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September 2012

## Supreme Court Criminal Law Jurisprudence - October 2008 Term

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### Recommended Citation

Klein, Richard (2012) "Supreme Court Criminal Law Jurisprudence - October 2008 Term," *Touro Law Review*. Vol. 26: No. 2, Article 10.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol26/iss2/10>

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## Supreme Court Criminal Law Jurisprudence - October 2008 Term

Cover Page Footnote

26-2

**SUPREME COURT CRIMINAL LAW JURISPRUDENCE—  
OCTOBER 2008 TERM**

*Richard Klein\**

The last Term of the Supreme Court addressed the constitutionally protected rights of criminal defendants not only at trial but at the post-conviction stage as well. The Court dealt with the defendant's rights to a speedy trial and effective assistance of counsel in *Vermont v. Brillion*;<sup>1</sup> the claim was that these constitutional protections were substantially frustrated by underfunded public defender offices, thereby leaving the defendant improperly incarcerated for three years.<sup>2</sup> The Court also considered a case wherein the State had utilized a jailhouse snitch to elicit inculpatory statements from a defendant in violation of his Sixth Amendment right to counsel.<sup>3</sup> Post-conviction relief was a matter before the court; the defendant in *In re Davis*<sup>4</sup> sought to challenge his conviction which was based on witnesses who had subsequently recanted.<sup>5</sup> In *District Attorney's Office v. Osborne*,<sup>6</sup> the defendant was seeking to conduct a new DNA test of the critical evidence in the case against him.<sup>7</sup> Accountability of lab experts was at the forefront in *Melendez-Diaz v. Massachusetts*.<sup>8</sup> Lastly, in *Baze v. Rees*,<sup>9</sup> the Court had held that the risk of pain from the maladministration of an otherwise humane three-drug cocktail method of lethal execution does not constitute cruel and unusual pu-

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\* Bruce K. Gould Distinguished Professor of Law, Touro Law Center; J.D., Harvard Law School, 1972. This Article is based on a presentation given at the Twenty-First Annual Leon D. Lazer Supreme Court Review presented at Touro Law Center, Central Islip, New York.

<sup>1</sup> 129 S. Ct. 1283 (2009).

<sup>2</sup> *Id.* at 1289.

<sup>3</sup> *Kansas v. Ventris*, 129 S. Ct. 1841, 1845 (2009).

<sup>4</sup> 130 S. Ct. 1 (2009).

<sup>5</sup> *Id.* at 1.

<sup>6</sup> 129 S. Ct. 2308 (2009).

<sup>7</sup> *Id.* at 2316.

<sup>8</sup> 129 S. Ct. 2527 (2009).

<sup>9</sup> 128 S. Ct. 1520 (2008).

nishment under the Eighth amendment.<sup>10</sup> Subsequent to *Baze*, the first single-drug lethal injection anywhere in the United States was administered in Ohio, thus stirring heated debate within the legal community.<sup>11</sup> This context frames this Article's discussion of the Supreme Court's criminal law jurisprudence of the 2008 Term.

## I. *VERMONT V. BRILLON*

*Vermont v. Brillon*<sup>12</sup> concerns a criminal defendant's Sixth Amendment right to a speedy trial.<sup>13</sup> In a decision that had been quite surprising to a number of scholars, the Vermont Supreme Court demonstrated very strong support for a criminal defendant's Sixth Amendment right to a speedy trial. It focused on the hardships that can result when an underfunded public defender's office is not able to provide the effective assistance of counsel that is constitutionally required. The court declared that when "a defendant presses for, but is denied, a speedy trial because of the inaction of assigned counsel or a breakdown in the public defender system, the failure of the system to provide the defendant a . . . speedy trial is attributable to the prosecution, not the defendant."<sup>14</sup>

The Vermont Supreme Court's opinion concluded by encouraging the State Legislature to examine the possible lack of adequate funding of the defender system.<sup>15</sup> That is precisely what so many people who have been intimately involved with defender services over the years have regarded to be of crucial import, and one of the reasons that public defenders rejoiced in this decision. At the conclu-

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<sup>10</sup> *Id.* at 1526.

<sup>11</sup> See *infra* notes 192-232 and accompanying text.

<sup>12</sup> 129 S. Ct. 1283 (2009).

<sup>13</sup> *Id.* at 1287; see also U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.").

<sup>14</sup> *State v. Brillon*, 955 A.2d 1108, 1111 (2008), *rev'd*, 129 S. Ct. 1283 (2009). The Vermont Supreme Court also suggested that "it would behoove the Legislature" to fix the inadequate funding or resources in the public defender system before the Court has to ultimately dismiss the charges against a defendant. *Id.* at 1112. Furthermore, the majority took issue with the dissent characterizing "the trial court, the State's attorney office, and the defender general's office as passive players helpless to prevent the defendant's 'monkey-wrenching' maneuvers." *Id.* Instead, the majority states that it is the role of the trial court "to control the proceedings" and ensure that the defendant is not committing fraud on the system. *Id.*

<sup>15</sup> *Id.* at 1126 ("To the extent that what happened in this case is not an aberration but rather the result of a lack of funding to support the criminal justice system in this state, we encourage the Legislature to examine any unfulfilled needs and address the problem.").

sion of the opinion, the court cited an American Bar Association Report entitled, *Gideon's Broken Promise*, which concluded that thousands of individuals are processed through America's courts every year with either no lawyer or a lawyer who does not have the time, resources, or inclination to provide effective representation.<sup>16</sup> If one were to research all the reports analyzing the status of assistance of counsel since *Gideon v. Wainwright*,<sup>17</sup> there would be any number of studies that conclude that the promise of *Gideon* has been broken,<sup>18</sup> and the expectations that arose after *Gideon* have not been met.<sup>19</sup> When the Vermont Supreme Court issued its decision, many public defenders saluted the decision as one that would require increased funding by the legislature in order to remedy the inadequate provision of defense services.

In *Brillon*, the defendant had been incarcerated for nearly three years prior to trial.<sup>20</sup> It is undisputed that Brillon, as is the case with all criminal defendants, had a Sixth Amendment right to a speedy trial.<sup>21</sup> The purpose of the right to a speedy trial is that no one ought to be incarcerated before the trial begins (one is of course, pre-

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<sup>16</sup> ABA Standing Comm. on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Quest for Equal Justice*, iv (2004), available at <http://www.abanet.org/legal/services/sclaid/defender/brokenpromise/>.

<sup>17</sup> 372 U.S. 335 (1963).

<sup>18</sup> See, e.g., *Gideon's Promise, Still Unkept*, N.Y. TIMES, Mar. 18, 1993 at A22 (noting that judges have to implore private counsel to take on criminal cases, and "[p]ublic-defender systems are soft targets for budget cutters, state and Federal"); Anthony Lewis, *The Silencing of Gideon's Trumpet*, N.Y. TIMES, Apr. 20, 2009 at 6 (reasoning that his disappointment of the failed promise of *Gideon* is due to "minimal level of financial support" and that lawyers fall below "the barest standards of competence").

<sup>19</sup> The author has written a number of articles analyzing the impact of inadequate funding for public defender services and the resulting threat to the integrity of the criminal justice system. See, e.g., Richard D. Klein, *The Emperor Gideon has No Clothes: The Empty Promise of the Constitutional Right To Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986). See also Stephen B. Bright, *Turning Celebrated Principles Into Reality*, CHAMPION, Jan./Feb. 2003 at 6, available at <http://www.criminaljustice.org/public.nsf/championarticles/A0301p6?OpenDocument> ("No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel."); *Lawyers for Juveniles*, N.Y. TIMES, Nov. 3, 2003 at A18 (noting that American Bar Association studies show a "woefully inadequate legal representation" for juvenile defendants, which result in a rise in imprisonment and a lack of substance abuse alternative programs); *Gideon's Trumpet Stilled*, N.Y. TIMES, Mar. 21, 2003 at A18 (explaining that in some states the lack of financing prevent lawyers from investigating and preparing proper defenses, and in other states, the lack of local financing result in some defendants waiting months in jail before seeing a lawyer).

<sup>20</sup> *Brillon*, 129 S. Ct. at 1287.

<sup>21</sup> U.S. CONST. amend. VI.

sumed to be innocent) for any extended period of time because it is fundamentally unfair.<sup>22</sup> The Sixth Amendment language, however, states only that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.”<sup>23</sup> The language is no more specific than that, it is amorphous and vague.<sup>24</sup> It does indicate the precise point at which it will be determined that the defendant’s right to a speedy trial has been denied.<sup>25</sup>

Furthermore, it is left to the courts to determine whether it is the prosecution’s fault or the defendant’s fault that no trial has occurred.<sup>26</sup> The court must ascertain whether the prosecution had not been ready for trial, in which case the delay is attributed to the state, or whether it was the defendant who had not been ready for trial, and therefore the delay could be chargeable to the defendant. As the Supreme Court noted in *Barker v. Wingo*,<sup>27</sup> it is necessary to apply a balancing test to assess the “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”<sup>28</sup>

Over a three-year period, six different attorneys had represented Brillon.<sup>29</sup> To be sure, Brillon was in sharp conflict with the first few lawyers that represented him.<sup>30</sup> But it was also clear that

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<sup>22</sup> See *Smith v. Hoey*, 393 U.S. 374, 377-78 (1969) (listing three purposes of the speedy trial right: “(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.” (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966))).

<sup>23</sup> U.S. CONST. amend. VI.

<sup>24</sup> See *Brillon*, 129 S. Ct. at 1290 (citing *Barker v. Wingo*, 407 U.S. 514, 521-22 (1972)) (“The right to a speedy trial is a more vague concept than other procedural rights.” It is “amorphous,” and “slippery.”); see also *Beavers v. Haubert*, 198 U.S. 77, 87 (1905) (“The right of a speedy trial is necessarily relative.”).

<sup>25</sup> See *Beavers*, 198 U.S. at 87 (“It is consistent with delays and depends upon circumstances.”); see also *Barker*, 407 U.S. at 521 (“It is . . . impossible to determine with precision when the [speedy trial] right has been denied.”).

<sup>26</sup> *Barker*, 407 U.S. at 530.

<sup>27</sup> 407 U.S. 514 (1972).

<sup>28</sup> *Id.* at 530.

<sup>29</sup> *Brillon*, 129 S. Ct. at 1287.

<sup>30</sup> *Id.* at 1288. Brillon’s first lawyer filed a motion to withdraw as counsel citing “certain irreconcilable difference in preferred approach between Mr. Brillon and counsel as to trial strategy, as well as other legitimate decisions.” *Id.* at 1288 n.3 (internal citations omitted). His third attorney was relieved after Brillon threatened him and claimed there was no communication and a lack of diligence. *Id.* at 1288. The fourth assigned attorney was dismissed for similar reasons. *Id.* at 1288-89.

the lawyers filed few motions for Brillon and, in fact, had done very little to represent him and move the case forward.<sup>31</sup> Significantly, one of the lawyers who was fired had informed the court immediately prior to the firing that he was not prepared for trial because “public defenders are under funded and under staffed.”<sup>32</sup> The Vermont Supreme Court concluded that the three-year delay in which the defendant had been incarcerated without being afforded his Sixth Amendment right to a speedy trial was egregious.<sup>33</sup> The last two years of that delay were indisputably charged to the State.<sup>34</sup>

Since it was the defense attorneys’ fault that the case had not progressed to trial, the issue for the Vermont Supreme Court was whether the delays were to be deemed state action since the public defenders were employees of the Vermont Office of the Defender General.<sup>35</sup> It was also claimed that the trial court has the ultimate responsibility for moving cases along, and the failure of the court to do that was another form of state action.<sup>36</sup> Therefore, the State had deprived Brillon of his right to a speedy trial.<sup>37</sup> When this right has been denied, a criminal defendant is entitled to a dismissal of the charges against him.<sup>38</sup> The Supreme Court has determined that even though such remedy might be “unsatisfactorily severe,”<sup>39</sup> it is required as the only response to the deprivation of the constitutionally protected right of the defendant to a speedy trial.<sup>40</sup>

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<sup>31</sup> *Brillon*, 955 A.2d at 1122.

<sup>32</sup> Joint Appendix, *Vermont v. Brillon*, 129 S. Ct. 1283 (2009) (No. 08-88), 2008 WL 4935374 at \*165.

<sup>33</sup> *Brillon*, 129 S. Ct. at 1289.

<sup>34</sup> *Id.*

<sup>35</sup> *Brillon*, 955 A.2d at 1111 (“Indeed, the defender general’s office is part of the criminal justice system and an arm of the state.”).

<sup>36</sup> *Id.* at 1121 (“[T]he defender general’s office is part of the criminal justice system, and ultimately it is the court’s responsibility to assure that the system prosecutes defendants in a timely manner that comports with constitutional mandates.”).

<sup>37</sup> *Id.* at 1111 (“[W]e take the extraordinary step of vacating the convictions and dismissing the charges against defendant because he was not prosecuted within a time frame that satisfied his constitutional right to a speedy trial.”).

<sup>38</sup> *Barker*, 407 U.S. at 522 (“The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived.”); see also *Strunk v. United States*, 412 U.S. 434, 440 (1973) (“In light of the policies which underlie the right to a speedy trial, dismissal must remain . . .”).

<sup>39</sup> *Barker*, 407 U.S. at 522.

<sup>40</sup> *Id.*

This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been

The State of Vermont, aware of the significant and potentially very costly decision of the state supreme court, appealed to the United States Supreme Court.<sup>41</sup> In its brief to the Court, the State characterized the Vermont Supreme Court opinion as a “first in the history of American jurisprudence,”<sup>42</sup> a “ruling [that] turns thirty-six years of settled jurisprudence into chaos,”<sup>43</sup> and that as a result, “one of the most fundamental principles of criminal law is at issue.”<sup>44</sup> Accordingly, if there were to be a call by the highest court in the state for more funding for public defender offices that are overwhelmed and cannot provide effective assistance of counsel, the remedy would require an increase in funding for these offices and would place an undesirable demand on the state.

The United States Supreme Court held that it is not state action when a public defender is representing a client and is responsible for a case not moving forward.<sup>45</sup> The State is not responsible for the lawyer’s failure, it is the defendant who is responsible for it. Therefore, in the *Brillon* matter, there had been no speedy trial violation even though almost three years had gone by and it was *Brillon*’s lawyers who caused the delay.<sup>46</sup> Justice Ginsburg authored the majority opinion and provided some limitation in the scope of the decision by concluding that “[d]elay resulting from a *systemic* ‘breakdown in the public defender system’ could be charged to the State.”<sup>47</sup>

In the dissent, Justice Breyer highlighted Ginsburg’s conclud-

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tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

*Id.*

<sup>41</sup> *Brillon*, 129 S. Ct. at 1290.

<sup>42</sup> Brief for the Petitioner, *Vermont v. Brillon*, 129 S. Ct. 1283 (2009) (No. 08-88), 2008 WL 5264661 at \*viii.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*48.

<sup>45</sup> *Brillon*, 129 S. Ct. at 1291 (“[O]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program. Unlike a prosecutor or the court, assigned counsel ordinarily is not a state actor.” (quoting *Polk County v. Dodson*, 454 U.S. 312, 318 (1981))).

<sup>46</sup> *Id.* at 1293 (“[D]elays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned. . . . [T]he record in this case does not show that *Brillon* was denied his constitutional right to a speedy trial.”).

<sup>47</sup> *Id.* at 1292 (emphasis added) (internal citation omitted); see also *Polk County*, 454 U.S. at 324-25 (suggesting that a public defender could be considered a state actor in certain circumstances); *Branti v. Finkel*, 445 U.S. 507, 519-20 (1980) (finding that a public defender is a state actor when making hiring and firing decisions on behalf of the State).



ing point. He emphasized the uncontroverted truth that, for a thirteen-month period, it was clear that this defendant had no lawyer at all.<sup>48</sup> The lack of funding for the public defender's office was responsible for the absence of meaningful counsel for this defendant.<sup>49</sup> In emphasizing the systemic breakdown, Justice Breyer noted that the Vermont courts have "considerable authority to supervise the appointment of public defenders."<sup>50</sup> Therefore, this authority must be considered when determining whether a speedy trial violation caused by the Office of the Defender General constitutes state action.<sup>51</sup>

## II. *KANSAS V. VENTRIS*

In *Kansas v. Ventris*,<sup>52</sup> a case involving someone in the role commonly referred to as a jailhouse snitch, it was uncontested that the State, the police, and the prosecutor's office violated the defendant's Sixth Amendment right.<sup>53</sup> The particular issue under review, however, required the Supreme Court to revisit its decision in *Masiah v. United States*,<sup>54</sup> which had held that the right to counsel is not just a trial right, but also includes a period of pretrial interrogation after indictment once the defendant has retained counsel.<sup>55</sup>

The state of the law at the time of *Ventris* was clear: the prosecution, as part of its direct case, could not use a statement that was obtained in violation of a defendant's Sixth Amendment right.<sup>56</sup> The

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<sup>48</sup> *Brillon*, 129 S. Ct. at 1293 (Breyer, J., dissenting) ("I believe it fairer to characterize this period, not as a period in which 'assigned counsel' failed to move the case forward, but as a period in which Brillon, in practice, *had no assigned counsel*." (emphasis in original)).

<sup>49</sup> *Id.* at 1294.

<sup>50</sup> *Id.* at 1294; *see also* VT. STAT. ANN. tit. 13, § 5272 (1971) (explaining the procedure for the appointment of a public defender).

<sup>51</sup> *Brillon*, 129 S. Ct. at 1294.

<sup>52</sup> 129 S. Ct. 1841 (2009).

<sup>53</sup> *Id.* at 1845.

<sup>54</sup> 377 U.S. 201 (1964).

<sup>55</sup> *Id.* at 206 ("We hold that the petitioner was denied the basic protections of [the sixth amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.").

<sup>56</sup> *Id.* at 207 ("All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."); *see also* *Maine v. Moulton*, 474 U.S. 159, 180 (1985) ("[I]ncriminating statements pertaining to pending charges are inadmissible at the trial of those charges . . . if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to assistance of coun-

issue presented in *Ventris* was whether once the defendant had testified, could the testimony of a jailhouse snitch be used to impeach the defendant as part of the prosecution's cross-examination?<sup>57</sup> In other words, even though the snitch was going to testify to information that was obtained in violation of *Ventris*'s rights, would it be admissible for him to tell the jury that the defendant had admitted to him that he was the one who committed the murder?

In *Ventris*, the prosecution and the police placed an individual into the same jail cell in which *Ventris* was being held awaiting trial.<sup>58</sup> Doser, the jailhouse snitch, was instructed to be a human listening device.<sup>59</sup> Doser and *Ventris* engaged in conversations and Doser was able to elicit incriminating statements from *Ventris*.<sup>60</sup> *Ventris* did not know that Doser was acting on behalf of the State, therefore there was no way that *Ventris* could have waived his Sixth Amendment right to counsel.<sup>61</sup>

*Ventris* had initially been charged with committing the crime along with an individual named Theel; Theel had agreed to plead guilty in exchange for his testimony against *Ventris*.<sup>62</sup> Theel testified at trial that *Ventris* was the one who had committed the murder.<sup>63</sup>

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sel.”). Courts have also held that the right to counsel attaches at a “critical” stage “where the results might settle the accused’s fate and reduce the trial itself to a mere formality.” *United States v. Wade*, 388 U.S. 218, 224 (1967); *Coleman v. Alabama*, 399 U.S. 1, 10 (1999) (finding that a preliminary hearing is a critical stage); *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) (holding that a defendant has a right to counsel at a pretrial custodial interrogation); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (noting that the period of arraignment to trial is the most critical stage).

<sup>57</sup> *Ventris*, 129 S. Ct. at 1845.

<sup>58</sup> *Id.* at 1844.

<sup>59</sup> *Id.* *Ventris* was instructed to “keep [his] ear open and listen” for incriminating statements. *Id.*

<sup>60</sup> *See id.* *Ventris* told Doser that “ ‘[h]e’d shot this man in his head and his chest’ and [took] ‘his keys, wallet, about \$350.00 and . . . a vehicle.’ ” *Ventris*, 129 S. Ct. at 1844.

<sup>61</sup> *See id.* The police placed Doser into the holding cell even though *Massiah* had held that a defendant has a right to counsel in jailhouse interrogations. *Massiah*, 377 U.S. at 206. The State also conceded a violation of the Sixth Amendment. *Ventris*, 129 S. Ct. at 1845.

<sup>62</sup> *Ventris*, 129 S. Ct. at 1844. Theel and *Ventris* were charged with murder and aggravated robbery, but the State agreed to allow Theel to plea to the robbery charge in exchange for testifying that *Ventris* was the shooter. *Id.*

<sup>63</sup> *State v. Ventris*, 176 P.3d 920, 923 (Kan. 2008), *rev’d*, 129 S. Ct. 1841 (2009). Theel testified that she

heard two shots and saw *Ventris* come out of the bedroom. She claimed *Ventris* said, ‘I have to shoot him again,’ to which she responded, ‘Okay.’ According to her testimony, she then left the house and at some point heard a third shot. *Ventris* then came out of the house and threw

However, Ventris testified that Theel was the person who had in fact committed the murder.<sup>64</sup> After both Theel and Ventris testified, the prosecution wanted to call Doser to testify that Ventris confessed to the murder in jail; defense counsel objected.<sup>65</sup>

Ultimately, the trial court permitted Doser to testify and Ventris was convicted of burglary and robbery.<sup>66</sup> The Kansas Supreme Court reversed the conviction, and held that the statements obtained in violation of the defendant's constitutional rights were inadmissible for impeachment purposes as part of the prosecution's cross-examination.<sup>67</sup>

In its decision, the United States Supreme Court reaffirmed its former holdings that any statements that are made by the defendant because of *coercion* could not be used for any purpose—the exclusionary rule applies.<sup>68</sup> Statements that are “not ‘the product of . . . free and rational choice’ are inadmissible at trial.”<sup>69</sup> However, the statements in this case were not obtained by coercion, they were the product of deceit.<sup>70</sup> The Supreme Court certainly acknowledged that the statements were obtained in violation of the defendant's Sixth Amendment rights; the concern was the determination of the proper remedy.<sup>71</sup>

The Court engaged in a cost-benefit analysis to determine exactly what would be gained if the jailhouse informant was permitted to testify.<sup>72</sup> A trial is about a search for the truth, and in this case it

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[the victim's] truck keys to [Theel]. She used the keys to gain access to [the victim's] truck and drove herself and Ventris away from the scene.

*Id.*

<sup>64</sup> *Ventris*, 129 S. Ct. at 1844.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1844. Ventris was also acquitted of felony murder. *Id.*

<sup>67</sup> *Id.* The Kansas Supreme Court stated that “[O]nce a criminal prosecution has commenced, the defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony.” *Ventris*, 129 S. Ct. at 1844 (quoting *Ventris*, 176 P.3d at 928).

<sup>68</sup> *Id.* at 1845.

<sup>69</sup> *Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978) (quoting *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968)); *see also* *New Jersey v. Portash*, 440 U.S. 450, 459-60 (1979) (holding that grand jury testimony under a grant of immunity cannot be used for impeachment a trial).

<sup>70</sup> *Ventris*, 129 S. Ct. at 1848 (Stevens, J., dissenting).

<sup>71</sup> *Id.* at 1846 (“This case does not involve . . . the prevention of a constitutional violation, but rather the scope of the remedy for a violation that has already occurred.”).

<sup>72</sup> *See id.* at 1846-47.

appeared that Ventris may have lied and committed perjury when he testified that he was not the one who committed murder.<sup>73</sup> There was an additional witness that testified that Ventris had indeed testified falsely when he stated that he did not commit the murder.<sup>74</sup> The Court ruled that the informant's testimony should be permitted; a trial above all has to focus on truth-finding and, therefore, any testimony that would show that the defendant had committed perjury is admissible.<sup>75</sup>

In conducting its cost-benefit analysis, the Court also considered the purposes of the exclusionary rule in determining whether it would be appropriate to simply exclude, for all purposes, the statements that were obtained in violation of Ventris' Sixth Amendment right.<sup>76</sup> The Court determined that exclusion would have little deterrent value, however, because the police already have strong incentives to abide by the Constitution when using informants to elicit incriminating statements.<sup>77</sup> If a statement that was obtained in violation of *Massiah*<sup>78</sup> were to prove to be useful for impeachment purposes, the investigator would have to anticipate that the defendant will testify and that such testimony will be inconsistent with the admissible prior statement.<sup>79</sup> Such a scenario was considered to be too speculative and, therefore, it was not necessary to decide the case with a focus on the need to deter future police misconduct.<sup>80</sup>

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<sup>73</sup> *Id.* at 1844.

<sup>74</sup> *Id.*

<sup>75</sup> *Ventris*, 129 S. Ct. at 1847 (“We hold that the informant’s testimony, concededly elicited in violation of the Sixth Amendment, was admissible to challenge Ventris’s inconsistent testimony at trial.”); *see also* *Harris v. New York*, 401 U.S. 222, 226 (1971) (“The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.”); *Walder v. United States*, 347 U.S. 62, 65 (1954) (“It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can . . . provide himself with a shield against contradiction of his truths.”).

<sup>76</sup> *Ventris*, 129 S. Ct. at 1846. The Court explained that the benefit of excluding tainted evidence when it is only used for impeachment is not worth the expense. *Id.* *See also* *Stone v. Powell*, 428 U.S. 465, 488 (1976) (“[T]he interests safeguarded by . . . exclusion[] . . . [are] outweighed by the need to prevent perjury and to assure the integrity of the trial process.”); *Harris*, 401 U.S. at 225 (noting that the prosecution cannot be denied “the traditional truth-testing devices of the adversary process” when a defendant testifies to a prior inconsistent statement that were otherwise inadmissible).

<sup>77</sup> *Ventris*, 129 S. Ct. at 1847.

<sup>78</sup> *See supra* note 54.

<sup>79</sup> *Ventris*, 129 S. Ct. at 1847.

<sup>80</sup> *Id.* (“[E]ven if ‘the officer may be said to have little to lose and perhaps something to

The National Association of Criminal Defense Lawyers submitted an amicus brief that focused on the unreliability of jailhouse informants.<sup>81</sup> If the Supreme Court was going to base its decision, as it did, on the reliability of this jailhouse informant, then the Court needed be cautious of evidence that shows the *unreliability* of jailhouse informants.<sup>82</sup> A report prepared for the American Bar Association had earlier determined that, “the most dangerous informer of all is the jailhouse snitch who claims that another prisoner confessed to him.”<sup>83</sup> The National Association of Criminal Defense Lawyers concluded “the leading cause of wrongful convictions” in capital cases is testimony by jailhouse snitches.<sup>84</sup>

Why is that the case? A jailhouse snitch has much to gain when he is able to obtain a confession from his cellmate who is

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gain by way of possibly uncovering impeachment material,’ we have multiple times rejected the argument that this ‘speculative possibility’ can trump the costs of allowing perjurious statements to go unchallenged.” (quoting *Oregon v. Hass*, 420 U.S. 714, 723 (1975))).

<sup>81</sup> Brief for the National Association of Criminal Defense Lawyers as Amici Curiae in support of Respondent, *State v. Ventris*, 129 S. Ct. 1841 (2008), 2008 WL 5409458 at \*1 [hereinafter Brief for NACDL].

<sup>82</sup> *Id.* at \*5. The unreliability stems from “incentives to lie through the promise of dropped charges, reduced sentences, or jailhouse benefits.” *Id.* Numerous courts have openly acknowledged the impact that jailhouse informants have on the criminal justice system. *See, e.g., Zappulla v. New York*, 391 F.3d 462, 470 n.3 (2d Cir. 2004) (“Several reports have found that jailhouse informants have a significant incentive to offer testimony against other defendants in order to curry favor with prosecutors and that the proffered testimony is oftentimes partially or completely fabricated.”); *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (“[I]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence.”), *cert. denied*, 484 U.S. 1026 (1988); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) (“[I]t . . . is obvious that promises of immunity or leniency premised on cooperation . . . may provide a strong inducement to falsify in that case.”); *Hoffa v. United States*, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting) (noting that the use of jailhouse snitch testimony “evidence[s] a serious potential for undermining the integrity of the truth-finding process”).

<sup>83</sup> Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996); *see also* American Bar Association, Section of Criminal Justice, Report to the House of Delegates 6 (2005) (“Corroboration should be required in *jailhouse* informant cases; no person should lose liberty or life based solely on the testimony of such a witness.”). A number of States have required corroboration by statute. *See, e.g.,* ALASKA STAT. § 12.45.020 (2004); ARK. CODE ANN. § 16-89-111 (West 2003); GA. CODE ANN. § 24-4-8 (West 2003); NEV. REV. STAT. § 175.291 (West 1967); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2003); OKLA. STAT. tit. 22, § 742 (West 2004); OR. REV. STAT. § 136.440 (West 2003).

<sup>84</sup> Brief for NACDL at \*15 (quoting Rob Warden, Executive Director, Center on Wrongful Convictions *The Snitch System*, 3 (2004) (noting that snitch cases account for 45.9% of the 111 death row exonerations since 1970).

awaiting trial.<sup>85</sup> In this case, Doser was incarcerated for violating probation;<sup>86</sup> subsequent to his testimony, the probation was lifted and he was released.<sup>87</sup> Jailhouse informants frequently receive reduced sentences or a promise that there is not going to be any prosecution of future charges.<sup>88</sup> Even if the informant will be remaining in jail, he may receive various benefits while incarcerated.<sup>89</sup> If it is found that an informant lied during the course of the trial, he is virtually never prosecuted for committing perjury.<sup>90</sup> If the jury did not believe the informant, he just returns to jail and serves whatever time he was going to be serving.

Justices Stevens and Ginsburg, however, wrote a sharply worded dissent which concluded that the Court's holding is "another occasion in which the Court has privileged the prosecution at the expense of the Constitution."<sup>91</sup> The dissent took issue with the majority characterizing the right to counsel as a prophylactic right and that the introduction of the prior inconsistent statement made to the jailhouse snitch does not itself violate the Constitution.<sup>92</sup> Under *Ventris*, the prosecution can circumvent *Massiah* by using jailhouse snitches to elicit statements from a criminal defendant and introduce those statements as impeachment material after the defendant testifies.<sup>93</sup>

<sup>85</sup> *Id.* at \*5.

<sup>86</sup> *Id.* at \*8.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at \*7 ("For snitches, 'the ultimate reward' is to be 'release[d] from custody' in exchange for their testimony. Prosecutors may drop charges pending against a snitch who testifies, thereby allowing him to avoid not only jail time but also a record." (quoting Report of the 1989-90 Los Angeles County Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County, 12 (June 16, 1990) [hereinafter Grand Jury Report])).

<sup>89</sup> Brief for NACDL at \*8. Some examples of day-to-day benefits include more food, phone calls, and the ability to watch television or movies. *Id.*

<sup>90</sup> *Id.* at \*11. See also Grand Jury Report, *supra* note 88 at 18, 90 ("[D]espite '[a]n appalling number of instances of perjury or other falsifications to law enforcement,' investigators 'failed to identify a single case of prosecution of an informant for perjury or for providing false information.'").

<sup>91</sup> *Ventris*, 129 S. Ct. at 1849 (Stevens, J., dissenting).

<sup>92</sup> *Id.* at 1848. See also *Harris*, 401 U.S. at 225-26 ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."); *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) ("The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections. But use of statements so obtained for impeachment purposes is a different matter.").

<sup>93</sup> *Ventris*, 129 S. Ct. at 1849 (Stevens, J., dissenting).

Unlike the majority, Justice Stevens was clearly concerned that “such shabby tactics are intolerable in all cases.”<sup>94</sup> If the use of illegally obtained statements is excluded from the prosecution’s case in chief, logic dictates that the same exclusion should apply to impeachment material.<sup>95</sup> Stevens determined that any use of statements obtained by a constitutional violation would offend the Sixth Amendment’s protection of fairness in the adversarial process.<sup>96</sup>

### III. *IN RE DAVIS*

The *In Re Davis*<sup>97</sup> matter has received worldwide attention. Troy Davis was a former sports coach in Georgia who was convicted of murder in 1991 and subsequently sentenced to death.<sup>98</sup> The Pope, former President Jimmy Carter, Nobel Peace Prize winner Desmond Tutu, and former FBI director William Sessions all sharply criticized the trial that had taken place.<sup>99</sup> Specifically, they criticized the failure of the court to consider the new evidence that Troy Davis was presenting to demonstrate that he was not the one who had committed the crime.<sup>100</sup> The Parliament of the European Union passed a resolution which stated that in view of the abundance of new evidence, a

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1848.

<sup>96</sup> *Id.* See also *Adams v. United States*, 317 U.S. 269, 276 (1942) (“[The] procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of ‘life, liberty, or property.’ ”).

<sup>97</sup> 130 S. Ct. 1 (2009).

<sup>98</sup> *Davis v. State*, 426 S.E.2d 844 (Ga. 1993).

<sup>99</sup> Jeffrey Scott & Marcus K. Garner, *Famous Join Chorus for Clemency*, ATLANTA J. CONST., Sept. 21, 2008, at D1 (“The case has attracted worldwide attention, with calls to stop [Davis’] execution from Pope Benedict XVI . . . and Nobel Peace Prize-winner Desmond Tutu. Rallies have been held as far away as Paris.”); see also *The Death Penalty: Reasonable Doubt*, THE ECONOMIST, Nov. 9, 2008, at 76, available at 2008 WLNR 23127805.

<sup>100</sup> See Scott & Garner, *supra* note 99 (noting that since Davis’ trial in 1991, a number of key witnesses, whose testimony was the crux of the prosecution’s case, have recanted their trial testimony. At trial, the prosecution could not present a murder weapon, there were no fingerprints, and importantly, no DNA evidence); *Reasonable Doubt*, *supra* note 99, at 76 (“William Sessions, a former head of the FBI, says that because there was no physical evidence in the case, Mr. Davis deserves another day in court.”); Robbie Brown, *With Two Hours to Spare, Justices Stay Execution*, N.Y. TIMES, Sept. 24, 2008, at A22 (noting that two of the recanting witnesses said that they were pressured by law enforcement officers to identify Mr. Davis as the shooter and three of the recanting witnesses said that another man actually confessed to killing Mark MacPhail).

new trial is needed.<sup>101</sup> Amnesty International called upon the Supreme Court to intervene immediately and unequivocally to prevent Davis' execution.<sup>102</sup>

The opinions of the Court in the *Davis* matter include a most highly controversial statement by Justice Scalia. The Justice wrote, regarding the evidence presented that might cast doubt on the actual guilt of Troy Davis:

This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent. . . . [There is] considerable doubt that any claim based on 'actual innocence' is constitutionally cognizable.<sup>103</sup>

In the concurring opinion by Justices Stevens, Breyer, and Ginsburg, the Justices responded that Justice Scalia's opinion would allow an individual who has new and conclusive evidence showing beyond a scintilla of a doubt that he did not commit the crime, to be put to death in spite of that evidence as long as the initial trial had not been found to be an unfair one.<sup>104</sup>

Eighteen years after the conviction of Davis, the Supreme Court, for the first time in almost fifty years, granted an original Writ of Habeas Corpus. The Writ remanded the case to the federal court in Georgia's Southern District court to hear testimony and make factual findings as to whether new information that was not available at the time of trial clearly established Troy Davis' innocence.<sup>105</sup> As of

<sup>101</sup> Michelle Garcia, *The Chokehold of Time*, 34 AMNESTY INT'L 3, Oct. 1, 2008, at 18.

<sup>102</sup> Kevin Johnson, *Death Row's Revolving Door: Post-trial Evidence in Ga. Case Resonates*, USA TODAY, May 18, 2009, at 3A ("Laura Moye, a deputy director of Amnesty International USA, which supports Davis' appeal, says the 'question of innocence doesn't seem to be as much of a priority for the courts as the craving for finality.' "); Bob Herbert, *What's the Rush?*, N.Y. TIMES, Sept. 20, 2008, at A19 ("Amnesty International conducted an extensive examination of the case, documenting the many recantations, inconsistencies, contradictions, and unanswered questions. Its report on the case drew widespread attention, both in the U.S. and overseas.").

<sup>103</sup> *Davis*, 130 S. Ct. at 3 (Scalia, J., dissenting) (emphasis added).

<sup>104</sup> *Id.* at 2 (Stevens, J., concurring) ("[I]magine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless.").

<sup>105</sup> *Id.* at 1. "Today this Court takes the extraordinary step-one not taken in nearly 50



March 2010, Troy Davis remains on death row and although a hearing has yet to be scheduled, it is expected to be in the spring or early summer of 2010.<sup>106</sup>

At Troy Davis' original trial, there were nine witnesses who had testified that he committed the murder.<sup>107</sup> Now, seven of those nine have recanted and changed their stories.<sup>108</sup> Three of the witnesses that recanted now claim that one of the two witnesses who did not recant was the real murderer.<sup>109</sup> The other witness who did not withdraw his testimony disappeared after trial and cannot be found.<sup>110</sup>

One of the witnesses who has recanted subsequently explained what prompted the earlier false testimony:

[The Savannah police] came and dragged me from my house . . . . I was handcuffed and they put a nightstick under my neck. . . . [They cursed at me and they] told me that I had shot the officer. They told me that I was going to the electric chair. . . . [And] [a]fter four or five hours, they told me to sign some papers. . . . I didn't read what they told me to sign and they didn't ask me to.<sup>111</sup>

Another recanting witness stated in an affidavit that she was on parole at the time and she was scared that if she didn't obey the police command to identify Troy Davis as the shooter, then the police would try to lock her up again."<sup>112</sup> In her affidavit, this recanting witness recalled that she was in a hotel close to the shooting and saw more than one man running from the scene but did not actually see the

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years-of instructing a district court to adjudicate a state prisoner's petition for an original writ of habeas corpus." *Id.* at 2 (Scalia, J., dissenting).

<sup>106</sup> *Join the Campaign: Justice for Troy Davis!*, AMNESTY INT'L USA, available at <http://www.amnestyusa.org/death-penalty/troy-davis-finality-overfairness/page.do?id=1011343>.

<sup>107</sup> Bob Herbert, *In the Absence of Proof*, N.Y. TIMES, May 23, 2009, at A21.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Since the trial, seven witnesses for the prosecution recanted their testimony and a number of individuals have said that the key prosecution witness was, in fact, the shooter. Myrna S. Raeder, *Post Conviction Claims of Innocence*, 24 CRIM. JUST. 14, 22 (Fall 2009).

<sup>110</sup> *Where is the Justice for Me?: The Case of Troy Davis Seeking Execution in Georgia*, AMNESTY INT'L USA, available at <http://www.amnestyusa.org/document.php?id=ENGAMR510232007&lang=e>.

<sup>111</sup> *Id.*

<sup>112</sup> *In the Absence of Proof*, *supra* note 107, at A21.

shooter.<sup>113</sup> This statement was inconsistent with her testimony at trial when she identified Troy Davis as the shooter.<sup>114</sup>

A common thread in the new testimony by these witnesses claiming to have been wronged, fooled, or coerced when they said it was Troy Davis, is that they believed that they had been pressured by the police to provide the original testimony.<sup>115</sup> Furthermore, there are three new witnesses who have come forward, and some of the original seven witnesses who have recanted have also said that they heard another individual say in recent years that he is the real killer.<sup>116</sup> These three new witnesses in their affidavits stated that they either knew this other individual and had been intimidated by him, or had seen him at the scene of the shooting or sometime after.<sup>117</sup>

Almost two decades after Davis' conviction, it is apparent that although there are new issues to resolve, the chance that the conviction will now be overturned does exist. Davis has the heavy burden of proving his actual innocence in the district court.<sup>118</sup> In recent years, there has been an increasing awareness of the weaknesses of eyewitness testimony.<sup>119</sup> In addition, in general, there is a decline in the implementation of the death penalty in this country.<sup>120</sup> The num-

<sup>113</sup> *Where is the Justice for Me?*, *supra* note 109.

<sup>114</sup> *Id.*

<sup>115</sup> Jungwon, *Ga. Supreme Court Agrees to Hear Appeal by Death Row Inmate Troy Davis*, 33 AMNESTY INT'L 3, Oct. 1, 2007, at 7.

<sup>116</sup> Brief of Appellant, at \*4-5, *Davis v. State*, 660 S.E.2d 354 (Ga. 2008) (No. S07A-1758), 2007 WL 5581178; Herbert, *supra* note 102, at A21.

<sup>117</sup> *Where is the Justice for Me?*, *supra* note 110 (noting that these new witnesses either saw this individual with a gun soon after the shooting, interacted with him after the shooting and noticed that he was extremely nervous, or expressed how they have always been fearful or scared of him).

<sup>118</sup> *Davis v. State*, 660 S.E.2d 354, 362 (Ga. 2008), *cert. denied*, 129 S. Ct. 397 (2008).

<sup>119</sup> See *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."). Justice Frankfurter stated: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy." *Id.* Inaccurate eyewitness testimony may have a prejudicial effect on a criminal trial. Richard A. Wise, Kristen A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 811 (2007). Juries may be quick to punish criminal defendants because they may be "unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses." *Id.* "[D]oubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction, '[T]hat's the man!'" *Id.* at 811-12.

<sup>120</sup> Richard C. Dieter, *Innocence and the Crisis in America Death Penalty*, Death Penalty Information Center, Sept. 2004, available at <http://www.deathpenaltyinfo.org/innocence->

ber of people who are put to death by the state is lower than at any time since the Supreme Court has reestablished the implementation of the death penalty in *Gregg v. Georgia* in 1976.<sup>121</sup> Even though thirty-five states currently have death penalty statutes, a sentence of death is infrequently carried out.<sup>122</sup>

#### IV. *DISTRICT ATTORNEY'S OFFICE V. OSBORNE*

In the matter of *District Attorney's Office v. Osborne*,<sup>123</sup> the Court reviewed the conviction of William Osborne who had been convicted of sexual assault in 1994.<sup>124</sup> At his trial, the District Attorney presented to the jury the result of a DNA test which at the time was not nearly as effective and conclusive as the DNA tests that are currently available.<sup>125</sup> The DNA test relied upon by the prosecution indicated that Osborne was within the fifteen percent of the population that would have had the same DNA markup as the perpetrator of this crime.<sup>126</sup> Osborne has been incarcerated for sixteen years,<sup>127</sup> and was claiming that there are much more sophisticated procedures presently available for DNA testing which ought to be utilized so as to lead to a more definitive result.<sup>128</sup>

Osborne requested to have a STR DNA test conducted on the

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and-crisis-american-death-penalty. "The number of death sentences, the size of death row, the number of executions, and public support have all declined in recent years." *U.S. Death Penalty Continues Steady Decline as 1000th Execution Approaches*, Death Penalty Information Center, Nov. 9, 2005, <http://www.deathpenaltyinfo.org/documents/DPIC1000thPR.pdf>. There has been a fifty percent decrease in the number of death sentences imposed annually since the late 1990's, executions have declined by forty percent since 1999, and the number of inmates on death row has declined annually since 2001. *Id.*

<sup>121</sup> See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (holding that the death penalty as a form of punishment does not violate the Constitution); Dieter, *supra* note 120; *The Death Penalty in 2009: Year End Report*, Dec. 2009, available at <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf>, at 1 ("Death sentences continued to decline in 2009, with this year having the fewest death sentences since the death penalty was reinstated in 1976.").

<sup>122</sup> Corinne Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 13-14 (2007); *Year End Report*, *supra* note 121, at 1 (reporting that only eleven out of the thirty-five states that have death penalty statutes carried out an execution in 2009 and eleven states made proposals or passed into law the abolition of the death penalty in their respective states).

<sup>123</sup> 129 S. Ct. 2308 (2009).

<sup>124</sup> *Id.* at 2314.

<sup>125</sup> *Id.* at 2313.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2312.

<sup>128</sup> *Osborne*, 129 S. Ct. at 2316

semen that was still remaining in the condom.<sup>129</sup> He claimed that this conclusive test would show that he was not the one who committed the sexual assault.<sup>130</sup> The STR DNA test is referred to as the “truth machine of law enforcement.”<sup>131</sup> Only one in 575 trillion people will end up having the same DNA marker as another individual who is tested with the STR DNA test.<sup>132</sup> Despite Osborne’s willingness to pay for the test, the State of Alaska denied Osborne’s request.<sup>133</sup> Osborne argued that since it was not going to cost the State anything, there was no reason why he should not have been permitted to have this conclusive DNA test conducted on the semen.<sup>134</sup> Alaska refused and Osborne sought relief in court.<sup>135</sup>

Ultimately, Alaska claimed that it is not required to provide the sample for retesting since Osborne does not have a constitutional right to the evidence.<sup>136</sup> The defendant’s request was made post-conviction; the State was not required to open up the evidence locker once the defendant had been convicted.<sup>137</sup> In its briefs, Alaska focused on the desire for finality in state prosecutions and verdicts.<sup>138</sup> The issue was whether there is a due process constitutional right, post

<sup>129</sup> *Id.* at 2315 n.3 (noting that Osborne argued to have access to the condom for STR testing).

<sup>130</sup> *Id.* at 2319.

<sup>131</sup> Seth F. Kreimer, *Truth Machines and Consequences the Light and Dark Sides of ‘Accuracy’ in Criminal Justice*, 60 N.Y.U. ANN. SURV. AM. L. 655, 662 (2005) (“[A]s its invocation by . . . Attorney General [Ashcroft] suggests, the metaphor of the ‘truth machine’ is two edged: . . . DNA testing functions not only by ‘clearing the innocent,’ but also by ‘identifying the guilty.’”); News Conf., Att’y Gen. John Ashcroft, *DNA Initiative* (Mar. 4, 2002), available at <http://www.justice.gov/archive/ag/speeches/2002/030402newsconfmedcnainitiative.htm> (“DNA technology has proven itself to be the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent.”).

<sup>132</sup> Nat’l Inst. of Justice, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group*, (Nov. 2008), at 30, available at <http://www.ncjrs.gov/pdffiles1/nij/183697.pdf>.

<sup>133</sup> *Id.* at 2336 (Alito, J., concurring).

<sup>134</sup> *Id.*

<sup>135</sup> *Osborne v. Dist. Attorney’s Office*, 445 F. Supp. 2d 1079 (D. Alaska 2006).

<sup>136</sup> *Osborne*, 129 S. Ct. at 2314.

<sup>137</sup> *Id.* at 2333 (Alito, J., concurring) (“In determining that Osborne was not entitled to relief under the post conviction statute, the Alaska Court of Appeals concluded that the DNA testing Osborne wished to obtain could not qualify as “newly discovered” because it was available at the time of trial.”).

<sup>138</sup> *Id.* at 2336 (“Insofar as the State has articulated any reason at all, it appears to be a generalized interest in protecting the finality of the judgment of conviction from any possible future attacks.”).

conviction, for someone at their own expense to be entitled to the State's evidence when the claim was that an examination of that evidence would show conclusively whether the defendant was guilty or innocent of the crime.<sup>139</sup>

Ultimately, the District Court, relying on the Supreme Court's holding in *Heck v. Humphrey*,<sup>140</sup> rejected Osborne's claim. The court ruled that if Osborne wished to pursue his claim he needed to proceed via the Writ of Habeas Corpus.<sup>141</sup> The Ninth Circuit Court of Appeals reversed and held that *Brady v. Maryland*<sup>142</sup> applied.<sup>143</sup> *Brady* held that any exculpatory evidence must be turned over to the defendant.<sup>144</sup> Even though *Brady* had not dealt with post conviction evidence, the Ninth Circuit concluded that the prosecutor's obligation to turn over exculpatory evidence applied post-conviction.<sup>145</sup>

However, the Supreme Court reversed the Ninth Circuit in a five to four decision, holding that there was no constitutional right to the evidence post-conviction and that the State of Alaska had no obligation to turn over this semen for testing.<sup>146</sup> Chief Justice Roberts, in writing for the five Justices of the Court, held that *Brady* did not apply once the defendant has been convicted.<sup>147</sup> The prosecutor's obligation exclusively pertains to the trial stage and there was only a limited interest in post-conviction release.<sup>148</sup> There was no procedural or substantive due process right that applied after the conviction had

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<sup>139</sup> *Id.* at 2316 (majority opinion).

<sup>140</sup> 512 U.S. 477 (1994).

<sup>141</sup> *Osborne*, 129 S. Ct. at 2315 ("The District Court first dismissed the claim under *Heck* . . . holding it 'inescapable' that Osborne sought to 'set the stage' for an attack on his conviction, and therefore 'must proceed through a writ of habeas corpus.'").

<sup>142</sup> 373 U.S. 83 (1963).

<sup>143</sup> *Osborne v. Dist. Attorney's Office*, 423 F.3d 1050, 1056 (9th Cir. 2005)

<sup>144</sup> *Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

<sup>145</sup> *Osborne v. Dist. Attorney's Office*, 521 F.3d 1118, 1132 (9th Cir. 2008).

<sup>146</sup> *Osborne*, 129 S. Ct. at 2322 (finding that it was not the Court's position to create new constitutional standards pertaining to DNA evidence by extending substantive due process rights to this area).

<sup>147</sup> *Id.* at 2320. Federal courts may provide alternative post-conviction relief if the State does not have adequate post-conviction relief to maintain the defendant's substantive due process rights. *Id.*

<sup>148</sup> *Id.* ("Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in post-conviction relief.").

occurred.<sup>149</sup>

Chief Justice Roberts opined that the Supreme Court did not need to constitutionalize this right to DNA testing because the states themselves were already addressing the issue.<sup>150</sup> Forty-six states had established, either legislatively or judicially, a mechanism to provide post-conviction rights to criminal defendants to have DNA tests conducted.<sup>151</sup> Chief Justice Roberts' reasoning was that because forty six states had made such provisions and Alaska was moving in that direction as well, there was no need for the Court to declare a new federal constitutional right.<sup>152</sup>

It is important to note that Alaska does provide a right to someone to have newly discovered evidence considered as part of a determination as to whether a new trial was required.<sup>153</sup> However, this evidence—the semen—was not itself *newly* discovered, even though it could well be maintained that the results of a not-previously-available STR DNA test conducted on the semen should be deemed to constitute “new” evidence. The need for a new trial might result if the state were to hand this evidence over to a criminal defendant and a new DNA test was performed. Alaska's determination that the semen itself is not newly discovered evidence absolved

<sup>149</sup> *Id.* at 2322.

<sup>150</sup> *Osborne*, 129 S. Ct. at 2322 (“The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords. To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response.”).

<sup>151</sup> *Osborne*, 129 S. Ct. at 2316. See Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1719 (2008) (surveying state post-conviction DNA statutes).

<sup>152</sup> *Osborne*, 129 S. Ct. at 2322.

<sup>153</sup> *Id.* at 2320.

Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It exempts such claims from otherwise applicable time limits. The State provides for discovery in post-conviction proceedings, and has-through judicial decision-specified that this discovery procedure is available to those seeking access to DNA evidence.

*Id.* See ALASKA STAT. § 12.72.010 (4) (2009), which states, in pertinent part:

A person who has been convicted of . . . a crime may institute a proceeding for post-conviction relief if the person claims that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice.

the state from any requirement that there be a new trial.<sup>154</sup>

Justices Stevens, Breyer, Ginsburg, and Souter, who joined in a dissenting opinion, focused on the basic question of just what is the State's interest in refusing to turn over the evidence.<sup>155</sup> If the DNA test shows that Osborne was guilty, then the State accomplished its goal of convicting the guilty.<sup>156</sup> If the test shows that Osborne did not commit the sexual assault, that would also serve the interest of the State.<sup>157</sup> Surely, Alaska would not want to have an innocent person convicted of a crime and serving time in jail. Alaska, therefore, could best ensure justice by providing the semen sample for DNA re-testing.

Another issue which was of significance to the dissent was that if it were to turn out that Osborne was not the one who had committed the crime, there needed to be a search for the real perpetrator.<sup>158</sup> For those reasons, the dissent concluded that there was nothing for Alaska to lose by refraining to turn over the semen for testing.<sup>159</sup> The paramount interest of the State was to seek justice.<sup>160</sup> The dissent concluded that the defendant was denied substantive due

<sup>154</sup> *Osborne*, 129 S. Ct. at 2333 (Stevens, J., dissenting).

<sup>155</sup> *Id.* at 2338 (finding that the State did not present any governmental interest that can support its decision to prohibit Osborne from testing the evidence, and therefore, was considered arbitrary action by the State).

<sup>156</sup> *Id.* at 2331.

The State . . . possesses physical evidence that, if tested, will conclusively establish whether . . . Osborne committed rape and attempted murder. If he did, justice has been served by his conviction and sentence. If not, Osborne has needlessly spent decades behind bars while the true culprit has not been brought to justice.

*Id.*

<sup>157</sup> *Id.* at 2338.

[I]f a wrongly convicted person were to [prove] his actual innocence, no state interest would be sufficient to justify his . . . detention. . . .

. . . An individual's interest in physical liberty . . . would be vindicated by providing postconviction access to DNA evidence, as would the State's interest in [punishing] the true perpetrator of a crime.

*Osborne*, 129 S. Ct. at 2338.

<sup>158</sup> *Id.* at 2337.

<sup>159</sup> *Id.* at 2338.

<sup>160</sup> *Id.* at 2335 ("Where the government holds previously-produced forensic evidence . . . that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence" (quoting *Harvey v. Horan*, 285 F.3d 298, 317 (4th Cir. 2002))).

process rights because the state action was arbitrary, it was in place without any procedural justification.<sup>161</sup> If our constitutional protections do not cease at the doors of our prisons, then *Brady* should apply to post conviction situations.<sup>162</sup> The underlying rationale of *Brady* is fundamental fairness; it is the obligation of the prosecutor to seek justice, not just to obtain convictions.<sup>163</sup>

Focusing on the determination that forty-six states have adopted the right for individuals to obtain post conviction evidence, Chief Justice Roberts essentially challenged the need for the Court to intervene when the right to post-conviction evidence is almost universal.<sup>164</sup> Justice Stevens responded to this position in his dissent by commenting that the fact that so many states have recognized this right shows that there was widespread acceptance of the need for those who have been convicted to obtain DNA testing.<sup>165</sup> Therefore, Stevens concluded, there needs to be a federal remedy when a state does not comply with what is commonly acknowledged to be an individual's right.<sup>166</sup>

There is an interesting postscript to this case. The Bush Administration had submitted an amicus brief in support of Alaska's claim that it did not have to turn over the semen for the post conviction DNA testing.<sup>167</sup> Subsequent to the filing of that amicus, the Obama Administration had taken office. There was a press release is-

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<sup>161</sup> *Id.* at 2338 (noting that although *Brady* does not apply to post-conviction relief, the Court's concern with fundamental fairness that was at the core of the *Brady* decision is also present when inmates, like Osborne want to have DNA tests conducted on evidence that can determine their guilt or innocence).

<sup>162</sup> *Osborne*, 129 S. Ct. at 2335.

<sup>163</sup> *Id.*; see *Prosecutorial Misconduct*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 603, 603 (2009) ("The prosecutor's duty in a criminal prosecution is to seek justice."); ABA Criminal Justice Section Standards, § 3-1.2 (c), available at [http://www.abanet.org/crimjust/standards/pfunc\\_blk.html#1.2](http://www.abanet.org/crimjust/standards/pfunc_blk.html#1.2) ("The duty of the prosecutor is to seek justice, not merely to convict.").

<sup>164</sup> *Osborne*, 129 S. Ct. at 2316 (majority opinion).

<sup>165</sup> *Id.* at 2335 (Stevens, J., dissenting).

<sup>166</sup> *Id.* at 2320 (majority opinion) ("Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.").

Osborne has demonstrated a constitutionally protected right to due process which the State of Alaska thus far has not vindicated and which this Court is both empowered and obliged to safeguard. On the record before us, there is no reason to deny access to the evidence . . . .

*Id.* at 2339 (Steven, J., dissenting).

<sup>167</sup> Brief for the United States as Amici Curiae in support of Petitioners, Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009), 2008 WL 5451774 at \*1.



sued on the day of the Court's decision by the new Attorney General, Eric Holder, which stated:

[In today's decision] the Court merely spoke about what is constitutional, not about what is good policy. And there is a fundamental difference. . . . Simply because a course of action is constitutional does not make it wise . . . .

. . . [T]his administration believes that defendants should be permitted access to DNA evidence in a range of circumstances.<sup>168</sup>

## V. *MELLENDEZ-DIAZ V. MASSACHUSETTS*

From a criminal defense attorney's perspective, *Melendez-Diaz v. Massachusetts*<sup>169</sup> is of great import because the Court's decision authorizes the cross-examination of experts who draft laboratory reports for the state.<sup>170</sup> The Supreme Court held that a laboratory report could only be admitted if the accused had the opportunity to cross-examine the person who prepared the report.<sup>171</sup> The Court concluded that this right of the accused was provided for and required by the Confrontation Clause of the Sixth Amendment.<sup>172</sup>

The authority to cross-examine the state's expert is of vital import to criminal defense attorneys for a number of reasons. First, there may be contamination of the sample which has been subjected to laboratory analysis.<sup>173</sup> For example, the technician may use some

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<sup>168</sup> Press Release, Att'y Gen. Eric Holder, Statement from the Attorney General on Today's Decision by the Supreme Court in *District Attorney's Office for the Third Judicial District et al. v. Osborne* (June 18, 2009) (emphasis added), available at <http://www.justice.gov/opa/pr/2009/June/09-ag-604.html>.

<sup>169</sup> 129 S. Ct. 2527 (2009).

<sup>170</sup> *Id.* at 2532.

[T]he analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that the petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial.

See *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

<sup>171</sup> *Melendez-Diaz*, 129 S. Ct. at 2532.

<sup>172</sup> *Id.* at 2534. See U.S. CONST. amend. VI, which states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

<sup>173</sup> *Melendez-Diaz*, 129 S. Ct. at 2532 n.5 (noting that specimens used in forensic studies

of the same utensils to test the newly received white powder that has just been used on a prior sample which might have consisted of cocaine or heroin. The laboratory expert needs to be cross examined about the accuracy, the weight and composition of the powder, the accuracy of the test itself, the methodology that was used, possible poor judgment of the analyst, and the ambiguity of any language in the report itself.<sup>174</sup>

The training, the expertise (or the lack thereof) of the laboratory technician who performed the test, and the possible bias of the analyst are all vital pieces of information that are important in subjecting the credibility and reliability of a laboratory analyst to cross-examination.<sup>175</sup> Very often these laboratory technicians work for the police department and may not be the detached, objective scientist who is merely reporting the results of his work. On cross-examination, there is an opportunity to explore any bias that may exist if the expert is under the employ of the police. When it is an independent laboratory that is not part of the police department that conducted the testing, it is possible that the laboratory might receive a very high percentage of its business from the police department, and, therefore, the technicians might be declined to have their analysis comply with the perceived desired result of the police.<sup>176</sup> Another reason why the Court's holding was so important is that justice and fairness may best be promoted when laboratory technicians know that their performance is going to be subjected to cross-examination. The experts may well be more effective and more careful if they know that they are going to have to testify to support the quality and accuracy of work they had done.

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have been contaminated or lost). Forensic evidence may be subjected to manipulation. *Id.*

<sup>174</sup> *Id.* at 2532.

<sup>175</sup> *Id.* at 2537-38.

Like expert witnesses . . . , an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

. . . .

. . . [T]here is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts.

*Id.* at 2537, 2538; Symposium, *Sixth Amendment—Witness Confrontation—Testimony of Crime Lab Experts*, 123 HARV. L. REV. 202, 210 (2009).

<sup>176</sup> Nat'l Research Council of the Nat'l Academies, *Strengthening Forensic Evidence* 160, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>

## VI. *BRISCOE V. VIRGINIA*

The Supreme Court recently granted certiorari to determine whether a state statute that shifted the burden to the defendant to subpoena the laboratory analyst as an adverse witness for cross-examination purposes was consistent with the *Melendez-Diaz* requirement that the State produce the analyst to testify in order to admit the report into evidence.<sup>177</sup>

In *Briscoe*, the defendant was charged with possession of cocaine.<sup>178</sup> At trial, the State sought to introduce a laboratory report, without calling the analyst to testify, that concluded that the substance was cocaine.<sup>179</sup> Briscoe objected on the ground that the Supreme Court case of *Crawford v. Washington*<sup>180</sup> prohibited the admissibility of the report because it was “testimonial” and the prosecution did not call the analyst to testify.<sup>181</sup> The trial judge ruled that because the Virginia statute provided the right to subpoena the analyst as an adverse witness for cross-examination during the defendant’s case-in-chief, Briscoe’s confrontation clause rights were still protected.<sup>182</sup> Briscoe was convicted and appealed his conviction.

The Virginia Supreme Court affirmed the trial judge’s ruling and held that Virginia’s statutory procedure preserved Briscoe’s confrontation clause right and the failure to subpoena the analyst was a waiver of that right.<sup>183</sup> The United States Supreme Court, in a one-sentence opinion, reversed and remanded for proceedings not incon-

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<sup>177</sup> *Magruder v. Virginia*, 657 S.E.2d 113 (2008) *vacated by*, *Briscoe v. Virginia*, 2010 WL 246152 (2010) (per curiam); *see also* Brief for Petitioner at \*1-2, *Briscoe v. Virginia*, 129 S. Ct. 2858, No. 07-11191 (2009), 2009 WL 2862541.

<sup>178</sup> *Id.* at 117.

<sup>179</sup> *Id.*

<sup>180</sup> 541 U.S. 36, 68 (2004).

<sup>181</sup> *Magruder*, 657 S.E.2d at 117. At the time of the trial, *Melendez-Diaz* had not been decided, but *Crawford* still demanded that in order for the prosecution to introduce “testimonial” statements without the declarant’s testimony, it must prove that the declarant is unavailable and the defendant had a prior opportunity to cross-examine the unavailable witness. *Crawford*, 541 U.S. at 68.

<sup>182</sup> *Id.* The statute at issue, VA. CODE ANN. § 19.2-187.1 (West 2009), states, in relevant parts:

The accused . . . shall have the right to call the person performing such analysis or examination . . . and examine him . . . as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

<sup>183</sup> *Crawford*, 541 U.S. at 124.

sistent with *Melendez-Diaz*.<sup>184</sup> It is unclear why the Supreme Court granted certiorari in this case only four days after *Melendez-Diaz*; varying explanations have been offered.<sup>185</sup> Indeed, Justice Scalia queried at the oral argument in *Briscoe*, “why is this case here except as an opportunity to upset *Melendez-Diaz*?”<sup>186</sup>

The Virginia statute that shifted the burden from the Confrontation Clause to the Compulsory Process Clause had not comported with the requirement of *Melendez-Diaz*. The implication of the Virginia statute was that the defendant bore the risk that a laboratory analyst might not be available to testify, thus there was no guarantee of the defendant’s right to cross-examination under *Crawford*.<sup>187</sup> Even if a witness were to be available, *Briscoe* argued that the Compulsory Process Clause would still constitute an inadequate substitute for the Confrontation Clause.<sup>188</sup>

There were twenty-six states and the District of Columbia that had signed an Amicus Curae in support of Virginia and argued that *Melendez-Diaz* imposed an undue burden on its forensic science practices because “the historic backlog of drug analysis requests” will be exacerbated due to the requirement that technicians be required to testify in court.<sup>189</sup> Many of these states have attempted to adopt new

<sup>184</sup> *Briscoe*, 2010 WL 246152 at \*1.

<sup>185</sup> See, e.g., *The Right to Confront Witnesses*, N.Y. TIMES Jan. 11, 2010 at A16 (suggesting that the replacement of Justice David Souter with Justice Sonya Sotomayor will provide the *Melendez-Diaz* dissenter the fifth vote needed to overturn that decision in *Briscoe*); Adam Liptak, *Court Refuses Noriega Case and Disposes of Another*, N.Y. TIMES, Jan. 26, 2010 at A15 (noting that State prosecutors argued that *Melendez-Diaz* “is already proving unworkable” and an amicus brief suggested “an overwhelming negative impact”).

<sup>186</sup> Adam Liptak, *With New Member, Supreme Court Takes New Look at Crime Lab Ruling*, N.Y. TIMES, Jan. 12, 2010 at A11.

<sup>187</sup> Brief for Petitioner, *supra* note 177 at \*9.

As *Melendez-Diaz* held, the burden imposed by the Confrontation Clause is on the prosecution to present its witnesses—not on the defense to present adverse witnesses. The Clause is worded in passive terms, which reflects the stark difference between the confrontation right and the . . . Compulsory Process Clause.

*Id.*; see also U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .”).

<sup>188</sup> Brief for Petitioner, *supra* note 177 at \*9. The Compulsory Process Clause “is . . . of little value” and imposes an added burden on the defendant. *Id.*

<sup>189</sup> Brief for the States of Indiana, et. al. as Amici Curae in Support of Respondent, *Briscoe v. Virginia*, 129 S. Ct. 2858 (2009) (No. 07-11191) 2009 WL 3652660 at \*1 [hereinafter Brief for the States] (noting that the backlog reached 222,000 requests as of 2005 (citing Mathew R. Durose, Bureau of Justice Statistics Bulletin, Census of Publicly Funded Forensic Crime Laboratories, 2005, Appendix 1 (July 2008))).

methods which they believed would comply with the Confrontation Clause, and it is claimed that the Court should have recognized this compelling state interest and accepted the procedures utilized by Virginia.<sup>190</sup> Furthermore, the States maintained that prosecution of drug possession cases are crippled because of the lack of resources to have a laboratory technician testify in every case.<sup>191</sup> Despite these contentions, the requirements outlined in *Melendez-Diaz* remain unchanged after *Briscoe*.

## VII. OHIO'S ONE-DRUG LETHAL INJECTION METHOD AFTER *BAZE V. REES*

In *Baze v. Rees*,<sup>192</sup> the Supreme Court held that the administration of a three-drug cocktail method of lethal execution is not cruel and unusual punishment under the Eighth amendment.<sup>193</sup> Romell Broom had been sentenced to be executed in Ohio for a 1984 rape and murder conviction, but on September 15, 2009, after eighteen failed attempts by the State to locate a vein to inject the lethal combination of drugs, the execution was required to be re-scheduled.<sup>194</sup> Such failed execution attempts are not an infrequent occurrence; in fact, the Death Penalty Information Center has a growing list of similar accounts from other states that have had similar cruel and unusual events.<sup>195</sup>

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<sup>190</sup> Brief for the States, *supra* note 188 at \*12-17. Some States have used “Notice-and-Demand Procedures,” which requires the State to give notice of intent to use a laboratory report and the defendant can make a demand for the technician to appear. *Id.* at \*12. Anticipatory demand requirements are a slight variation of notice and demand, which places the burden on the defendant to demand that the technician appear without notice from the State. *Id.* at \*14. Video conferencing is also used to ease the burden on the State and allow the technician to testify from the laboratory. *Id.* at \*15. Another procedure, surrogate testimony, allows an expert to testify concerning laboratory reports because the analyst might not remember a given specific test conducted. *Id.* at \*17.

<sup>191</sup> Brief for the States, *supra* note 189 at \*7.

<sup>192</sup> 128 S. Ct. 1520 (2008).

<sup>193</sup> *Id.* at 1526 (“[P]etitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment.”).

<sup>194</sup> Bob Driehaus, *Ohio Plans to Try Again as Execution Goes Wrong*, N.Y. TIMES, Sep. 17, 2009 at A16.

<sup>195</sup> *Botched Executions*, N.Y. TIMES, Oct. 3, 2009 at A22 (noting that in Ohio, there had been three failed attempts in the last four years, including one that lasted ninety minutes and resulted in nineteen puncture wounds); see also Michael L. Radelet, Death Penalty Information Center, *Some Examples of Post-Furman Botched Executions*, Sept. 16, 2009,

The two hours of torture that Broom was put through have sparked a public outcry for states to consider whether the death penalty is constitutional at all.<sup>196</sup> In Ohio, Governor Strickland was forced to postpone three other executions until the State could revise its protocol to ensure that the executions were conducted in a humane manner. Lawrence Reynolds, convicted of a 1994 murder of a woman, and Darryl Durr, convicted of kidnapping and rape of a sixteen-year-old girl were the second and third executions to be postponed.<sup>197</sup> Kenneth Biros, who was convicted of attempted rape and murder in 1991, became the fourth prisoner to have his execution postponed.<sup>198</sup> As a result of Broom's failed execution and the subsequent stay of executions of four other prisoners, Ohio became the first state to implement a one-drug cocktail lethal injection.<sup>199</sup>

Under this single-drug approach, prison officials intravenously inject a large amount of anesthetic to kill the inmate.<sup>200</sup> If the prison officials are unable to find the inmate's vein or the process fails (as in the case of Broom), the officials will administer two back-up chemicals—midazolam and hydromorphone—intramuscularly.<sup>201</sup> Ohio officials claimed that their decision to switch to a single-drug approach was based on the requirement of an Ohio statute specifically mandating that a procedure be used which provides "inmates a quick and painless death."<sup>202</sup>

Biros, who was set to be the first prisoner scheduled to be executed under this new method, challenged the Ohio policy as violat-

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<http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (listing two failed execution attempts by asphyxiation, ten by electrocution, and thirty by lethal injection).

<sup>196</sup> *Botched Executions*, *supra* note 195.

<sup>197</sup> Bob Driehaus, *In Aftermath of Failed Execution, Ohio Governor Orders Postponement of 2 Others*, N.Y. TIMES, Oct. 6, 2009 at A12.

<sup>198</sup> Bob Driehaus, *Judge Delays Another Ohio Execution*, N.Y. TIMES, Oct. 20, 2009 at A19.

<sup>199</sup> Bob Driehaus, *Ohio is First to Change To One Drug In Executions*, N.Y. TIMES, Nov. 14, 2009 at A10.

<sup>200</sup> Ian Urbina, *Ohio Finds Itself Leading the Way to a New Execution Method*, N.Y. TIMES, Nov. 18, 2009, at A25.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* In Ohio, the executioners are not anonymous, making it difficult for the State to recruit physicians to carry out the executions and Ohio also had a law that specifically guarantees "inmates a quick and painless death," which the three-drug cocktail could not uphold. *Id.*

ing his eighth and fourteenth amendment rights.<sup>203</sup> However, the Sixth Circuit Court of Appeals rejected the petition to stay the execution and found that Ohio's new protocol did not "demonstrate[] risk[s] of severe pain . . . that . . . is substantial when compared to the known and available alternatives."<sup>204</sup> Although the protocol has not been perfected, it is not cruel and unusual punishment; in fact, the court stated that it is a significant improvement over the three-drug method Ohio had eliminated.<sup>205</sup>

The Sixth Circuit rejected all five of Biros' arguments challenging the new Ohio protocol. Biros' first contention regarding a risk of possible maladministration<sup>206</sup> was similar to that which was made and rejected in *Baze* when the Supreme Court concluded that a possible improper mix of chemicals or the failure to properly locate a vein for the IV fluid by medical staff is not "objectively intolerable."<sup>207</sup> The Sixth Circuit stated that non-specific claims of improper implementation made by Biros were not sufficiently distinguishable from the similar general claims of maladministration which were considered in *Baze*.<sup>208</sup> Biros' second claim regarding the insufficiency of a minimal one-year training requirement for medical staff that will carry out the execution was rejected.<sup>209</sup> In *Baze*, the Supreme Court had approved of a one-year professional experience requirement for the medical personnel that participated in the execution.<sup>210</sup>

Biros' third argument of the lack of supervision by licensed physicians was similarly rejected.<sup>211</sup> Similar to Kentucky's protocol in *Baze*, the Ohio protocol requires the Warden and Director of the

<sup>203</sup> *Cooney II v. Strickland*, 589 F.3d 210, 215 (6th Cir. 2009), *cert denied*, 130 S. Ct. 826 (2009).

<sup>204</sup> *Id.* at 216 (quoting *Baze*, 128 S. Ct. at 1537).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 223-24.

<sup>207</sup> *Baze*, 128 S. Ct. at 1537-38; *see also* *Beardslee v. Woodford*, 395 F.3d 1064, 1071-72 (9th Cir. 2005) (*per curiam*) (rejecting a similar claim that "the lack of specificity" in the protocol can lead to "variables that can complicate the maladministration of the drugs").

<sup>208</sup> *Cooney II*, 589 F.3d at 224.

<sup>209</sup> *Id.* at 226.

<sup>210</sup> *Baze*, 128 S. Ct. at 1533-34. Other states that considered this issue permit medical staff with less training to participate in executions. *See, e.g.*, *Emmett v. Johnson*, 532 F.3d 291, 295 (4th Cir. 2008) (finding that Virginia's eight hours of training per month is sufficient to start and administer IV fluid); *Harbison v. Little*, 571 F.3d 531, 538 (6th Cir. 2009) (finding that monthly training sessions for paramedic technicians administering the IV provided sufficient safeguards to assume proper administration of Tennessee's protocol).

<sup>211</sup> *Cooney II*, 589 F.3d at 227.

Ohio Department of Rehabilitation and Correction to remain in the room to determine whether the prisoner is unconscious, if he needs more IV fluid, or whether there is any issue with the tubing and catheter itself.<sup>212</sup> The fourth argument regarding the unlimited time the execution team has to locate a vein was rejected, relying on *Baze* for the principle that one hour to locate a primary and secondary IV location was appropriate and not excessive.<sup>213</sup> Finally, Biros' fifth claim that there was no explicit ban on a cut-down procedure<sup>214</sup> was also rejected because there was no evidence that this method would be used in Ohio.<sup>215</sup>

As a result of the Sixth Circuit's denial of the stay of execution in *Cooley II*, on December 9, 2009, Biros became the first inmate in the United States to be executed by the one-drug intravenous method.<sup>216</sup> Biros was pronounced dead at 11:47 a.m.<sup>217</sup> It took executioners roughly thirty minutes to find Biros' vein, as opposed to the two hours it took to find Mr. Broom's vein.<sup>218</sup> Some critics of the one-drug method have concluded that it is inhumane,<sup>219</sup> maintaining that because of the method's experimental nature it should not have been used before a "public airing of its strength and weaknesses, with input from medical and legal authorities."<sup>220</sup> In addition, the one-drug method's "required dosage of [barbiturate] would be less predictable and more variable when it is used as the sole mechanism for producing death."<sup>221</sup> Biros' attorney, Timothy Sweeney, in the request for an emergency stay of Biros' execution, claimed that the one-drug lethal injection was "human experimentation, pure and simple."<sup>222</sup>

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<sup>212</sup> *Id.* See also *Baze*, 128 S. Ct. at 1528, 1534.

<sup>213</sup> *Cooley II*, 589 F.3d at 227. See also *Baze*, 128 S. Ct. at 1534 (noting that the one-hour time limit was found by the trial court to be "not excessive but rather necessary").

<sup>214</sup> A cut-down procedure is the process by which an incision is made into the prisoner's arm or leg to gain IV access. See *Nelson v. Campbell*, 541 U.S. 637 (2004).

<sup>215</sup> *Cooley II*, 589 F.3d at 228.

<sup>216</sup> Ian Urbina, *Ohio Killer is the First Inmate in U.S. to be Executed With a Single-Drug Injection*, N.Y. TIMES, Dec. 9, 2009, at A18.

<sup>217</sup> *Id.*

<sup>218</sup> *There is No 'Humane' Execution*, N.Y. TIMES, Dec. 14, 2009, at A30.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Workman v. Bredesen*, 486 F.3d 896, 919 (6th Cir. 2007).

<sup>222</sup> Lisa Cornwell, *Execution Can Proceed Under New Ohio Standards*, HOUSTON CHRON., Nov. 26, 2009, at A3; Cf. *Ohio Killer is the First Inmate*, *supra* note 216 (Kent



In spite of Ohio's experimental use of the new single-drug injection method, it is still the case that all the other states that have death penalty statutes continue to rely on the three-drug method.<sup>223</sup> However, in 2009, there were proposals in eleven state legislatures to fully abolish the death penalty.<sup>224</sup> In 2009, New Mexico became the fifteenth state to abolish the death penalty.<sup>225</sup> Although, the Connecticut legislature approved legislation to repeal the death penalty, the governor vetoed the proposal.<sup>226</sup> In Colorado and Montana, proposals to abolish the death penalty were approved by one house of its state legislatures.<sup>227</sup> The Maryland legislature reformed its capital punishment law to make it more difficult to impose the death penalty in the state.<sup>228</sup> The high costs of carrying out executions, the potential for botched executions, and the reality of wrongful convictions have been the primary factors which have prompted states to reconsider their death penalty statutes. Opponents of the death penalty have focused on the revelations resulting from the use of DNA evidence to show how unreliable the system has been.<sup>229</sup> According to the Death Penalty Information Center, since 1973, 130 people have been released from death row because of evidence, including that of DNA analysis, which has exonerated them.<sup>230</sup> As inmates on death row have been exonerated, it is claimed by some that it is inevitable that innocent people have been put to death.<sup>231</sup> Such critics insist that the only way to eliminate the varied and insurmountable problems with executions is to simply abolish the death penalty.<sup>232</sup>

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Scheidegger, the legal director of the Criminal Justice Legal Foundation of Sacramento, an organization that supports the death penalty, in response to the argument that the one-drug method was human experiment stated, "[w]hat kind of test do they expect? . . . A controlled study with volunteers? Not likely.")

<sup>223</sup> *Lethal Injection: Moratorium on Executions Ends After Supreme Court Decision*, available at <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision>.

<sup>224</sup> *Year End Report*, *supra* note 121, at 1.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 1-2.

<sup>228</sup> *Id.* at 5.

<sup>229</sup> *There Is No 'Humane' Execution*, *supra* note 218.

<sup>230</sup> Dr. Andrew D. Moran, *Evolving Standards of Decency? The Death Penalty in the USA in 2008*, available at <http://www.deathpenaltyinfo.org/evolving-standards-decency-death-penalty-usa-2008>.

<sup>231</sup> *There Is No 'Humane' Execution*, *supra* note 218.

<sup>232</sup> *Id.*

### VIII. CONCLUSION

The 2008 Term of the Supreme Court was presented with issues concerning a criminal defendant's right to a speedy trial, effective assistance of counsel, post-conviction access to DNA testing, and the imposition of the death penalty.<sup>233</sup> In some instances, the Court's rulings advanced the rights of criminal defendants,<sup>234</sup> yet other holdings could be interpreted as showing a diminished deference to the constitutional protections of those charged with crimes.<sup>235</sup> Some of these cases have illustrated the unfortunate realities of our criminal justice system; the state-desired focus on finality appears to be of the utmost concern and the integrity of the prosecutorial process may at times be sacrificed. Indigent defendants are confronted with unique challenges due to their representation by inadequately funded public defender offices.<sup>236</sup> For Troy Davis and William Osborne, who have attempted to present critical and material evidence bearing on their guilt or innocence, it has been extremely difficult. In *Osborne*, the Court held that there was no constitutional right to subject to a new and highly reliable form of DNA analysis a semen sample that had been tested sixteen years earlier.<sup>237</sup> Troy Davis' future as of March 2010 is unclear; the Court had taken the extraordinary step of in-

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<sup>233</sup> *Id.*

<sup>234</sup> See *Davis*, 130 S. Ct. at 1 (noting that the United States Supreme Court granted the writ and remanded the case to the federal district court to "make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence"); *Melendez-Diaz*, 129 S. Ct. at 2532 (holding that a laboratory report could only be admitted if the accused had the opportunity to cross-examine the person who prepared the report); *Magruder*, 657 S.E.2d 113 (2008), *vacated*, *Briscoe*, 2010 WL 246152, at 1 (noting that the Supreme Court granted certiorari to decide whether a state statute that shifted the burden to the defendant to subpoena the laboratory analyst as an adverse witness for cross-examination purposes was consistent with the requirement that the State produce the analyst to testify to admit the report into evidence).

<sup>235</sup> See *Ventris*, 129 S. Ct. at 1846 (holding that the jailhouse informants testimony that was obtained in violation of the Sixth Amendment, was allowed to be used to attack Ventris' testimony at trial); *Brillon*, 129 S. Ct. at 1293 (holding that "delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned"); *Osborne*, 129 S. Ct. at 2322 (holding that it is not for the Court to constitutionalize a "freestanding right to access DNA evidence").

<sup>236</sup> See *Brillon*, 955 A.2d at 1126; *Osborne*, 129 S. Ct. at 2336 (Stevens, J., dissenting) ("Insofar as the State has articulated any reason at all, it appears to be a generalized interest in protecting the finality of the judgment of conviction from any possible future attacks.").

<sup>237</sup> See *Osborne*, 129 S. Ct. at 2322 (majority opinion) (finding that it was not the Court's position to create new constitutional standards pertaining to DNA evidence by extending substantive due process rights to this area).

2010]

*CRIMINAL LAW JURISPRUDENCE*

577

structing the district court to adjudicate Davis' petition for an original writ of habeas corpus based on the claim of actual innocence.<sup>238</sup>

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<sup>238</sup> See *Davis*, 130 S. Ct. at 2 (Scalia, J., dissenting) (“Today this Court takes the extraordinary step-one not taken in nearly 50 years-of instructing a district court to adjudicate a state prisoner’s petition for an original writ of habeas corpus.”).

