloodstained items were seized from a strip mining pit on Johnston's property. Johnston's first conviction was ultimately reversed because of some problems with the hypnotized witness and the state's failure to disclose evidence which may have helped Johnston with his defense. Prior to retrial, the court excluded incriminating statements Johnston made during his initial interrogation as well as incriminating evidence seized due to the interrogation. The prosecution then dismissed the case due to the passage of time, poor recollection of the witnesses, and the suppression of evidence. Johnston's subsequent wrongful imprisonment lawsuit was rejected since "although the evidence did not prove Johnston committed the murders, it did not prove his innocence." Cleveland Plain Dealer (5/11/90, 5/12/90, 6/22/91, 9/13/93); Associated Press (5/11/90).

48. Jimmy Lee Mathers—*State* v. *Mathers,* 796 P.2d 866 (Ariz. 1990). Mathers was convicted, along with two codefendants, of the murder of Sterleen Hill in 1987. In a 3–2 decision, the Arizona Supreme Court reversed Mathers' conviction for insufficient evidence. Since the reversal was based on insufficiency of the evidence, retrial was barred by the Double Jeopardy Clause. The dissent points out that there was still ample evidence of Mathers' guilt even if the majority of the court did not believe there was substantial evidence to support a conviction beyond a reasonable doubt. The appellate court reversal of Mathers' conviction was not a finding of actual innocence and the record of his case would not possibly justify such a finding.

50. Bradley Scott—*Scott* v. *State,* 581 So.2d 887 (Fla.1991). This case was reversed due to delay in prosecution and insufficient circumstantial evidence. The delay in prosecution appears to have hampered both parties to the extent that no assessment may be made of Scott's actual innocence. According to the appeals court, the available circumstantial evidence "could only create a suspicion that Scott committed this murder." Once again, even if the available evidence of Scott's guilt was not sufficient to support a conviction beyond a reasonable doubt, he certainly was not exonerated.

52. Jay C. Smith—*Commonwealth* v. *Smith,* 615 A.2d 321 (Pa. 1992); *Commonwealth* v. *Smith,* 568 A.2d 600 (Pa.1989); *Smith* v. *Holtz* (3rd Cir. 2000), 210 F.3d 186; *Smith* v. *Holtz* (M.D.Pa. 1998) 30 F.Supp.2d 468. Smith was not freed because he was innocent, but because the Pennsylvania court believed that Pennsylvania's double jeopardy clause barred a retrial due to prosecutorial misconduct in withholding exculpatory evidence. The Pennsylvania court conceded that the United States Constitution and other states would not necessarily have compelled such a harsh sanction.

Without belaboring the evidence of Smith's guilt which was unaffected by the evidence withheld by the prosecution, it is enough to note that the DPIC List does not mention Smith's subsequent loss in civil court when he sued the Commonwealth of Pennsylvania for wrongful imprisonment. As the appeals court explained, "*Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished* * * * and Smith has therefore not established that he is entitled to compensation * * *" [emphasis added]. Indeed, a federal jury trial ultimately found that the withheld evidence was not "crucial" at all and that the prosecution's alleged misconduct did not undermine confidence in the outcome of Smith's trial. Thus, if anything, the courts have repeatedly reaffirmed their conclusion that Smith was "actually guilty". Smith's inclusion on the DPIC List is a "false exoneration" at its most extreme.

57. James Robison—Robison was accused of being one of three participants in the conspiracy to murder Arizona news reporter Don Bolles. The other conspirators were Adamson and Dunlap. Robison was acquitted on retrial because the jury did not believe the testimony of his accomplice, Adamson. However, the separate trial of third co-defendant Dunlap elicited evidence that Robison had received "hush money" to prevent him from revealing Dunlap's role in Bolles' murder. Dunlap admitted giving gifts and money to Robison, but only out of "friendship". At Dunlap's trial, evidence

was admitted of incriminating diary entries made by Robison. Dunlap filed a new trial motion offering Robison's testimony from Robison's second trial in which Robison testified that Dunlap's gifts to him were not offered to obtain his silence. The trial court denied Dunlap's motion because it did not find Robison's testimony credible. In particular, the trial court noted that Robison had admitted at his own trial that he had lied under oath and "would have no hesitation in testifying to whatever he felt was expedient." *People* v. *Dunlap,* 930 P.2d 518 (Ariz.App. 1996). Robison has been subsequently convicted of plotting to murder alleged accomplice Adamson. Arizona Republic (12/19/93,7/27/95). The Dunlap trial record does not support including the duplicitous Robison on a list of "actually innocent" defendants.

58. Muneer Deeb—*Deeb* v. *Texas,* 815 S.W.2d 692 (1991). The evidence indicates that Deeb was not "actually innocent," even if there was not enough evidence to convict him beyond a reasonable doubt. At his first trial, Deeb was convicted of conspiring with David Wayne Spence to murder Deeb's girlfriend, Kelley, in order to collect insurance money. However, Spence and some confederates bungled the job by accidentally murdering the wrong woman and two other people. A jailhouse informant testified that Spence told him about numerous incriminating statements by Deeb in which Deeb stated that he would benefit from Kelley's death and that Deeb asked Spence if he knew someone who would kill Kelley. One of Spence's confederates, Melendez, also testified that he was present when Spence and Deeb conspired to commit the murder. Deeb's conviction was reversed because the trial court erroneously admitted Spence's hearsay statements to the informant. Deeb was acquitted on retrial. The special prosecutor at Deeb's retrial explained that Melendez had refused to testify a second time against Deeb.

However, the jury at Deeb's second trial did not believe that Deeb was "actually innocent". After the second trial in which Deeb was found not guilty, the jury foreperson more accurately put it: "We did not say that this man was innocent of the crime. We did not say that. We just could not say that he was guilty."

Spence was tried separately for the triple murders and executed for them. Evidence was presented at Spence's trial that Spence argued with Deeb about the murder, indicating that the murder had gone awry. There was also evidence that Deeb and Spence frequently discussed whether Kelley should be killed. *Spence* v. *Johnson,* 80 F.3d 989, 1004 fn. 12 (5th Cir. 1996); Dallas Morning News (11/4/93). Thus, the record of Spence's trial also indicates that Deeb was not "actually innocent".

59. Andrew Golden—*Golden* v. *State,* 629 So.2d 109 (1994). The Florida Supreme Court felt compelled to reverse Golden's conviction for murdering his wife to collect insurance because the evidence was insufficient to prove guilt beyond a reasonable doubt, but the state court noted as follows: "The finger of suspicion points heavily at Golden. A reasonable juror could conclude that he more likely than not caused his wife's death." After his wife's death, Golden denied having insurance. However, it turned out he had $300,000 in insurance, was heavily in debt, and that he filed for bankruptcy after her death. There was evidence he forged his wife's

signature on insurance applications. The "heavy finger of suspicion" indicates that Golden is not "innocent".

62. Robert Charles Cruz—In light of the United States Supreme Court's recent decision in *Ring* v. *Arizona,* this Arizona case should now be deleted from the DPIC List. Pursuant to *Ring,* the Arizona statute unconstitutionally denied defendants their Sixth Amendment right to a jury trial on the findings necessary for death penalty eligibility by giving that power to state trial judges. As with the earlier cases in which the defendants were tried under now defunct death penalty statutes, Arizona convictions are no longer appropriately considered in light of current death penalty jurisprudence. It is simply speculative that Cruz would have been found eligible for the death penalty by a jury under a constitutional statute.

63. Rolando Cruz.

64. Alejandro Hernandez—*People* v. *Cruz,* 521 N.E.2d 18 (Ill. 1988); *People* v. *Cruz,* 643 N.E.2d 636 (Ill. 1994); *People* v. *Hernandez,* 521 N.E.2d 25 (Ill. 1988); *Buckley* v. *Fitzsimmons,* 919 F.2d 1230 (7th Cir. 1991). These defendants were charged with the notorious abduction, rape, and murder of ten-year-old Jeanine Nicarico. Cruz was convicted and sentenced to death twice, but both judgments were reversed. During the third trial, the trial court judge lambasted the police for "sloppy" police work and accused a sheriff's deputy of lying. He then directed a verdict for Cruz and freed him before the presentation of the defense case. The trial court did acknowledge that the prosecution had "circumstantial evidence" but did not consider it sufficient to support a conviction beyond a reasonable doubt. Hernandez's first conviction was reversed. After a hung jury ended his second trial, he was convicted in a third trial and sentenced to 80 years in prison. However, that conviction was reversed and after the court dismissed Cruz's case the prosecution dropped charges against Hernandez.

During this time, another convicted murderer named Brian Dugan announced he was willing to confess to being the lone perpetrator of the Nicarico murder in return for immunity from the death penalty. Dugan himself had been sentenced to two life sentences for other sex related murders. A 1995 DNA test implicated Dugan in Nicarico's murder, but excluded Cruz and Hernandez as actual perpetrators. However, this test result did not exclude Cruz's and Hernandez's potental culpability as accomplices to Nicarico's murder.

Ultimately, after Cruz's acquittal by the court, Illinois law enforcement officers and prosecutors were prosecuted for their roles in Cruz's case. The trial court excluded evidence that after the first trial for the Nicarico murder, Cruz looked at Nicarico's sister and mouthed the words, "You're next." However, during this trial, the defense for the accused law enforcement officers attempted to link Cruz with other suspects in the murder. There was evidence which raised a question as to whether Cruz and Dugan could have lived on the same block at the time of the murder, thus raising questions as to whether Dugan acted alone. Moreover, Dugan had a relevant modus operandi for burglaries which involved accomplices. Cruz himself took the stand and contradicted his previous testimony. He also testified that he was seeing a psychiatrist about his lying! The

jury was advised that scientific evidence excluded Cruz as the rapist, but did not exclude Dugan. However, the jury was also told that the scientific evidence could not exclude the possibility that Cruz was present at the Nicarico murder. The police officers were acquitted. The trial court also acquitted one of the officers of a charge that he had falsely testified about incriminating statements Cruz made in jail. Some jurors stated they believed Cruz was guilty of the Nicarico murder. Other jurors observed that they could not believe Cruz's testimony that he had not made a so-called incriminating "dream statement" to the police about the murder in which he described details of the Nicarico murder. Chicago Daily Law Bulletin (4/28/99; 5/25/99); Chicago Daily Herald (4/21/99, 5/5/99, 5/26/99); Chicago Tribune (12/8/95; 4/30/99, 5/26/99); Chicago Sun-Times (12/9/95; 12/10/95; 5/26/99; 6/6/99); Chicago Daily Herald (4/21/99; 6/6/99); Associated Press (6/5/99, 7/22/02); State Journal-Register (6/14/99).

The actual reliability of Dugan's confession that he was the lone murderer, including his actual motivation for that confession, is subject to question. Notwithstanding the DNA test, Dugan has nothing to lose by confessing to the Nicarico murder, but also has no incentive to implicate or "snitch off" anyone else. *People* v. *Cruz,* 643 N.E.2d 636–695, 676–687, 691–695 (Ill. 1994) (plur.opn. of Freeman, J.) (dis.opns. of Heiple, McMorrow, J.J.).

65. Sabrina Butler—*Butler* v. *State,* 608 So.2d 314 (Miss. 1992). Butler was convicted of murdering her infant son, Walter. She brought Walter to the hospital with severe internal injuries and gave numerous conflicting statements, including at least one version in which she admitted pushing on his protruding rectum and hitting the baby boy once in the stomach with her fist when he was crying. Other versions included statements by her that she had tried to apply CPR when the baby was not breathing.

Butler's first conviction was reversed because the prosecutor improperly commented on her failure to testify at trial. She was acquitted on retrial, but not necessarily because she was not the actual killer of her young baby. At both trials, the evidence indicated that the baby died from peritonitis, the presence of foreign substances in the abdomen. Although a witness substantiated one of Butler's versions of events about administering CPR to the baby and the coroner admitted his examination had not been thorough, the jury foreperson indicated only that the jury had a "reasonable doubt" that Butler administered the fatal blow.

There does not appear to be any witness as to what occurred prior to the CPR. The jury was not told that Butler had lost custody of another child because of abuse. Apparently, the defense provided sufficient alternative explanations for the baby's injuries to "speculate" (but not establish) that the cause of death was either SIDS or a cystic kidney disease. There does not appear to be any definitive verdict as to the cause of death. Even Butler's own attorney stated that he "doesn't know what the truth is." Butler's cocounsel indicated that at best the case should have been prosecuted as a manslaughter, hardly an endorsement of Butler's innocence. Butler's acquittal on retrial does not represent a finding that she did not administer a deadly trauma to baby Walter's abdomen.

Mississippi Clarion-Ledger (1/22/96); Baltimore Sun, (1/02/96); Washington Times (12/30/95).

69. Gary Gauger—Gauger was not actually sentenced to death. Although the trial court erroneously imposed a death sentence in January 1994, the court granted a motion for reconsideration and vacated the sentence less than ten months later in September 1994. The trial court found that it had not considered all the mitigating evidence and concluded that Gauger should not be sentenced to death. *People* v. *Bull,* 705 N.E.2d 824, 843 (Ill. 1999); Chicago Tribune (9/23/94). Although Gauger served a brief time on Death Row, he was not properly sentenced to death by the trial court. He should never have been sent to Death Row because the trial court did not finally sentence him to be executed. Gauger's case is an example of how consideration of mitigating evidence under current law results in a sentence less than death. Whatever the reasons for Gauger's later release from prison, he is not properly considered as an innocent person released from Death Row since his initial death sentence was not legitimately imposed under Illinois law. Accordingly, Gauger's case is not appropriate for the DPIC List.

70. Troy Lee Jones—*In re Jones,* 13 Cal.4th 552 (1996); *People* v. *Jones,* 13 Cal.4th 535 (1996). The conviction was vacated because of ineffective assistance of counsel. The California Supreme Court held that while the evidence of Jones' guilt was not overwhelming, it still suggested Jones' guilt. Jones was convicted of murdering Carolyn Grayson in order to prevent Grayson from implicating him in the murder of an elderly woman, Janet Benner.

Grayson had told Jones' brother Marlow that she had seen Jones strangle the old lady. Grayson had told her daughter Sauda that Jones killed Ms. Benner. Jones' sister overheard a conversation between Jones and his mother in which Jones arguably regretted not killing Grayson when he killed Benner. The same sister also testified to Jones' involvement in a family plot to murder Grayson. Although there was also evidence that Jones was ambivalent about killing Grayson, there was more testimony that Grayson's neighbor witnessed a violent altercation between Grayson and Jones in which she assured him that she would not say anything and he continued to threaten to kill her. Grayson's body was later found in a field the day after she had reportedly left with Jones for Oakland. At best, Jones only had evidence to contradict the inferences suggesting his guilt.

To sum up: "[T]he prosecution introduced * * * evidence that [Jones] was observed attacking Carolyn Grayson with a tire iron a few weeks before she was fatally shot, [Jones] and his family engaged in a plot to fatally poison Grayson, [Jones] confided to his brother that he had to kill Grayson or she would send him to the gas chamber, [Jones] informed his brother of the need to establish an alibi for the evening Grayson was murdered, and Grayson's daughter, Sauda, testified that, on the night of Grayson's death, Grayson told her daughter that she was going out with [Jones]." *In re Jones,* 13 Cal.4th at 584. While it was also true that this evidence had been subject to some varying accounts and biases, the evidence came from several different sources and it can hardly be said that Jones has been shown to be "actually innocent."

The prosecution did not choose to drop charges because Jones was innocent. Rather, due to the passage of time, it no longer had the evidence and witnesses available to retry the case. Modesto Bee, (11/16/96); Washington Times, (9/12/99).

71. Carl Lawson—*People* v. *Lawson,* 644 N.E.2d 1172 (Ill. 1994). Lawson was convicted of murdering eight year old Terrance Jones. The victim's body was found in an abandoned church. There was evidence that Lawson's romantic relationship with the young boy's mother had ended and that Lawson was upset about the breakup. Investigators discovered two bloody shoeprints of a commonly worn brand of gym shoe near the body. Lawson wore these type of shoes. The shoeprints were made near the time of the crime and were the only evidence capable of establishing Lawson's presence at the scene of the crime at the time it occurred. Various items were removed from around the victim's body. Two of the items near the body, a beer bottle and a matchbook, had Lawson's fingerprints. Lawson's first conviction was reversed because his attorney had a conflict of interest. He was acquitted at his second trial, apparently, because the shoeprint evidence could not be associated only with him the shoe was too popular. However, this does not change the fact that Lawson's fingerprints were on items found near the body and that other evidence, albeit some of it highly inconsistent, remain to incriminate Lawson, including evidence of motive.

72. Ricardo Aldape Guerra—*Guerra* v. *Johnson,* 90 F.3d 1075 (5th Cir. 1996); *Guerra* v. *Collins,* 916 F.Supp. 620 (S.D.Tex. 1995); *Guerra* v. *State,* 771 S.W.2d 543 (Tex.Crim.App. 1988). Guerra was convicted as the triggerman, but evidence indicates he may have only been the accomplice. It is noted in the federal court opinion that Guerra was not prosecuted as an accomplice although he was undoubtedly present at the scene and in the company of the triggerman. He fled with the shooter from the scene and was hiding at the site of a subsequent shootout with the police. Near him was a gun wrapped in a bandanna. Originally, this factual distinction was not considered proof of "actual innocence". Stanford, at 43.

73. Benjamin Harris—*Harris (Ramseyer)* v. *Wood,* 64 F.3d 1432 (9th Cir. 1995). Harris was convicted of hiring a hit man named Bonds to murder a man named Turner. Harris gave numerous inconsistent statements about his whereabouts and involvement in the murder. Ultimately, Harris admitted taking turns with Bonds in shooting Turner, but denied hiring Bonds to shoot Turner. Harris did admit having a motive to murder Turner. He admitted driving the murderer Bonds to the scene and providing a gun. Initially, Harris confessed, but then testified at trial that he and Bonds took turns pulling the trigger.

By denying a contract killing, Harris hoped to avoid eligibility for the death penalty under Washington state law. A federal court vacated his conviction because of ineffective assistance of counsel. Although Harris's counsel claimed that Harris fantasized his confession, the prosecution chose not to retry Harris because the alleged hitman (Bonds) was in prison and would not testify, other witnesses were unavailable, and the federal court had ruled Harris's confession inadmissible.

Since Harris could not be retried, the prosecution sought his civil commitment based on a petition from hospital psychiatrists. He

was confined in state a mental hospital, but a jury subsequently found he should be kept in a less restrictive environment. These circumstances do not support placing Harris on a list of the actually innocent. Seattle Times, (8/19/97,4/16/00); Portland Oregonian, (8/24/97); Seattle Post-Intelligencer, (7/17/97, 8/23/97); Tacoma News Tribune, (5/29/97).

74. Robert Hayes—*Hayes* v. *State,* 660 So.2d 257 (Fla. 1995). The initial conviction was based on a combination of DNA evidence, Hayes's inconsistent statements about when he was last with the victim, and hearsay statements by the victim expressing fear of Hayes. The Florida Supreme Court reversed the case because the trial court erroneously admitted DNA evidence matching Hayes with semen on the victim's shirt. The court held that a "band-shifting" technique used to identify the DNA had not reached the appropriate level of scientific acceptance—a Florida state opinion not universally shared. See, e.g. *State* v. *Copeland,* 922 P.2d 1304 (Wash. 1996). However, the court also held that the trial court on retrial could consider admitting evidence of Hayes's semen in the victim's vagina. The appeals court opinion noted that "evidence exists in this case to establish that Hayes committed this offense, physical evidence also exists to establish that someone other than Hayes committed the offense."

On retrial, the trial court admitted evidence that Hayes' semen was in the victim's vagina. However, there was also evidence that the victim was clutching hairs in her hand inconsistent with Hayes' hair. The state attorney explained to the Florida Commission on Capital Cases: "In the end, the jury disregarded the fact that Hayes' DNA was found in the victim's vagina and acquitted of murder." Nothing about Hayes' retrial changes the appeals court's original observation that evidence existed to establish Hayes' guilt. The acquittal on retrial was based on reasonable doubt, not actual innocence.

77. Curtis Kyles—*Kyles* v. *Whitley,* 514 U.S. 419 (1995). After one vacated conviction and four mistrials in which a jury was unable to reach a verdict over a 14-year period, the prosecutor chose not to retry Kyles although the final jury hung 8–4 for conviction (an earlier jury hung 10–2 for acquittal). The man whom Kyles alleged did the killing was himself killed by a member of Kyles' family in 1986. New Orleans Times-Picayune, (2/19/98,6/27/98); Baton Rouge Advocate, (2/19/98). A 5–4 United States Supreme Court split decision vacating Kyles' conviction disagreed on the strength of the evidence against Kyles. That disagreement itself certainly refutes any judgment that Kyles was actually innocent.

78. Shareef Cousin—*State* v. *Cousin,* 710 So.2d 1065 (La. 1998). Contrary to the DPIC List's summary, Cousin's case was not reversed because of "improperly withheld evidence * * *". In fact, the Louisiana Supreme Court explicitly did not rule on that issue. *State* v. *Cousin,* 710 So.2d at 1073 fn. 8. Rather, the Louisiana high court reversed Cousin's conviction because the prosecutor improperly impeached a witness with prior inconsistent statements recounting a confession made to him by Cousin. In other words, to prove the case against Cousin, the prosecutor brought out the fact that the witness had previously told the police that Cousin had confessed to the crime. Under Louisiana law, such prior statements

cannot be used as substantive evidence of the defendant's guilt. *State* v. *Brown,* 674 So.2d 428 (La.App. 1996) Other jurisdictions, of course, would not necessarily find this evidence inadmissible as substantive evidence. See *State* v. *Owunta,* 761 So.2d 528 (La. 2000) (acknowledging that Louisiana follows the minority rule in not allowing prior inconsistent statements to be used as substantive evidence). Thus, Cousin's conviction may have been upheld in other states. See *California* v. *Green,* 399 U.S. 49 (1970). Without these statements, the prosecution determined that the remaining evidence (weak or tentative identifications and Cousin's incriminating comment that the arrest warrant had the wrong date for the murder) was insufficient to carry the burden of proof. Baton Rouge Saturday State Times/Morning Advocate (1/9/99); New Orleans Times-Picayune (1/9/99). Cousin was not retried because the prosecution believed he was "actually innocent," but because Louisiana state law precluded evidence of guilt in this case that would actually have been admissible in other states.

80. Steven Smith—*People* v. *Smith,* 565 N.E.2d 900 (Ill. 1991); People v. Smith, 708 N.E.2d 365 (Ill. 1999). In this case, Smith was accused of assassinating an assistant prison warden while the victim was standing by his car in a local bar's parking lot. Various witnesses testified that they saw Smith and two other men in the bar and then departing just before the victim left.

The prosecution's theory was that Smith murdered the victim at the behest of a local neighborhood criminal gang leader. One eyewitness, who knew Smith, identified him as the shooter. When Smith was arrested, he was talking to the leader of the local gang. There was testimony that on certain occasions, Smith had been seen in the company of the gang leader. When the police searched Smith's residence they seized 77 pages of documents including regulations or bylaws of the criminal gang, other information relating to the gang, and two invitations to recent gang functions. However, at trial, the court excluded this evidence of Smith's association with the gang. The trial court admitted evidence of gang-related activity in the Illinois prison system, that the victim was a strict disciplinarian, and that the leader of Smith's gang had had an altercation with the victim. However, the trial court excluded the evidence seized in Smith's residence connecting him to the prison gang. On appeal, Smith's conviction was reversed because there was no evidence at trial connecting Smith to the prison gang! The irony was not lost on the dissenting judge: "If there was error at trial, it occurred not because the trial judge admitted too much evidence, but because he admitted too little."

Smith's conviction after retrial was then reversed for insufficient evidence. In any event, although various witnesses identified Smith in the bar before the victim was shot, only one eyewitness identified Smith as the actual shooter. The appellate court found that there were too many serious inconsistencies and impeachment of that witness at the trial to support Smith's conviction for shooting the victim. The court rejected the State's arguments reconciling some of the conflicting accounts of the shooting, although only because the State had not raised these arguments until it was too late for the defense to challenge the State's theory. It is not clear if the witness was confronted with previous statements that were

consistent with the accounts of other witnesses. Ordinarily, the testimony of a single witness is sufficient to convict. However, the Illinois court explained that the conviction may be rejected if the witnesses' testimony "is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." At best, the circumstantial evidence "tending to link defendant to the murder merely narrowed the class of individuals who may have killed the victim * * *" Given the evidence, Smith appears to have been an accomplice to the shooting even if he was not the actual triggerman. He was certainly not eliminated from the "class of individuals who may have killed the victim * * *".

Significantly, in reversing Smith's conviction and ending any chance for another retrial, the appellate court explained: "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof. While there are those who may criticize courts for turning criminals loose, courts have a duty to ensure that all citizens receive those rights which are applicable equally to every citizen who may find himself charged with a crime, whatever the crime and whatever the circumstances. When the State cannot meet its burden of proof, the defendant must go free. This case happens to be a murder case carrying a sentence of death against a defendant where the State has failed to meet its burden. It is no help to speculate that the defendant may have killed the victim." In short, as the appeals court took pains to emphasize, the evidence against Smith was legally insufficient, but it was not shown that he was "actually innocent".

81. Ronald Keith Williamson—Even widely touted DNA exonerations are sometimes less than they seem. For instance, the recent decision by the Oklahoma authorities not to retry Williamson after DNA testing established that the victim's body did not contain his semen did not automatically make him "poster material for Actual Innocence".

Recent Congressional testimony by the Oklahoma Attorney General indicates there is more to this story:

> Williamson was not convicted "on the strength of a jailhouse snitch" as reported. Among the direct and circumstantial evidence of his guilt was a statement he gave to the Oklahoma State Bureau of Investigation describing a "dream" in which he had committed the murder. Williamson said, "I was on her, had a cord around her neck, stabbed her frequently, pulled the rope tight around her neck." He paused and then stated that he was worried about what this would do to his family.
>
> When asked if Fritz was there, Williamson said, "yes."
>
> When asked if he went there with the intention of killing her, Williamson said 'probably.'
>
> In response to the question of why he killed her, Williamson said, "she made me mad."
>
> The Pontotoc County prosecutor had a tough decision to make on a re-prosecution of Williamson and Fritz and con-

> cluded that conviction was highly unlikely in the wake of the DNA evidence, even though the note left at the scene said "Don't look fore us or ealse," [sic] indicating multiple perpetrators.

Testimony of the Honorable W.A. Drew Edmondson, Attorney General of the State of Oklahoma, Senate Judiciary Committee, 6/13/00.

Although Williamson suffered from mental problems that included delusional thinking, there was nothing presented to indicate that he would coincidentally "imagine" the actual facts of the murder. The victim had small puncture wounds and cuts. There was a semicircular ligature mark on her neck. The cause of death was suffocation due to a washcloth in her mouth and the ligature tightened around her neck. Thus, Williamson's "dream" was consistent with the murder. Given the evidence of Williamson's alleged mental problems, there is no more reason to believe his denials of guilt than his incriminating statements.

Furthermore, the DNA testing showed only that the semen in the victim's body belonged to another man named Gore. However, as the Attorney General's statement indicates, the evidence at trial indicated that more than one person could have been involved in the assault on the victim. The evidence of a group involvement in the murderous assault means that the failure to find Williamson's semen in the victim does not eliminate him as a participant in her assault. He may be exonerated as a perpetrator of the sexual assault, but he is not necessarily exonerated as an accomplice. Compare *People* v. *Gholston* (Ill.App. 1998) 697 N.E.2d 415; *Mebane* v. *State* (Kan.App. 1995) 902 P.2d 494; Note, 62 Ohio L.J. 1195, 1241 fn.46; Nat'l Comm'n on the Future of DNA Evidence, Post Conviction Testing: Recommendations for Handling Requests, September 1999; NIJ Research Report, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, June 1996 (all discussing potentially inconclusive DNA results in cases involving multiple defendants).

84. Warren Douglas Manning—*State* v. *Manning,* 409 S.E.2d 372 (S.C. 1991). There were five trials in this case, including two convictions that were reversed and two mistrials, before Manning was acquitted. Manning was convicted of murdering a state trooper who had taken him into custody for driving with a suspended license. Manning first stated that the victim had released him with a warning ticket, but then explained that he escaped from the trooper's car when the trooper stopped another car. However, the trooper was shot with his own revolver and that revolver was seized in a barn behind Manning's residence. Other circumstantial evidence was also consistent with Manning's guilt. Manning was acquitted in his fifth trial based on a defense of reasonable doubt. Hence, his defense lawyer conceded in argument to the jury that "[i]f there wasn't any case against Warren Manning, then we wouldn't be here. But the law requires that the state prove him guilty beyond a reasonable doubt. Without that, the law says you cannot find him guilty." Associated Press, 9/30/99. Manning's acquittal on retrial does not mean that Manning was "actually innocent."

86. Steve Manning—*People* v. *Manning,* 695 N.E.2d 423 (Ill. 1998). The prosecution exercised its discretion not to retry Man-

ning after his conviction was reversed. The Illinois Supreme Court forbade the use of certain evidence including questionable informant testimony. However, the Illinois Supreme Court also excluded the victim's wife's hearsay testimony that the victim had warned her that if he was ever killed to tell the FBI that Manning killed him. Apparently, the victim had told his wife that Manning had "ripped him off for a lot of money" and he was going to get the money back. Thus, while legally inadmissible under state law, there was evidence that Manning had a motive to murder the victim. It was also "consolation" to the district attorney in not retrying the case that Manning, a former cop gone bad, was already serving two life sentences plus 100 years for kidnaping in Missouri. Chicago Tribune, 1/19/00.

88. Joseph N. Green, Jr.—*Green* v. *State,* 688 So.2d 301 (Fla. 1997). The prosecution's case in this robbery-murder was based on the victim's dying declaration, an eyewitness, and "circumstantial evidence that Green had the opportunity to kill" the victim. Green's conviction and death sentence were reversed because the prosecution improperly cross-examined a defense witness and because the trial court erroneously denied a suppression motion. On retrial, the critical eyewitness was found incompetent to testify. This eyewitness had given inconsistent and contradictory testimony. The trial court then dismissed the case because there was no physical evidence connecting Green to the murder. The trial court found that there was a reasonable doubt about Green's guilt and it was "possible" someone else had committed the crime. However, the victim's dying declaration describing her assailant was generally consistent with Green's description, i.e., a slim black man in his mid-20's. The victim also said the murderer fled toward the motel where Green resided. Green needed money. Furthermore, when Green was arrested, he gave inconsistent statements about his activities on the night of the murder although one of his alibis did receive some corroboration. St. Petersburg Times (12/29/99, 3/17/00.) Thus, while there may not be sufficient evidence of Green's guilt, the evidence hardly establishes his innocence.

The recent report of the Florida Commission on Capital Cases sheds additional information on this case. Prior to the first trial, the court suppressed evidence of gun power residue in the pockets of Green's clothing. Although the trial court had originally found the eyewitness competent to testify at the first trial, it reversed itself on retrial and found the witness incompetent. The prosecution reiterated that Green had "been given the benefit of the doubt", but that his innocence was not established since he had motive, opportunity, and problems with his alibi. Green's defense attorney actually attributed his client's acquittal at least partially to the "bad search warrant" served in the case. Since the search warrant was "bad", evidence of Green's guilt such as the gun residue in his pocket was never presented to the jury.

90. William Nieves—*Commonwealth* v. *Nieves,* 746 A.2d 1102 (Pa. 2000). This Hispanic defendant was convicted of murdering Eric McAiley due to a drug debt. As the police sped to the scene of the murder, a bearded Hispanic in a Cadillac pointed out where the murder occurred and drove away. A witness ultimately identified Nieves as the man who got out of a Cadillac and shot McAiley.

The witness also admitted that she initially failed to identify Nieves. McAiley's nephew testified that McAiley sold drugs for Nieves. Another witness testified that before the murder he overheard Nieves warn McAiley, "Better get me my fucking money, I'm not playing with you." Nieves did not testify at the guilt phase of his first trial because his lawyer erroneously advised him that he would be impeached with his prior record of firearms and drug trafficking offenses. Ultimately, Nieves did testify at his penalty phase. He admitted he was a "small-time drug dealer" who had only a few drug transactions with McAiley. Nieves' case was reversed because of his attorney's faulty advice about whether he would be impeached if he testified.

Nieves was acquitted on retrial. His retrial defense again impeached the eyewitness who identified Nieves with prior conflicting statements she had made, including that she had initially identified two thin black men and then a husky Hispanic. The witness denied identifying the assailant(s) as black men. Nieves is Hispanic, but not "husky." Another witness testified that he saw a black man shoot McAiley, but this witness' testimony was also rife with inconsistencies. The Philadelphia district attorney continues to maintain that Nieves is guilty. The Nieves case is not an example of a defendant who was found actually innocent, but of a defendant for which the prosecution could not prove guilt beyond a reasonable doubt. Associated Press (10/20/00, 5/14/01, 5/25/01).

92. Michael Graham.

93. Ronnie Burrell—The Louisiana Attorney General dismissed charges rather than retrying these two defendants after their convictions were vacated due to a witness recantation and the discovery of significant impeaching evidence of a jailhouse informant. The Louisiana Attorney General's decision was not based on "innocence," but on the lack of sufficient credible evidence to establish guilt. However, Graham's and Burrell's own counsel acknowledge that new evidence could result in reinstatement of the charges and they have instructed their clients not to discuss the case. Contrary to the DPIC summary, DNA played no role in this case. The case was not dismissed because Graham and Burrell have been established as "innocent," only because there was insufficient evidence of guilt. The local prosecutor, now retired, indicated that he would have tried the case again. Baton Rouge Advocate (3/20/01, 3/21/01, 3/30/02); Minneapolis-St. Paul Star Tribune (1/1/01).

94. Peter Limone—*Limone* v. *Massachusetts,* 408 U.S. 936 (1972). As with Lawyer Johnson, Limone was convicted and sentenced under Massachusetts' defunct, pre-1976 death penalty statute.

96. Joaquin Martinez—*Martinez* v. *State,* 261 So.2d 1074 (Fla. 2000). Spanish native Martinez was accused of murdering a couple at their home sometime between October 27, 1995 and October 30, 1995. One victim was shot and the other victim died of multiple stab wounds. There was no physical evidence of a forced entry, indicating that the victims knew their assailant. A phone list in the kitchen included a pager number for "Joe." After the police left several messages for "Joe," Martinez's ex-wife, Sloane, called and explained she had the pager. She advised the police of her suspicions that Martinez was involved in the murders. The detective listened to a phone conversation Martinez had with his ex-wife in which he

stated, "[T]his is something that I explained to you before, and that I am going to get the death penalty for what I did." When she asked him if he was referring to the murder, he cryptically replied, "No, I can't talk to you about it on the phone right now." Martinez's ex-wife Sloane then had a surreptitiously recorded conversation at her home during which Martinez made "several remarks that could be interpreted as incriminating." Martinez's girlfriend testified that Martinez went out on October 27 and returned with ill-fitting clothes, a swollen lip, and scraped knuckles. Another witness testified he saw Martinez on October 27 and that he looked like he had been in a fight. Three inmates testified to incriminating statements by Martinez. The prosecution relied primarily on Sloane's testimony and the surreptitious tape. Sloane testified about the contents of the taped conversations, Martinez's behavior, and other statements he had made to her as well.

Martinez's case was reversed because a police witness erroneously testified as to his opinion that Martinez was guilty. The case was returned for retrial and the prosecution suffered many of the problems that occur on retrial in terms of changes in the evidence. Due to the passage of time, a witness had died, another witness had refused to cooperate (apparently Martinez's girlfriend), and the third witness (Martinez's ex-wife Sloane) had recanted.

Furthermore, a major piece of prosecution evidence was excluded on retrial. At Martinez's first trial, the trial court overruled Martinez's objection that the incriminating tape of his conversation with ex-wife Sloane was unintelligible and incomplete. The trial court allowed the tape to be played while the jury read a transcript. On appeal, Martinez did not challenge the admission of the tape. However, several of the judges on the appeals court noted that the tape was of "poor quality and portions of the conversation are difficult to hear * * *" However, one concurring justice specifically stated that the tape recording was "sufficiently audible to be admitted * * *" In any event, even if portions of the tape were inaudible, Sloane Martinez could herself testify as to what was said during her incriminating conversation with Martinez. There seems to be no question that Martinez made potentially incriminating statements on the tape.

Nevertheless, on retrial and despite the appeals court indications that portions of the tape were audible, the trial court excluded the tape completely as inaudible.[11] Sloane Martinez now stated that she had lied about what her former husband had said. The tape was not available to contradict her. The prosecution chose not to call Sloane to testify and instead relied on a police officer to testify from memory about what he had heard when Martinez's incriminating conversation with Sloane. However, the officer had no independent recollection any more of the conversation and had to rely on a transcript of the recording. The jury's request to hear the actual tape was denied. Associated Press (6/6/01); St. Petersburg Times (6/7/01). Martinez's acquittal on retrial appears attributable

[11] The appeals court holding about the tape was not binding on the trial court. Thus, the trial court judge had the discretion on retrial to exclude the entire tape. The prosecution would not have been able to appeal the trial court's ruling. The Martinez acquittal could have boiled down to no more than a disagreement between the prosecution and the trial court about the audibility of a tape.

to a deterioration and gutting of the prosecution's evidence, not proof of innocence. Both the prosecution and the defense advised the Florida Commission on Capital Cases that the prosecution was unable to present the same evidence at Martinez's retrial.

97. Jeremy Sheets—*State* v. *Sheets,* 618 N.W.2d 117 (Neb. 2000). The appellate court decision explains that Sheets was convicted of a racially motivated murder of a young African American girl. The evidence of Sheets' guilt included the tape-recorded statements of an accomplice named Barnett, who had died prior to Sheets' trial. The Nebraska Supreme Court reversed the conviction because Sheets could not cross-examine the dead accomplice.

According to newspaper accounts, the prosecutor did not retry the case since he believed there was insufficient evidence to convict Sheets beyond a reasonable doubt, not because the prosecutor believed that Sheets was innocent. In fact, Sheets' arrest originally resulted from a tip based on Barnett's statements that he and Sheets had murdered the victim. The tipster then tape recorded statements by Barnett implicating Sheets as the murderer. Once again, there is no reason to doubt the reliability of this particular taped statement by Barnett since it occurred before Barnett's arrest. Sheets' own testimony that he did not buy a car involved in the murder until after the murder occurred was contradicted by other police testimony. Testimony was also presented that Sheets had threatened an African American neighbor and had a fascination with Nazism, including shaving his head and drawing swastikas.

Most significantly, Sheets later requested a refund of the monies deposited in the Victim's Compensation Fund on his behalf. The Nebraska Attorney General pointed out in denying Sheets' request that the reversal of Sheets' conviction is not even considered a "disposition of charges favorable" to the defendant unless the case is subsequently dismissed because the prosecution is convinced that the accused is innocent. Neb. Op. Atty. Gen. No. 01036; Omaha World Herald, 5/6/97, 6/13/01. Since the dismissal was not on the basis of innocence, Sheets' request for compensation was denied.

98. Charles Fain—As with Arizona, Idaho's statute is now invalidated under the recent decision in *Ring* v. *Arizona.* It is speculative as to whether a jury, as opposed to a judge, would have found Fain death eligible.

99. Juan Roberto Melendez—*Melendez* v. *State,* 498 So.2d 1258 (Fla. 1986); *Melendez* v. *State,* 612 So.2d 1366 (Fla. 1992); *Melendez* v. *Singletary,* 644 So.2d 983 (Fla. 1994); *Melendez* v. *State,* 718 So.2d 746 (Fla. 1998). Melendez was convicted of murdering a beauty salon owner in 1984. Melendez's conviction was based on the testimony of a friend John Berrien and of a David Falcon, who claimed Melendez confessed to him in jail. The defense relied on alibi and presented evidence that a third party named James had confessed to murdering the victim. The defense also impeached Falcon as a paid informant.

After his conviction, Melendez continued to attack the credibility of the prosecution's witnesses and to further support his defense that James actually committed the murder. Various witnesses testified as to incriminating statements by James. However, James never explicitly confessed to these witnesses or he otherwise gave

conflicting explanations for murdering the victim. His accounts of the murder also conflicted. Berrien partially recanted and it was revealed he had negotiated a deal for his testimony. However, none of these witnesses who provided this new information for Melendez were found to be credible.

Then, Melendez's original trial attorney suddenly discovered a long-forgotten transcript of a jailhouse confession by James. It was not explained why this transcript had not been used at trial. Apparently, according to this transcript, James had also confessed to a state investigator. The suddenly discovered transcript and the Berrien recantation coupled with the belated revelation of a deal for his testimony were sufficient for a court to order a new trial. However, by this time, James and Falcon were both dead. Thus, there was no longer any opportunity for the prosecution to explore and impeach their conflicting accounts. On that basis, although the prosecution continued to believe that Melendez was the murderer, the prosecution decided there was insufficient evidence for a new trial and dismissed the case. Sun Herald, 1/6/02; The Guardian, 1/5/02; St. Petersburg Times, 1/4/02, 1/5/02; Tampa Tribune, 1/3/02; 1/4/02.

101. Thomas H. Kimbell—*Commonwealth* v. *Kimbell,* 759 A.2d 256 (Pa. 2000). Kimbell's acquittal on retrial is another example of a case in which the prosecution could not prove guilt beyond a reasonable doubt, but the acquittal did not establish Kimbell's innocence.

Kimbell's defense at his first trial was that another member of the victim's family, probably the husband, committed the murder. The victim's mother had testified that she had been talking on the telephone with her daughter shortly before the murders (between two and three in the afternoon) when her daughter said she had to go because "someone" had pulled into the driveway (possibly the murderer). Previously, the mother had told the police that her daughter had said that her husband had driven into the driveway. The Pennsylvania Supreme Court reversed Kimbell's conviction because Kimbell's lawyer was not allowed to impeach the mother with her prior inconsistent statement that her daughter had specifically said that her husband (not just "someone") was arriving at the house. The court agreed that this testimony could have created a reasonable doubt about Kimbell's guilt.

Despite the acquittal on retrial, the prosecution maintained that Kimbell was the murderer and noted that "the more time that elapses between a crime and a trial, the harder it can be to obtain a conviction." Lost in the shuffle was evidence casting doubt on the credibility of the mother's testimony and recollection in general, given her understandable grief about her daughter's murder. At the first trial, a psychiatrist had testified that the mother's testimony "could be affected by the impact that the slayings have had on her." Indeed, when the mother testified at the first trial, she repeatedly broke down sobbing and said she had talked to her daughter a "whole bunch" and that the conversations were "mixed up together". She had also told investigators before that her daughter had hung up to make dinner, but she could not remember that previous statement. Furthermore, another witness had testified that he did stop briefly at the victims' home at around 2:00 p.m. to

make a phone call and then left (although this person could have been the person whom the daughter referred to in the phone call with her mother, he is apparently not considered a suspect in the case). When Kimbell was interviewed by the police he provided them information about the murder that he claimed he overheard on police scanners, but this information had not been broadcast on the police radios.

At the first trial, a friend of Kimbell's testified that Kimbell had pointed at the victims' home after the murders and admitted killing the people. However, this witness died after the first trial. Other witnesses had identified Kimbell as being near the victims' home on the day of the murder and other witnesses had testified to incriminating admissions by Kimbell. Pittsburgh Post-Gazette, 5/4/02; 5/6/98, 5/2/98; 2/4/97; Associated Press, 5/6/98. While there might have been "reasonable doubt" about Kimbell's guilt, the available information does not exonerate him.

102. Larry Osborne—*Osborne* v. *Commonwealth,* 43 S.W.3d 234 (Ky.2001). Osborne was convicted of breaking into the home of an elderly couple, bludgeoning them, and burning their house down. Osborne was acquitted on retrial due to reasonable doubt, but not because the evidence established that he was not the actual culprit. A friend and potential accomplice of Osborne's implicated Osborne in a grand jury proceeding. However, this witness then died by drowning before the first trial. Instead, his grand jury testimony was read at Osborne's first trial. The conviction was reversed because of the admission of the dead witnesses' grand jury testimony—since there was no opportunity for Osborne to cross-examine the witness. On retrial, without the grand jury testimony of the dead witness, the prosecution had insufficient evidence to convince the jury of Osborne's guilt beyond a reasonable doubt. Nevertheless, there was evidence that Osborne and his mother staged a phony "911" call to the police in order to divert police attention to another potential perpetrator. There was also a dispute whether Osborne possessed a set of wire cutters removed from the victims' home. Louisville Courier-Journal (8/2/02; 8/3/02); Associated Press (8/2/02).

D. *UNITED STATES* V. *QUINONES*

On July 1, 2002, in the case of *United States* v. *Quinones,* 205 F.Supp.2d 256 (S.D.N.Y. 2002) the United States District Court for the Southern District of New York declared that the Federal Death Penalty Act unconstitutional. The federal court based its decision in part on the DPIC List. The federal court itself analyzed the List and applied undefined "conservative criteria" to conclude that 40 defendants on the List were released on grounds indicating "factual innocence." However, 23 of the names on the *Quinones*' List are names which this study submits that should be eliminated from the DPIC List. If the *Quinones* court's analysis of the DPIC List is combined with this critique's analysis, only 17 defendants should be on the List, not the 102 defendants currently listed.

IMPLICATIONS AND CONCLUSION

The DPIC engaged in a "rush to judgment" to compile a list of allegedly innocent defendants released from Death Row. It is tragic whenever an innocent person is convicted and sentenced to death. Obviously, it is a very serious charge to claim that 102 innocent defendants have suffered such an unjust fate. While recent developments such as DNA have revealed "wrongful convictions," the evidence does not support other claims of such miscarriages under our current capital punishment system.

In compiling its List, the DPIC has too often relied on inexact standards such as acquittals on retrial, dismissals by the prosecution, and reversals for legal insufficiency of evidence to exonerate released death row inmates. However, there is a big difference between "reasonable doubt" and the kind of "wrong person mistake" that was the genesis of the original Stanford study. Moreover, the DPIC has used old cases in which the defendants did not receive the modern protections that "probably reduce the likelihood of executing the innocent."

No reasonable person would be so dishonest as to say that no actually innocent person has ever been convicted and sentenced to death. The system has always anticipated potential factual error and has provided remedies for wrongly convicted defendants—that is why there is a more elaborate post-*Furman* trial process, an appellate process, state and federal habeas corpus processes, and clemency. The development in DNA technology is now giving birth to new post-conviction procedures in many of the states designed to give inmates the opportunity to have DNA testing that was not available at the time of their trials. Moreover, our open society promotes ongoing inquiry and investigation into legitimate claims of injustice.

However, it is irresponsible to misrepresent the extent and dimensions of this phenomenon. "It is important to preserve the distinction between acquittal and innocence, which is regularly obfuscated in news media headlines. When acquittal is interpreted as a finding of innocence, the public is led to believe that a guiltless person has been prosecuted for political or corrupt reasons." Schwartz, at 154–155. The DPIC's gimmicky and superficial List falsely inflates the problem of wrongful convictions in order to skew the public's opinion about capital punishment.

The Cooley article includes the dramatic, but meaningless, statistical conclusion that "one death row inmate is released because of innocence for every five inmates executed." Cooley, at 916. Of course, comparing an execution rate with a "sentenced to death" rate is mixing apples and oranges since there is no claim that any innocent defendants have actually been executed—being sentenced to death is not the same as then being executed. Yet, the recent book by Barry Scheck and Peter Neufeld, Actual Innocence (2000), updated this hysterical ratio to assert that one innocent inmate is being released for every seven inmates executed. This contrived "statistic" has even made its way to the Senate floor. 148 Congressional Record S889–92 (2/15/02). The "wide use" of this dubious "new measure for evaluating the accuracy of the death penalty * * *" is cited as one of the events most responsible for

"igniting the current capital punishment debate." 33 Columbia Human Rights Law Review 527 (2002); 63 Ohio St. Law Journal 343 (2002).

Of course, the valid comparison is between the total number of death sentences and the number of innocent Death Row inmates actually released from Death Row. The most recent available statistics reveal that 6,930 death sentences were imposed between 1973 and 2000.[12] Thus, even under the DPIC's own questionable estimate that 102 innocent defendants have been sentenced to death—only 1.4% of the inmates sentenced to death were released because of innocence. Of course, given the analysis in this paper, the DPIC's estimate of 102 innocent inmates is artificially inflated. If the 68 cases analyzed in this paper are removed from the DPIC List, then the most that can be said is that between 1973 and 2000, there were 34 wrongly convicted defendants, i.e. less than ½ of 1% or 0.4% of the inmates sentenced to death were actually innocent.

The analysis of the federal court opinion in *Quinones* yields similar results. As noted, that decision held that 40 names on the DPIC List were released for reasons indicating "actual innocence." This would mean that approximately ½ of 1% of the 6,930 inmates sentenced to death between 1973 and 2000 were "actually innocent." When the *Quinones* analysis and this critique are combined to remove all but 17 names from the List, the result is that 2/10 of 1% or 0.2% of the 6,930 prisoners were released on actual innocence grounds.

The significance of these figures may be appreciated when contrasted with the aforementioned hyperbolic ratio used by the authors of the Cooley study and echoed in Actual Innocence and in the halls of Congress which fallaciously compares executions and exonerations. That 7:1 ratio is a nonsensical public relations statistic that creates the misimpression of an epidemic of wrongful convictions. The facts actually show that for every 6,930 death sentences imposed, 102 innocent defendants were sentenced to death or more likely it is that for every 6,930 death sentences imposed only 40 or 34 or 17 innocent defendants have been sentenced to death. In other words, the relative number of innocent defendants sentenced to death appears to be infinitesimal.

The public may or may not take comfort from these estimates. The microscopic percentage of defendants who may have been wrongly convicted and sentenced to death can be considered a testament to the accuracy and reliability of our modern capital punishment system in filtering out and punishing the actual perpetrators of our most heinous crimes. The United States Supreme Court continues to monitor and modify this system.

However, if a person believes that the death penalty should be abolished if there is any risk at all that an innocent person could be sentenced to death, then that person is justified in advocating the abolition of capital punishment. No criminal justice system can promise that kind of foolproof perfection—although the minute number of cases in which an innocent person may have been sentenced to death in this country approaches that absolute standard.

[12] The total number of death sentences since 2000 is not yet available.

However, the inherent risk of sentencing an innocent person to death and the still unrealized possibility that an innocent person may actually be executed cannot be considered in isolation. Counterbalancing the concern that even one innocent person may be executed is the question of whether the death penalty saves innocent lives by deterring potential murderers.[13] Now, for the first time, various academic and statistical reports have been published that examine the effect of capital punishment during this modern post-*Furman* period of death penalty jurisprudence. A recent study by the Emory University Department of Economics concludes that capital punishment as it is currently administered has a strong deterrent effect, saving 8–28 lives per execution. Another study conducted by School of Business & Public Adminstration at the University of Houston-Clear Lake and published in Applied Economics shows that homicides increase during periods when there are no executions and decrease during periods when executions are occurring. Economists with the University of Colorado at Denver studied the impact of capital punishment during the years 1977 through 1997. The preliminary results of the Colorado study indicate a deterrence effect of 5–6 fewer homicides per execution. Finally, statistical evidence has been cited to argue that the homicide rates have fallen more steadily and steeply in states that have conducted executions as opposed to states that do not conduct executions or do not have capital punishment. The Weekly Standard, 8/13/01. Inevitably (and properly), the debate over deterrence and the validity of these new studies will continue.[14]

Deterrence, of course, involves more than numbers. As Senator Dianne Feinstein (D.–Cal.) explained to the Senate Judiciary Committee in 1993:

> In the 1960's, I was appointed to one of the term-setting and paroling authorities and sat on some 5,000 cases of women who were convicted of felonies in the State of California. I remember one woman who came before me because she was convicted of robbery in the first degree, and I noticed on what is called the granny sheet that she had a weapon, but it was unloaded. I asked her the question why was the gun unloaded and she said, so I wouldn't panic, kill somebody and get the death penalty.
>
> That case went by and I didn't think too much of it at the time. I read a lot of books that said the death penalty was not a deterrent. Then in the 1970's, I walked into a mom-and-pop grocery store just after the proprietor, his

[13] By focusing on the deterrence aspects of capital punishment, this writer is not ignoring that for many people there are reasons for supporting and opposing the death penalty that are totally irrelevant to the deterrence issue.

[14] Indeed the Emory study notes potential problems with some of these other studies. However, the objectivity of some of these studies is underscored by the ambivalence expressed about the death penalty by several of the academicians who compiled the information. For instance, the Emory study warns: "[D]eterrence reflects social benefits associated with the death penalty, but one should also weigh in the corresponding social costs. These include the regret associated with the irreversible decision to execute an innocent person. Moreover, issues such as the possible unfairness of the justice system and discrimination need to be considered when making a social decision regarding capital punishment." The Colorado working paper concludes with a similar caveat about other "significant issues" including racial discrimination in the imposition of the death penalty and the pardon process. "Given these concerns, a stand for or against capital punishment should be taken with caution." Thus, the reserachers who have prepared these most recent deterrence studies do not appear predisposed to supporting the death penalty.

> wife and dog had been shot. People in real life don't die the way they do on television. There was brain matter on the ceiling, on the canned goods. It was a terrible, terrible scene of carnage.
>
> I came to remember that woman because by then California had done away with the death penalty. I came to remember the woman who said to me in the 1960's, the gun was unloaded so I wouldn't panic and kill someone, and suddenly the death penalty came to have new meaning to me as a deterrent.

Statement of the Honorable Dianne Feinstein, Senator from California, Hearing Before the Senate Judiciary Committee on S. 221 (April 1, 1993).[15]

Under any analysis, innocent lives are at stake. On the one hand, there is the remote prospect that an innocent person may be executed despite the most elaborate, protracted, and sympathetic legal review procedures in the world. On the other, there is the possibility of innocent people horribly and brutally murdered in the streets and in their homes with no legal review process at all. When weighing these choices, the public deserves information that places the innocence question in proper perspective. The DPIC List of allegedly innocent defendants released from Death Row fails to provide that legitimate perspective.

POSTSCRIPT: ACTUALLY GUILTY

Recent international interest has focused on the case of James Hanratty, one of the last murderers to be executed in England. Hanratty was hung in 1962 for the notorious "A–6 Murder". He was convicted of murdering Michael Gregsten and also raping/shooting Gregsten's girlfriend, Valerie Storie. Despite some alleged confusion about Storie's identification of him as the perpetrator, Hanratty was convicted after the longest murder trial in English history. After Hanratty was hung, another man confessed to the murder, but then recanted the confession. Hanratty's case became a cause celebre and was part of the final impetus leading to the abolition of the death penalty in England in 1969. Bailey, Hangmen of England (1992 Barnes & Noble ed.) at 190–191. The late Beatle John Lennon mourned Hanratty as a victim of "class war". However, the continuing efforts of Hanratty's supporters to "clear" his name have now come to naught. DNA evidence from Ms. Storie's underpants established Hanratty's guilt and eliminated the other alleged perpetrator who had "confessed" after Hanratty's execution. In dismissing the Hanratty family's case, the English court graciously "commend[ed] the Hanratty family for the manner in which they have logically but mistakenly pursued their long campaign to establish James Hanratty's innocence." *Regina* v. *James Hanratty Deceased by his Brother Michael Hanratty,* 2002 WL

[15] Moreover, case law reveals examples of the ineffectiveness of imprisonment as a deterrent to murder. See, e.g. *Campbell* v. *Kincheloe,* 829 F.2d 1453 (9th Cir. 1987) (prison escapee commits triple murder of witnesses who testified against him); *Hernandez* v. *Johnson,* 108 F.3d 554 (5th Cir. 1997) (twice-convicted murderer murders jail guard during abortive jail escape); *People* v. *Allen,* 42 Cal. 3d 1222 (Cal. 1986) (murderer serving life sentence convicted of murdering witness on the outside, murder of two bystanders, and conspiracy to murder seven other prior witnesses).

499035 (May 10, 2002). Since the abolition of the death penalty, the rate of unlawful killings in Britain has soared. McKinstry, All my Life I have Been Passionately Opposed to the Death Penalty * * *. This is Why I have Changed My Mind, Daily Mail, 3/13/02. "All of us who regret the transformation of our country from a 'relative oasis in violent world' to a society where crimes like the A6 murder are almost daily occurrences, are surely entitled to an apology." Hanratty Deserved to Die, The Spectator (May 11, 2002) at 24–25.