

# CALIFORNIA'S NEW EVIDENCE STANDARD NEEDS A MAKEOVER

*by Michael Semanchik*

Since 1989, more than 1,500 people have been exonerated of crimes they did not commit nationwide. What was once thought of as a unique, uncommon, unfortunate circumstance is now reported almost daily across the country. Advances in science, as well as our understanding of eyewitness testimony, false confessions, and the uncovering of police and prosecutorial misconduct, have catapulted wrongful convictions into the spotlight. California alone has 150 exonerations, including 4 from death row. And, if not for one of the toughest new evidence standards in the country, California would have many more.

California's standard for reversing a conviction when an inmate presents new evidence to the court is extremely high. As it stands today, a defendant seeking a reversal under the new evidence standard must first prove the evidence they are presenting is, in fact, new. This is common in most states, and the reason is pretty obvious. The justice system favors finality and respects a jury's decision in a criminal case. Where California's standard runs afoul of the majority of other states is that California also requires a defendant to completely undermine the prosecution's case, and the evidence must point unerringly to innocence. As will be discussed, this is often an impossible standard to meet and consequently, leaves many innocent inmates in prison.

One does not have to think hard about a situation where strong new evidence might cast serious doubt on the prosecution's case, but does not completely undermine it. For example, there may be eyewitness testimony placing a defendant at the scene of a murder, but DNA tests suggest a different defendant deposited several hairs and left blood behind. Similarly, many instances of new evidence may cast serious doubt on a case, but not point unerringly to innocence. In other words, there may be a 5% chance the evidence points to some other explanation (not innocence). Let's put this in practical, real-life terms.

D gets convicted of murdering V after two hung juries. In the initial investigation and trial, investigators discovered a watch near V's body. When presented with a picture of the watch, D thought it may have belonged to him, but later realized he was mistaken. The prosecution argued the watch belonged to the murderer. Additionally, the prosecution put on evidence of an extramarital affair between D and V, including numerous lies told by D to co-workers about the affair. After a few mistrials, D gets convicted. Without a doubt, the most compelling evidence against D was the watch. As the prosecutor told the jury in closing, there is

nothing more compelling than the murderer's watch found next to the body.

Now, fast-forward to the present day. D asks for DNA testing on the watch. The DNA on the watch comes back to V's stepson, G, who had a rocky relationship with V. D is excluded from the watch. Assume for the purposes of this example, DNA testing is considered new (not available at the time of trial). Would the discovery of the stepson's DNA completely undermine the prosecution's case? Probably not. The prosecution's case included other circumstantial evidence that, although may have an explanation, cannot be completely undermined. Would the discovery of the stepson's DNA point unerringly to innocence? Certainly, the prosecution argued at trial the watch belonged to the murderer. Nonetheless, the prosecution would be able to argue the stepson's DNA is inconsequential and arrived on the watch through some other means not associated with V's murder, leaving its significance open to error. Thus, in California, finality wins and D's conviction would remain intact despite the problematic watch evidence used against him.

In 39 of the 50 states, D would be granted a new trial and his conviction would be reversed. Why? The vast majority of the states have a standard similar to the following: "In order to gain a new trial upon newly discovered evidence, a defendant must establish that it is so material that it would probably produce a different verdict, if the new trial were granted." In the case of D, the prosecution would be left with a very circumstantial case. Further, given it took multiple trials, it would be difficult to argue this was not a "close case." The watch was clearly material, consisting of 13 of 29 of the prosecution's exhibits, and it was the only physical evidence linking D to the crime. At the very least, in most states, D's conviction would be reversed, and it would proceed back to a new trial. The prosecution could then re-prosecute, and this new piece of evidence would be factored in to a case where the state must prove beyond a reasonable doubt the defendant committed the crime.

It is time for California to catch up with the rest of the country and allow our justice system to correct the mistakes it has made. Our system is not perfect and probably never will be as long as humans are involved.

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