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At about the same time that the United States Supreme Court was deciding that state time limits for requesting a new trial based on newly discovered evidence did not violate due process, scientific evidence was emerging that should force courts to rethink the rigid application of limitation periods in serious criminal cases.[1] The purpose of this essay is to explore that phenomenon and suggest methods by which appellate courts may approach its fair resolution.

I. *HERRERA V. COLLINS*

Six years ago, in *Herrera v. Collins*,[2] the United States Supreme Court held that due process was not violated when a state refused to consider newly discovered evidence in a capital case eight years after conviction. The case arose in Texas, where state law imposed a thirty-day time limit for filing motions for new trial based on newly discovered evidence. The newly

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1. The recent revelation that the guilt of convicted defendants, including some on death row, has been refuted or substantially questioned by newly-available DNA test results has generated greater public awareness of the potential for conviction of the innocent by a criminal justice system subject to human error. *See, e.g.*, JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (detailing ten cases of convicted defendants ultimately released due to discovery of evidence of their actual innocence); Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1999, at 66, 68 (noting that more than eighty death row inmates have been freed from prison since death penalty reinstated in 1976 based on evidence of innocence, a number equivalent to 15% of those executed in the same period); Margaret Carlson, *Death, Be Not Proud: Nothing is as Certain as the Pace of Executions In Bush's Texas*, TIME, Feb. 21, 2000, at 38 (noting "[t]hirteen people scheduled for death in Illinois had been exonerated" in commenting on moratorium on executions imposed by Illinois Governor George Ryan).

2. 506 U.S. 390 (1993).

discovered evidence was affidavits of witnesses which, if believed, established the actual innocence of the condemned defendant.

Emphasizing that due process "does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person,"[3] the Court denied Herrera relief from the time limit imposed by Texas law. Such motions, filed under state law, were grounded in long tradition that required their filing within a short period of time after trial. Therefore, the Texas time limit did not transgress principles of fundamental fairness and justice.[4]

II. MOTIONS FOR NEW TRIAL[5]

At the time *Herrera* was decided, only nine states did not limit the time within which a new trial motion could be filed.[6] Thus, the majority of the states imposed time limits for the filing of a motion for new trial varying between ten days and three years.[7] This approach is consistent with the historical disfavoring of motions for new trials, particularly those based on newly discovered evidence.

The historical aversion to motions for new trial is justified by the motion's limited purpose. A motion for new trial provides the trial judge the opportunity to correct legal errors that occurred during the trial. Because the grounds for the motion in

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3. *Id.* at 399 (quoting Patterson v. New York, 432 U.S. 197, 208 (1977)).

4. *Id.* at 411.

5. While this essay focuses on issues relative to limitation periods for motions for new trials, its arguments are also applicable to statutes of limitations for the filing of post-conviction and habeas petitions.

6. Those states were California, Colorado, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, and West Virginia. Georgia's 30-day time limit can be extended as can Idaho's 14-day limit. Oregon's 5-day limit, Iowa's 45-day limit, Ohio's 120-day limit, and Kentucky's one year limit can each be waived.

7. Sixteen states have limits of 60 days or less. These states are Alabama, Arizona, Arkansas, Florida, Hawaii, Illinois, Indiana, Minnesota, Missouri, Montana, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. One state, Mississippi, requires that the filing be made during the term in which the judgment is rendered. Seventeen states and the District of Columbia have filing periods between one and three years. These states are Alaska, Connecticut, Delaware, Kansas, Louisiana, Maine, Maryland, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, Vermont, Washington, and Wyoming.

most cases are what transpired during trial and therefore, is known to counsel at the end of trial, no need exists for any substantial delay in filing the motion.

As is true of all limitation periods, policy reasons have traditionally supported the strict application of deadlines for the filing of motions for new trial. In the criminal context, the most pressing of those policy reasons is the government's legitimate interest in finality. After trial resulting in a conviction, the presumption of innocence has dissolved and been replaced with a presumption of guilt. While the convicted may have the right to meaningful appellate review or a new trial if certain errors have occurred, prolonging the time period in which those events transpire fulfills no legitimate individual interest and disserves the important interest in the finality of judgments. Additionally, the government has a legitimate interest in carrying out punishment in order to promote respect for the law and its procedures.

Other policy considerations favoring the strict application of limitation periods are more applicable in the civil context, but are nonetheless instructive. Limitation periods promote accurate and expeditious fact finding while witnesses' memories are fresh and evidence is available. They also alleviate surprise and encourage parties to be diligent about pressing their rights.[8]

Despite the importance of these policy considerations, not all motions for new trial are based solely on events that transpired during trial, easily presented within days of the rendering of the verdict. Some, for example, involve later discoveries of improprieties, such as the use of perjured testimony or the suppression of exculpatory evidence.[9] Still other motions for new trial may be based, not on what happened in the courtroom nor on later discoveries of trial improprieties, but rather on the discovery of new evidence that might have affected the determination of guilt.

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8. United States v. Kubrick, 444 U.S. 111, 117 (1979); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944).

9. In these two particular contexts, the Supreme Court has responded to the unfairness that would result if the presentation of the issue were barred by time limitations and has found both the use of perjured testimony and the withholding of exculpatory evidence to violate the due process clause. Mooney v. Holohan, 294 U.S. 103, 112 (1935) (perjured testimony); Brady v. Maryland, 373 U.S. 83, 87 (1963) (exculpatory evidence).

III. MOTIONS FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

Though difficult to accomplish, a motion for new trial based on newly discovered evidence will be granted if the new evidence is discovered *after* trial, the defendant by exercise of due diligence *could not have* discovered the evidence during trial, the evidence is material and is not merely cumulative or impeaching evidence, and most critically, the evidence would probably produce a different verdict if offered in a new trial.[10] For new trial motions based on newly discovered evidence, strict time limits are also imposed, based upon the same policy considerations that support limitation periods in general. While the grounds for the motion may be unknown for some time, so that a party could not legitimately be accused of "sleeping on his or her rights," the other policy considerations of finality and accurate and expeditious fact finding, on balance, tip the scales. Thus, motions for new trial based on newly discovered evidence are said to be disfavored with the burden for establishing entitlement resting on the defendant and said to be far greater than the burden on a defendant moving for new trial on other grounds.

Notably, the policy considerations supporting strict adherence to limitation periods was among the reasons supporting the Court's decision in *Herrera*.[11] Despite Herrera's claim that he was not guilty and his offer of testimony to prove his innocence, the Court observed that a later determination of guilt or innocence would not likely be more "exact" given that the "erosion of memory and dispersion of witnesses . . . diminish the chances of a reliable criminal adjudication."[12] But

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10. This general description of the grounds for a new trial based on newly discovered evidence is consistent, for example, with the federal rules approach in both the civil and criminal context. FED. R. CRIM. P. 33 (two-year limitation period for newly discovered evidence); FED. R. CIV. P. 59, 60(b)(one-year limitation period for newly discovered evidence).

11. It is, of course, recognized that the case was a habeas corpus case in which issues of finality are much more pronounced than they are at the motion for new trial phase of a case. Additionally, and as obvious as the first caveat, habeas courts ensure only that the Constitution is not violated and do not sit to correct issues of fact.

12. Herrera v. Collins, 506 U.S. 390, 403-04 (quoting McClesky v. Zant, 499 U.S. 467, 491 (1991)); *see* Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986)(plurality opinion).

what if the evidence that the court is urged to consider on a motion for new trial does not involve eroded memories or dispersed witnesses, but is instead described as exacting and most reliable? What if it consists of evidence that does not change over time, that cannot be altered with a vigorous cross-examination, that will establish the same fact twenty years from judgment as it would have at the time of judgment? What if the evidence is not newly discovered evidence, but newly available evidence due to the advance of technology?

Further, should courts apply the same test to newly available evidence as is applied to newly discovered evidence, particularly when this evidence, although highly reliable, cannot meet the requirements of the test? It is, after all, not newly discovered. It existed in some form at the time of trial, but is only now capable of being converted into probative evidence. It is not newly discovered, but newly available as a result of technological advances. And finally, should requests for relief based on this newly available evidence be subjected to the harsh time limitations generally applicable to newly discovered evidence?

IV. APPLICATION TO NEWLY AVAILABLE DNA EVIDENCE

The technological advances that have produced exacting DNA evidence pose all of these problems. At about the time the Supreme Court was affirming the denial of Herrera's claim, courts were grappling with the admissibility of so-called new DNA evidence. In the early years of DNA testing, the testing provided some narrowing of suspects, but often yielded erroneous results. Courts concerned with the reliability of DNA evidence often excluded it. In the last ten years, however, DNA technology has significantly advanced to more discriminating methods. "The introduction of DNA profiling has revolutionized forensic science and the criminal justice system [and gives] courts a means of identifying . . . perpetrators . . . with a high degree of confidence."[13]

Modern-day DNA evidence as such is much more capable

13. Walter Rowe, *Commentary*, *in* CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xv (1996).

of definitively excluding potential suspects and exonerating wrongfully convicted defendants.[14] But before the evidence can play this significant role in assuring a fundamentally fair criminal justice system, it must be admissible. Given the long-standing disfavor of motions for new trial based on newly discovered evidence, the strict proof requirements placed upon the defendant, and the limited time periods available for raising such claims, a substantial likelihood exists that defendants who have been wrongfully convicted, but whose time periods for filing for new trials based on newly discovered evidence have lapsed, will not be able to establish their innocence in court.

Thus the enthusiastic welcome of DNA technology as a means of convicting the guilty and exonerating the innocent "by science" is not without challenges for America's courts. No one can seriously question that reliable methods for excluding potential suspects as well as identifying perpetrators should be embraced by the courts. But what about the thousands of cases in which the courts have already acted, in which the strict time limits for motions for new trial or for post-conviction or habeas petitions have long since passed? Will courts allow age-old precepts of appellate review to forestall efforts of exoneration brought belatedly by the wrongfully convicted?

The challenge of how to deal with newly available evidence will largely fall on the appellate courts. The strict time periods for filing motions for new trial based on newly discovered evidence in most jurisdictions will deny the already-convicted defendant the opportunity to establish innocence. Routinely, and correctly perhaps, the trial courts will dismiss time-barred motions or petitions based upon limitation periods. The lower court will have determined when the limitations period began to run, usually on the date of verdict or judgment, and when the motion or petition was filed. Based on those factual findings, the trial court will have concluded, by simple mathematics, that the motion is beyond the limitations period

14. According to Federal Bureau of Investigation officials, twenty-five percent of the suspects have been excluded by forensic DNA testing every year since 1989 in sexual assault cases referred to the FBI and in which DNA results could be gathered. Private labs, according to the National Institute of Justice, have noted about a twenty-six percent exclusion rate during the same time period. Peter Neufeld & Barry Scheck, *Commentary*, *in* CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii (1996).

and therefore, barred. The case will come to the appellate court with a presumption of correctness as to the trial judge's factual findings, allowing reversal only upon an offense of discretion. Undoubtedly, a trial judge who dismisses a late-filed petition has not abused his or her discretion. Thus, the appellate court will be in a perfect posture to summarily affirm the dismissal.

Or perhaps, the trial court not faced with a limitations problem will find that DNA evidence was *available* at the time of the trial. After all, the fluid from which the DNA sample could have been derived was left at the scene. Thus, a trial judge could find that the evidence was not newly discovered because it was in existence before the trial. Again, this factual finding would bear the presumption of correction on appeal, barring the appellate court from offering relief unless the finding represented an abuse of discretion.

The real issue that must be resolved will then rest with the appellate courts. Is the newly discovered evidence formulation the correct one when the evidence is newly available DNA profiling evidence? Because of the trial court's obligation to find facts and apply law, it is unlikely, and perhaps inappropriate, that the matter be resolved at that level. When properly presented, however, the appellate court must resolve these issues. Should evidence in existence at the time of trial, but not capable at that time of yielding probative evidence, be subjected to the newly discovered evidence test? Should that same evidence be barred due to limitation periods when that evidence can today, as a result of advancing technology, exonerate the convicted?

V. ANALOGOUS RESPONSES

Arguably, motions for new trial based on newly available DNA evidence should not be subjected to the strictures of the newly discovered evidence rule. The purposes of the strictness—finality, fairness, and accurate and expeditious disposition of claims—are not met by suppressing newly available DNA evidence of actual innocence. Additionally, allowing the evidence does not defeat those purposes. The fear of failing memories and lost evidence that prompts the strict time limits is inapplicable in the DNA context. The only

governmental interest that is served by adhering to the demanding requirements is finality. Surely finality and quickness must take a back seat to fairness and accuracy. The challenge for appellate courts is to determine how to assure that fundamental fairness prevails over procedural rigidity.

Fortunately, appellate judges need not write on a blank slate. Courts have responded creatively in other legal contexts when strict adherence to time limits seemed to beget unfairness. One of the earliest examples of judicial response arose in a worker's injury case in which the plaintiff had contacted silicosis.[15] Though a strict application of the statute of limitations had resulted in the dismissal of plaintiff's case, the United States Supreme Court construed the accrual of the claim to be at the time of manifestation and diagnosis of the disease that was much later than the time of contact[16] This manipulation of limitation periods, now commonly known as the delayed discovery rule, has been extended to civil cases involving professional liability, products liability, and other torts.[17]

Most recently, the application of the delayed discovery rule has been urged in civil and criminal cases against the perpetrators of sexual offenses.[18] In the civil context, application of the delayed discovery rule is justified when injuries resulting from child sexual offenses do not fully manifest until adulthood or when, as a result of repressed memory or other psychological disorders caused by the sexual abuse, the victim is incapable of recognizing the full nature of the injuries until much later.[19] Thus, the limitation period should accrue then, rather than at the time of the offenses.

In criminal cases, the concerns are different. The statutes of limitations are intended to limit cases to a time period in which

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15. Urie v. Thompson, 337 U.S. 163 (1949).

16. *Id.* at 170. Plaintiff in the words of the Court was in "blameless ignorance" of his injury until it manifested itself and was diagnosed. *Id.*

17. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 120, at 889-96 (5th ed. 1984).

18. For the purposes of this writing, sexual offenses include sexual penetration or sexual contact against a child or adult.

19. The delayed discovery doctrine has historically only been used to toll statutes of limitations for plaintiffs under the theory that a balance of the interests of a blameless plaintiff (who misses the otherwise applicable statute of limitations) and the interests of a defendant in not having to defend against a civil action weighs in favor of the plaintiff.

the evidence is fresh and to encourage prosecutors, police, and the courts to proceed in a timely manner so as not to affect defendants' ability to mount a defense.[20] Additionally, the limitation periods protect the one-time criminal who has become rehabilitated from a continual torment regarding whether the one transgression will result in a charge. Thus, in a criminal case, a limitation period is to be "liberally interpreted in favor of repose"[21] and begins when "the crime is complete."[22]

Nevertheless, some courts have stretched limitation periods in criminal sexual offenses cases by construing the crimes as "continuing" in order to toll the statute; others have tolled the statute under the theory that the threat or coercion accompanying the criminal act served to conceal the crime.[23] In other efforts to assure the prosecution of those accused of sexual offenses, legislatures have acted to either extend the time period or provide for tolling of the statute under certain circumstances.[24]

Thus, it is clear that courts (and legislatures) have creatively responded to harsh limitation periods in circumstances when response seemed essential to accomplishing justice, at least justice as perceived by the civil plaintiff and victims of sexual offenses. No less response is due when the harsh limitation period extinguishes the ability of a convicted person sentenced to life imprisonment or death to establish actual innocence.

VI. SOME RESPONSIBLE RESPONSES

A few state appellate courts confronted with the issue of newly available DNA evidence have interpreted limitation periods to provide for tolling in order to avoid a miscarriage of

20. *See* Toussie v. United States, 397 U.S. 112, 114-15 (1970).

21. United States v. Scharton, 285 U.S. 518, 522 (1932).

22. Pendergast v. United States, 317 U.S. 412, 418 (1943).

23. *See generally* Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 143-54 (1993).

24. The most common circumstance is the acquiring of the age of majority. Other circumstances commonly used by legislatures to toll the statute are those in which the nature of the abuse is not discovered until a later time or is concealed due to fear, threat, or coercion.

justice.[25] Others have refused to do so. [26] At least one court has found a state constitutional basis for allowing a defendant a hearing on a late claim of actual innocence, although relief was denied in the case in which the right was recognized.[27] Thus, one option for appellate courts is to construe accrual to occur upon discovery that DNA evidence was secured in the case and remains available. Under this approach, defendants who were convicted before the more exacting DNA methods were available would have a reasonable time after learning that DNA evidence was secured in their case to file a motion for consideration of the evidence. Because defendants who protest their innocence would welcome the opportunity to exonerate themselves, little delay in learning of the existence of DNA evidence should be expected. Another approach would be to determine when the exacting methods of testing became available in the jurisdiction and to make that the date of accrual.

In other states, the legislature has reacted, often with court prompting, to create extended limitation periods in forensic

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25. *See, e.g.*, New York v. Callace, 573 N.Y.S.2d 137, 139 (Suffolk County Ct. 1991) (post-conviction court, holding that newly-available DNA evidence would fit within a statutory definition of newly discovered evidence); In re Dabbs, 570 N.Y.S.2d 765, 768 (Sup. Ct. 1990) (granting motion for discovery in post-conviction process to permit DNA testing).

Similarly, in *New Jersey* v. *Thomas*, 586 A.2d 250, 252 (N.J. Super. Ct. App. Div. 1991), the court held that although defense counsel had not moved for DNA testing prior to trial, this decision did not amount to procedural default because DNA evidence had not previously been ruled admissible in New Jersey and the defendant was unable to bear the cost of testing. Where the prosecution's case was weak and defendant advanced a credible alibi at trial, the court noted the the potential exculpatory value of newly-available scientific evidence and concluded:

> And we can conceive of no greater injustice, when that evidence is available, of depriving a convicted defendant of access to it. The prosecutor, the court, and the judicial system have an obligation to protect the innocent which is no less fundamental than the obligation to punish the guilty.

Id. at 252; *see also* Sewell v. Indiana, 592 N.E.2d 705, 708 (Ind. Ct. App. 1992) (holding in post-conviction proceedings that defendant was entitled to discovery of the "rape kit" in the State's possession to permit DNA testing because prosecution's case at trial "weak" or susceptible to reasonable doubt and critical evidence establishing guilt or innocence could be made available to resolve claims of wrongful conviction).

26. Virginia, which has a twenty-one day limitations period for motions for new trial executed James O'Dell in July 1997, despite his claims of actual innocence after the Governor rejected his request for DNA testing. Pope John Paul II, Mother Teresa, and the president of Italy had joined those requesting that the test be done.

27. Graham v. Texas Board of Pardons & Paroles, 913 S.W.2d 745, 751 (Tex. Ct. App. 1996) (holding that "Graham's right to a due course of law hearing on his claim of actual innocence has been satisfied by the habeas corpus procedure").

testing cases.[28] Because appellate courts most often draft their own procedural rules, modified rules extending limitation periods in cases involving newly available DNA evidence could be proposed and adopted.[29] If the procedural requirements are statutory, courts could suggest appropriate statutory amendments.

While some courts have preferred to leave the issue to the attorney general, reopening cases upon agreement by the prosecution, to do so shirks a judge's responsibility to "act at all times in a manner that promotes public confidence in the integrity . . . of the judiciary."[30]

VII. CONCLUSION

Appellate judges faced with the appeals of dismissals of late-filed motions for new trial based on newly available DNA evidence have an obligation to assess whether adherence to long-standing principles applicable to such motions is appropriate when the evidence is not newly discovered in the traditional sense, but rather newly available as a result of recent technological advances. In those cases in which the evidence could actually exonerate a wrongfully convicted defendant, strict

28. Georgia statutorily allows for the filing of a motion for new trial after the expiration of the thirty-day time period if some good cause is shown why the motion was not made during the time period. GA. CODE ANN. § 5-5-41 (1999). Even when a previous motion has been made, a late motion will be entertained if it is "extraordinary," which particularly applies to "events that do not ordinarily occur in the transaction of human affairs." Cade v. Georgia, 129 S.E.2d 405, 406 (Ga. Ct. App. 1962). New York has a forensic testing statute for convictions occurring before January 1, 1996, which allows DNA testing if the court determines that a "reasonable probability that the verdict would have been more favorable to the defendant" exists. N.Y. CRIM. PROC. LAW § 440.30 (McKinney 1999). The New York courts, however, have imposed a due diligence requirement for filing under the statute. *See* New York v. Kellar, 218 A.D.2d 406, 410 (N.Y. App. Div. 1996). Illinois has a similar provision. *See* 725 ILL. COMP. STAT 5/116-3 (West Supp. 2000).

29. *See* Mark Hansen, *DNA Bill of Rights*, A.B.A. J., Mar. 2000, at 30 (noting that 62 people have been freed from prison in the past decade based on DNA test results demonstrating their actual innocence of offenses for which they were convicted). Senator Patrick Leahy, D-Vt., has introduced legislation which would require procedures for DNA testing for convicted federal defendants and encourage states to develop similar procedures. Innocence Protection Act of 2000, S. 2073, 106th Cong., 2d Sess. (2000).

30. CODE OF JUDICIAL CONDUCT Canon 2A.

time limitations should not impede the courts from accomplishing justice.