NOTE

Once was Enough: Extending the Double Jeopardy Clause to Prohibit the Reprosecution of Defendants Who Were Wrongfully Convicted Because of Official Misconduct

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I. INTRODUCTION

Louis Taylor spent forty-two years in prison for a crime he did not commit.[1] On April 2, 2013, however, Taylor pleaded no contest so that he would not die in prison.[2] While assisting in Taylor's release, Barry Scheck, Co-Director of the Innocence Project, said, "Mr. Taylor has served more than four decades in prison for a crime that arson scientists now believe never even happened, and forcing [sic] him to accept this plea . . . ."[3]

On December 19, 1970, Louis Taylor, a 16-year-old African American, walked to the Pioneer Hotel in downtown Tucson, Arizona where several Christmas parties were underway.[4] Shortly after he arrived, a fire erupted in the hotel.[5] As the flames spread, Taylor assisted emergency workers and helped guests escape the blaze.[6] Despite Taylor's heroic efforts during the conflagration, police later decided Taylor's presence at the hotel was suspect and took him to the precinct where they interrogated him throughout the night.[7] The Innocence Project report states, "Although Taylor always maintained his innocence, he was arrested for the crime before there was even a report that the fire was arson."[8]

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[1] *Innocence Project Deeply Troubled by Plea of Wrongly Convicted Arizona Man*, INNOCENCE PROJECT (Apr. 2, 2013, 12:00 AM), http://www.innocenceproject.org/innocence-project-deeply-troubled-by-plea-of-wrongly-convicted-arizona-man/. [hereinafter *Innocence Project Deeply Troubled by Plea*].

[2] *Id.*; Richard Ruelas, *Man Imprisoned for Fatal Tucson Hotel Fire to be Freed After 42 Years*, ARIZ. REPUBLIC (Mar. 29, 2013, 10:38 PM), http://archive.azcentral.com/news/arizona/articles/20130329tucson-man-imprisoned-hotel-fire-to-be-freed-42-years.html.

[3] *Innocence Project Deeply Troubled by Plea, supra* note 1.

[4] *See* State v. Taylor, 537 P.2d 938, 941-43 (Ariz. 1975) (en banc).

[5] *See id.*

[6] *See id.*

[7] *See id.* at 943–44.

[8] *Innocence Project Deeply Troubled by Plea, supra* note 1; *see* Ruelas, *supra* note 2.

Soon after, an all-white jury convicted Taylor and sentenced him to life in prison.[9] The prosecution's star witness was Cyrillis W. Holmes, a fire prevention officer, who investigated the fire at the Pioneer Hotel.[10]

In 2013, Taylor's lawyers "conducted a sworn deposition with original fire investigator, Holmes, who claimed that he was able to determine that the fire was set by an 18-year-old black person as soon as he completed a quick walk-through of the debris."[11] In the deposition, Holmes said:

> Blacks at that point, their background was the use of fire for beneficial purposes. In other words, they were used to clearing lands and doing cleanup work and things like that and fire was a tool. So it was just a tool for them. In other words, you're comfortable with it. And if they get mad at somebody, the first thing they do is use something they're comfortable with. Fire was one of them.[12]

Around that time, "Taylor's defense team also learned that the prosecutors never informed Taylor that six samples of debris from the fire were subjected to scientific testing that found that no accelerant had been used."[13] His lawyers "also learned that the prosecution had improper communication with the judge prior to the trial."[14]

In the years since Taylor's conviction, arson science and investigative methodologies have greatly improved. Both the Tucson Fire Department and panel of renowned fire experts, who reevaluated the evidence, now "agree that there was no scientific basis whatsoever for concluding that the fire was caused by arson" as Holmes's "original findings were based on outdated arson science."[15] Despite this, Holmes stood by his original findings, which were sufficient for the Prima County Attorney's Office.[16]

Prosecutors maintained the evidence was sufficient to secure Taylor's conviction once again.[17] Instead of going through the expense of retrying Taylor, prosecutors offered Taylor the option to agree to an *Alford* plea,

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[9] Ruelas, *supra* note 2.
[10] *Innocence Project Deeply Troubled by Plea, supra* note 1.
[11] *Id.*; *see* Ruelas, *supra* note 2.
[12] *Innocence Project Deeply Troubled by Plea, supra* note 1.
[13] *Id.*
[14] *Id.*
[15] *Innocence Project Deeply Troubled by Plea, supra* note 1; *see* Ruelas, *supra* note 2.
[16] *Innocence Project Deeply Troubled by Plea, supra* note 1; *see* Ruelas, *supra* note 2.
[17] *Innocence Project Deeply Troubled by Plea, supra* note 1.

similar to a no contest plea.[18] Under this plea, Taylor would maintain his innocence while pleading to time served and immediately be released. Thus, Taylor, who had been wrongfully imprisoned for more than thirty years, reluctantly accepted the plea so that he would not die in prison.[19]

Louis Taylor is not the only wrongfully convicted defendant who has been forced to accept a plea after being subjected to repeated reprosecution, despite abundant official misconduct. Another example is Edward Lee Elmore, who narrowly avoided a death row execution after spending thirty years wrongfully imprisoned for his wife's murder.[20] For decades, case prosecutors concealed the fact that DNA evidence implicated a Caucasian man in the murder, not Elmore, who is African American.

Habeas corpus proceedings revealed that prosecutors and police were aware of possible exculpatory evidence. This knowledge did not prevent officials from disclosing the evidence. Instead, prosecutors and police claimed the evidence had been lost.[21] Proceedings also revealed that police fabricated evidence with the intent to convict Elmore.[22] The court's response to the official misconduct was retrial.[23] In total, the state convicted Elmore of his wife's murder three times.[24] Appellate courts overturned each conviction, allowing the state to have another opportunity to convict Elmore.[25] Even though the Fourth Circuit vacated Elmore's conviction, prosecutors refused to dismiss the case. Instead, prosecutors offered Elmore an *Alford* plea which he accepted.[26]

The story of Kerry Max Cook represents the lengths to which prosecutors will go to seek and retain their conviction records.[27] In 1978, Cook was twenty-one years old when he was convicted of rape and murder.[28] Cook spent the next twenty-two years in prison, more than half

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[18] *Compare No Contest*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[a] criminal defendant's plea that, while not admitting guilt, the defendant will not dispute the charge.") *with Alford Plea*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[a] guilty plea that a defendant enters as part of a plea bargain without admitting guilt.").

[19] *See* Ruelas, *supra* note 2.

[20] RAYMOND BONNER, ANATOMY OF INJUSTICE: A MURDER CASE GONE WRONG (2012) [hereinafter ANATOMY OF INJUSTICE]; *see* Raymond Bonner, *When Innocence Isn't Enough,* N.Y. TIMES, Mar. 2, 2012.

[21] ANATOMY OF INJUSTICE, *supra* note 20.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] FRONTLINE, *The Plea: Kerry Max Cook* (June 17, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/cook.html [hereinafter *The Plea: Kerry Max Cook*].

[28] *Id.*

of which was spent on death row.[29] The state retried Cook twice due to pervasive prosecutorial misconduct that occurred in the initial trial.[30] The Texas Criminal Court of Appeals confirmed that police and prosecutors had manipulated witnesses, fabricated evidence, and presented perjured testimony. Even the District Attorney, David Dobbs, who prosecuted Cook in the retrials, confirmed that the government committed official misconduct during the investigation and Cook's first trial.[31] Despite the misconduct and weak evidence, Dobbs maintained that Cook should not walk free. Afraid to lose the trial and refusing to dismiss the case, Dobbs offered Cook an *Alford* plea.[32] Cook was reluctant to accept the deal but eventually relented, stating that he did not want to "give any more time."[33]

Two months after Cook accepted the plea, DNA analysis revealed that Cook was not the perpetrator.[34] Startlingly, Dobbs already knew that Cook's DNA did not match.[35] Dobbs had the DNA analysis performed shortly before the fourth trial against Cook, but did not disclose the evidence to the defense, claiming that the evidence was not exculpatory. [36]

Deciding to ignore the official misconduct laying in the wake of the Cook prosecution, Dobbs instead focused on obtaining a plea agreement, boasting that "[t]he important thing for us was to insure that [Cook] got a conviction for murder that would follow him for the rest of his life."[37] Sadly, Taylor's, Elmore's, and Cook's situations are not unique.[38] Studies by the National Academy of Science, the Innocence Project, and the National Registry of Exonerations demonstrate that hundreds of defendants wrongfully convicted based on official (police and/or prosecutorial) misconduct[39] accepted pleas because prosecutors threatened to reprosecute them.[40]

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *The Plea: Kerry Max Cook, supra* note 27.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *See Additional Innocence Information*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/additional-innocence-information (last visited Dec. 14, 2015); Raymond Bonner, *When Innocence Isn't Enough,* N.Y. TIMES, Mar. 4, 2012, at SR8; *see also* Sydney Schneider, *When Innocent Defendants Falsely Confess Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279, 283 (2013).
[39] *See infra* Part II.
[40] There are several but somewhat similar definitions of what constitutes official misconduct. For this Comment, the term "official misconduct" means egregious behaviors that satisfies the legal standards for prosecutorial misconduct and for police misconduct. *See* Darden v. Wainwright*,* 477 U.S. 168, 181 (1986); United States v. Young*,* 17 F.3d 1201, 1203-04 (9th Cir. 1994); Nickerson v. Roe,

The National Registry of Exonerations reports that homicide cases include a high rate of official misconduct resulting in wrongful convictions.[41] According to the May 2015 report, more than 425 defendants were wrongfully convicted for homicide due to official misconduct.[42] Nevertheless, many of these individuals, and other wrongfully convicted defendants, had to endure retrial to secure their release.[43]

Given the scale and severity of this problem, even a naïve or novice understanding of the Double Jeopardy Clause may lead one to question why there is retrial or the need to plead no contest. The Fifth Amendment of the United States Constitution provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[44] One could make the argument that this amendment bars retrial.[45]

However, prosecutors in these cases would be quick to correct this apparent misunderstanding. Cases dating back to the 1800s hold that when one obtains a new trial after appealing his conviction, he waives protection against reprosecution.[46] These cases hold that the success of appeal wipes

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260 F. Supp. 2d 875, 911 (N.D. Cal. 2003). Additionally, I appropriate the descriptions exoneration experts use:

> Official misconduct . . . [is] not a type of evidence that might mislead a court and convict an innocent person, but a broad category of behaviors that affect the evidence that's available in court, and the context in which that evidence is seen. The range of misconduct is very large. It includes flagrantly abusive investigative practices that produce the types of false evidence we have discussed: committing or procuring perjury; torture; threats or other highly coercive interrogations; threatening or lying to eyewitnesses; forensic fraud. At the far end, it includes framing innocent suspects for crimes that never occurred. The most common serious form of official misconduct is concealing exculpatory evidence from the defendant and the court.

SAMUEL R. GROSS & MICHAEL SHAFFER, THE NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989 – 2012, 65-66 (2012). *See also* Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2011); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10-14, 1999; THE NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014 10 (2015) [hereinafter EXONERATIONS IN 2014]; KATHLEEN M. REILLY & MAURICE POSSLEY, VERITAS INITIATIVE, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 (2010) (concealing exculpatory evidence from the defendant and the court is a common and "most serious form of official misconduct").

[41] THE NAT'L REGISTRY OF EXONERATIONS, THE FIRST 1,600 EXONERATIONS 7 (2015) [hereinafter THE FIRST 1,600 EXONERATIONS].

[42] *Id.* at 11.

[43] THE FIRST 1,600 EXONERATIONS, *supra* note 41.

[44] U.S. Const. amend. V.

[45] *Id.*

[46] *See* United States v. Ball, 163 U.S. 662 (1896).

the defendant's slate clean so it is as if the initial conviction never happened, and as such there is no double jeopardy problem.[47]

Additionally, job and political considerations affect many prosecutors' decisions to proceed with post-conviction cases.[48] In many State's Attorney's Offices, retention and promotion decisions are based on the prosecutor's case win/loss ratio. The ratio does not account for accurate convictions, but mere quantity.[49] Thus, for prosecutors to confirm a defendant was wrongfully convicted, they potentially jeopardize their track records, raise doubts about their fitness to serve, and risk looking weak to constituents that consistently prefer an official with a tough-on-crime attitude.[50] Accordingly, prosecutors whose careers depend on their conviction records ignore the Louis Taylors and use double jeopardy precedent to their advantage.[51]

This Comment argues to overturn the precedent that the Double Jeopardy Clause does not bar the reprosecution of a defendant wrongfully convicted because of official misconduct. Part I discusses the prevalence of wrongful convictions and the means to secure relief through current procedures. Part II reviews the legal background of the Double Jeopardy Clause by presenting relevant precedent on interpreting the Double Jeopardy Clause and identifying the justifications for why the Clause does not prohibit retrying wrongfully convicted defendants. Part III argues for extending the Double Jeopardy Clause to prohibit retrying a defendant

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[47] *See* North Carolina v. Pearce, 395 U.S. 711, 721 (1969).

[48] Brittnay Lea-Andra Morgan, Wrongful Convictions: Reasons, Remedies, and Case Studies (May 2014) (unpublished M.S. thesis, Appalachian State University) (on file with UNC Libraries, University of North Carolina Greensboro) (internal citations omitted).

> Many of the problems that result from prosecutorial misconduct have been suggested to stem from the institutional culture of the job itself. [P]rosecutors may feel motivated to coerce plea bargains or even withhold evidence in order to meet the demands of their career. For instance, it is well known that prosecutors have long been subject to increasing caseloads and the pressures of the poorly funded and resourced criminal justice system. As such, they must find ways to take short cuts and quickly dispose of cases before they make it to trial. This increased pressure can be challenging, as it could drive prosecutors to cut corners and impede justice. Additionally, the pressure to meet a specific standard and hold a specific reputation can lead prosecutors to do anything in their power to increase their conviction rate indicates that a prosecutor today who tries to give defendants the benefit of the doubt or tries to be fair is regarded as a failure. These internal pressures are likely to be reinforced daily, due to the fact that prosecutors are not likely to face any repercussions from these actions. Prosecutors may also feel as if they can get away with these types of misconduct, which include witness tampering, suggestive or inappropriate closing arguments, and failure to turn over exculpatory evidence. Prosecutors have long been able to experience an enormous degree of immunity from prosecution and/or civil lawsuits, even when these improper actions are exposed. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 263 (2d ed. 2013).

[49] MEDWED, *supra* note 48, at 267.

[50] *Id.* at 268.

[51] *See Pearce*, 395 U.S. at 721; Ruelas, *supra* note 2.

wrongfully convicted by official misconduct. This section will counter anticipated opponents' objections by arguing that: (1) extending double jeopardy protection to wrongfully convicted defendants is more consistent with the Double Jeopardy Clause's Attachment Principle; (2) a limited exception is unlikely to give rise to uncertainty about a decision's criminal finality because the bar only would apply upon a finding that the government wrongfully convicted a defendant through official misconduct; (3) a retrial bar for wrongful convictions fosters the judicial exercise of prosecutorial powers; (4) Supreme Court interpretations extending the scope of rights protected under the Federal Constitution do not unconstitutionally abridge state powers; (5) case precedent equating a wrongful conviction to a mistrial technicality does not comport with the drastic differences in the defendant's procedural posture and duration of imprisonment; and (6) prohibiting retrial of wrongfully convicted defendants promotes public safety by encouraging accurate convictions. Finally, this Comment concludes with questions about the scope of the proposed limited extension of the Double Jeopardy Clause that will need to be addressed if ever applied by the courts or through legislation.

II. FACTUAL BACKGROUND

A. *Statistics on Wrongful Convictions*

According to the National Registry of Exonerations May 2015 report, 1,600 defendants serving sentences for violent or non-violent crimes have been exonerated.[52] However, those exonerations do not capture the entire picture of all wrongfully convicted defendants.[53] The National Registry of Exonerations defines exoneration as:

> A person convicted of a crime and (1) declared to be factually innocent by a government agency that has the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official who has the authority to take that action.[54]

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[52] THE FIRST 1,600 EXONERATIONS, *supra* note 41; EXONERATIONS IN 2014, *supra* note 40.

[53] THE FIRST 1,600 EXONERATIONS, *supra* note 41; EXONERATIONS IN 2014, *supra* note 40.

[54] THE NAT'L REGISTRY OF EXONERATIONS, *GLOSSARY* (2015), https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (official actions that qualify are governor granted pardons; or a court or prosecutor acquitting or dismissing the defendant of all charges he was convicted of at trial. These official actions, whether it be a pardon, acquittal, or dismissal "must be the result of evidence of innocence" that was either not available at trial when the defendant was convicted; or in the instance the defendant pled guilty, neither the defendant, the defense attorney, or

Similarly, the Nation Academy of Science's 2014 study concluded that at least 4.1% of defendants sentenced to death in the United States are likely innocent – a percentage that the study's authors acknowledge is likely a "conservative estimate."[55] The study is the "first rigorous estimate of the rate of conviction of innocent criminal defendants in any context and disturbingly reveals that, "the number of innocent people sentenced to death is more than twice the number of inmates actually exonerated and freed by legal action."[56]

The study found that since 1973, 138 prisoners who had been sentenced to death were later exonerated. Though, as lead author of the study Samuel R. Gross laments, many other innocent capital defendants are overlooked and not exonerated. Gross says that "[t]he great majority of innocent people who are sentenced to death are never identified and freed. The purpose of our study is to account for the innocent defendants who are not exonerated."[57]

The study shows that most sentences of death row prisoners are reduced after appeals to life in prison.[58] While this saves prisoners' lives, the reduction in sentencing makes these cases much lower in priority and lawyers, courts, and governors turn their focus on capital cases that carry the risk of executing innocent people.[59] Consequently, while an innocent defendant might be exonerated if he were to remain on death row, he avoids execution and is likely to die in prison once the sentence is reduced to life.[60]

B. *Likelihood of Relief for Wrongfully Convicted Prisoners Through Current Procedures*

There are several procedures through which a wrongfully convicted defendant can seek post-conviction relief by: (1) a direct appeal; (2)

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the court knew of the evidence at that time). *See also* GROSS & SHAFFER, *supra* note 40, at 7. "'Exoneration,' . . . is a legal concept. It means that a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered.

[55] Samuel R. Gross, Barbara O'Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants Who Are Sentences to Death*, 111 PNAS 7230 (2014).

[56] *Id.*

[57] Nancy Petro, *National Academy of Sciences Study: Over Four Percent of People Sentenced to Death Are Likely Innocent,* THE WRONGFUL CONVICTIONS BLOG (Apr. 28, 2014), http://wrongfulconvictionsblog.org/2014/04/28/national-academy-of-sciences-study-over-four-percent-of-people-sentenced-to-death-are-likely-innocent/.

[58] *See* Gross, O'Brien, Hu & Kennedy, *supra* note 55.

[59] *Id.*

[60] *Id.*

clemency; (3) state habeas corpus action; (4) federal habeas corpus action; (5) a petition of actual innocence based on DNA testing; and (6) a petition of actual innocence based on non-DNA testing.[61] All these post-conviction procedures have restrictions limiting the type of constitutional claims and/or evidence the presiding body may review, and the types of relief granted.[62]

1. *Direct Appeal*

The direct appeal is the first appeal filed after the defendant is convicted of a crime.[63] This appeal is limited to issues raised at trial and addresses the way the trial was conducted.[64] The trial judge must have the opportunity to decide upon the issue, and the appeal must be based on the existing court record.[65]

2. *Executive Pardon or Clemency*

Executive pardon or clemency occurs when the governor of a state forgives the offense and releases the prisoner.[66] Most states have a "board," which after hearing the claim and any supporting evidence makes a recommendation to the governor.[67] Some governors will grant relief based on actual innocence.

3. *Habeas Corpus Actions*

A habeas corpus action is a civil lawsuit filed against the state for unconstitutional imprisonment.[68] A federal habeas corpus petition is similar to a state collateral attack and is used to challenge a violation of due process or other constitutional right.[69] Governed by 28 U.S.C.§ 2254-2255, federal habeas corpus petitions are filed in federal district court in the jurisdiction where the defendant is imprisoned.[70]

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[61] BRIAN R. MEANS, POSTCONVICTION REMEDIES § 1 (2013); Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J. C.R. & C.L. 55 (2014).

[62] Hartung, *supra* note 61.

[63] Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 605 (2009).

[64] *Id.*

[65] *Id.*

[66] MEANS, *supra* note 61.

[67] *Id.* at § 1:3.

[68] *See* Hartung, *supra* note 61, at 63.

[69] *Id.* at 63-65.

[70] *Id.*

The 1996 Anti-Terrorism and Effective Death Penalty ("AEDPA") severely curtailed habeas rights for state prisoners.[71] It limits the number of habeas corpus petitions to one and requires prisoners to file them one year from the date the conviction becomes final.[72] That deadline is tolled while collateral attacks are pending in state courts.[73]

In addition to the limited relief the petitioner may obtain, there are a number of procedural bars that can prevent a petitioner from filing a claim. For example, the petitioner must not have known of the basis for a claim at an earlier stage or must have raised the claim in all prior courts.[74] Additionally, the claim must have been based on the same underlying facts and arguments; otherwise the claim is procedurally defaulted or waived.[75] There are two ways to get around procedural default or waiver in a post-conviction court: proof of ineffective assistance of counsel or proof of new evidence of actual innocence. Courts may also set aside default or waiver "in the interests of justice," though they rarely do. [76]

4. *State Collateral Attack or Petition for Post-Conviction Review*

Collateral attacks, also called a petition for post-conviction review, are used to raise constitutional claims, including those based on evidence outside of the existing court record.[77] As with direct appeals, the remedy sought is a new trial.[78]

A prisoner may file a state habeas corpus action, also known as a petition for post-conviction review, with the trial court in which he was convicted.[79] In this action, the prisoner seeks a new trial claiming that his conviction is the product of substantial prejudice arising from a deprivation of his guaranteed constitutional rights. In the petition, the prisoner would need to assert specific constitutional violations.[80]

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[71] *See* EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 41 (2010).

[72] *See, e.g.*, Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA 's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 366 (2001).

[73] *See* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 929-31 (2001).

[74] *See id.*

[75] *See id.*

[76] *See* Lyn Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 83 (2005).

[77] *See id.* at 83-84.

[78] *See id.* at 83.

[79] *See id.* at 85.

[80] *See id.* at 84.

5. *Federal Habeas Corpus Action*

A prisoner may file a federal habeas corpus action at the same time as his state action.[81] The federal habeas corpus suit is similar to the state post-conviction review, but claims that the district court should grant the petitioner a new trial, as the state court would have determined had the state court applied the correct constitutional standards for the claims the petitioner raised. [82]

6. *Petition for DNA Testing & Post Conviction Proof of Actual Innocence*

A prisoner may also file a petition for DNA testing and a petition for post-conviction proof of actual innocence based on the results of DNA testing. A petition for DNA testing involves seeking and obtaining access to biological evidence from crime, and testing that evidence for identity of true perpetrator.[83]

All states have statutes allowing post-conviction proof of innocence based on DNA testing. Some states also allow post-conviction claims of innocence based on non-DNA evidence. Common shortcomings of these statutes are strict filing deadlines and not providing the petitioner with access to DNA databanks for comparison of test results.[84] Additionally, all procedures have restrictions limiting claims to evidence that is newly discovered.[85] Newly discovered evidence is evidence that was not available before conviction or at an earlier stage in post-conviction proceedings.[86]

To satisfy the "new evidence" requirement, the petitioner must demonstrate that: (1) the biological evidence was not known or available before his conviction; or (2) that the biological evidence was not previously subjected to testing because the procedure was not available.[87] For example, the Virginia Code requires that a petition for a writ of actual innocence based on previously unknown or untested biological evidence.[88]

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[81] *See* Steven A. Krieger, *Why Our Justice System Convicts Innocent People and the Challenges Faced by Innocence Projects Trying to Exonerate Them,* 14 NEW CRIM. L. REV. 333 (2011); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 681 (2005) [hereinafter *Up the River Without a Procedure*].

[82] *See* JOHN ROMAN, KELLY WALSH, PAMELA LACHMAN & JENNIFER YAHNER, URBAN INST. JUSTICE POLICY CTR., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION (2012).

[83] *See* Morgan, *supra* note 48.

[84] *See id.*

[85] ROMAN ET AL., *supra* note 82.

[86] *Up the River Without a Procedure, supra* note 81, at 681.

[87] *Id.*

[88] VA. CODE ANN. § 19.2-327.3 (2004).

Similarly, under the Washington D.C. statute, a petition for DNA testing requires that the "[e]vidence is in testable condition and could not have been subjected to testing earlier. . . . Petitioner must . . . [s]et forth the reason that the requested testing was not previously obtained and [e]xplain how the DNA evidence would help establish actual innocence."[89] Additionally, these statutes generally require the petitioner establish that the biological sample is testable and probative. Under these statutes even if the petitioner successfully demonstrates that the biological sample did not come from him/ her, this evidence does not provide that the petitioner be released.[90]

III. LEGAL BACKGROUND

Part A of this section addresses doctrinal and factual underpinnings that courts and prosecutors likely rely on for opposing a double jeopardy exception that would bar retrial of a wrongfully convicted defendant. Part B explains the likely justifications opponents would raise to such an exception for wrongly convicted defendants.

A. *The Double Jeopardy Clause*

The Fifth Amendment's Double Jeopardy Clause guarantees that no person shall be subject "for the same offense to be put twice in jeopardy of life or limb."[91] Double jeopardy protections apply to both the federal and state governments.[92] Specifically, double jeopardy prohibits the same sovereign government from reprosecuting a defendant who had already been convicted or acquitted for that same offense at trial.[93] Similarly, the Double Jeopardy Clause protects against the government exacting multiple or successive prosecutions for the same offense.[94]

However, it is the attachment principle that triggers double jeopardy protections. Generally, jeopardy attaches when a defendant faces a determination of guilt.[95] However, as explained below, Supreme Court

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[89] D.C. CODE § 22-4133 (2001).

[90] VA. CODE ANN. § 19.2-327.3 (2004).

[91] U.S. CONST. amend. V.

[92] Double Jeopardy Clause restricts state power through the Incorporation Doctrine of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1968).

[93] It is the general understanding that under the Double Jeopardy Clause, once a defendant is placed in jeopardy for an offense and jeopardy terminates with respect to that offense, the state may not try or punish the defendant a second time for the same offense. *See* Blueford v. Arkansas, 132 S. Ct. 2044 (2012).

[94] Hudson v. Louisiana, 450 U.S. 40, 42 (1981).

[95] Crist v. Bretz, 437 U.S. 28, 35 (1978). "Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach

precedent has weakened the attachment principle and has interpreted double jeopardy to be waived, permitting a defendant's retrial for the same offense.[96]

B. *United States Supreme Court Precedent on the Double Jeopardy Clause*

In *Ball v. United States*, the Supreme Court created an exception to the double jeopardy bar, allowing for reprosecution of a defendant who has successfully appealed his conviction, unless the reversal is based on insufficiency of evidence.[97] The prominent theories for permitting retrial after appealing reversal is: (1) that by appealing his conviction, the defendant waives his double jeopardy protection; or (2) the original trial, the appeal, and the subsequent retrial are part of the same prosecution for the same offense, and thus double jeopardy continues through this process until the trial is finalized.[98] In *United States v. Tateo,* Justice Harlan espoused the "most reasonable" justification for the continued jeopardy exception, stressing that the exception was necessary for administrative purposes and for maintaining the integrity of the criminal justice system and faith that civilians, judicial officials, and defendants place in the proceedings.[99] For example, judges would be more lax in policing

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in a jury trial might have been open to argument before this Court's decision in *Downum v. United States*. … There the Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken. The Court thus necessarily pinpointed the stage in a jury trial when jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn."

[96] *See, e.g.,* United States v. DiFrancesco, 449 U.S. 117, 131 (1980). ("Finally, if the first trial has ended in a conviction, the double jeopardy guarantee imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside. … It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. … [T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.") *See also* Blueford v. Arkansas, 132 S. Ct. 2044, 2051 (2012).

[97] Unless the defendant's appeal challenges that evidence to convict was insufficient then a successful finding in defendant's favor will not bar retrial. Burks v. U.S., 437 U.S. 1 (1978). "[W]hen a defendant's conviction has been overturned due to a failure of proof at trial … the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty."

[98] Paul C. Giannelli*, Double Jeopardy: "Twice in Jeopardy,"* 20 CASE W. RESERVE U. 5 (1998).

[99] United States v. Tateo, 377 U.S. 463, 466 (1964).

procedural improprieties, allowing those making prejudicial remarks to stand in fear that by declaring a mistrial a defendant would escape prosecution.[100] In this respect, Justice Harlan's thoughts echo the reasoning for permitting retrial in the event of a mistrial.[101] Specifically, Justice Harlan stated:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pre-trial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.[102]

Yet at the time, the *Ball* principle failed to address whether the Double Jeopardy Clause applies if the prosecution engages in misconduct that results in mistrial.

Similar to the permissibility of retrial following appellate reversal, many courts have found that in the case of mistrials the Double Jeopardy Clause does not bar reprosecution of the defendant where the procedural circumstances present a manifest necessity for a new trial.[103] A mistrial occurs when a trial judge adjourns a case without a decision on the merits and grants a new trial jury because there is a serious procedural error or misconduct that would result in an unfair trial.[104] Nonetheless, it is well

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[100] *Id*.
[101] *See* Illinois v. Sommerville, 410 U.S. 458 (1973).
[102] *Tateo*, 377 U.S. at 463.
[103] *Sommerville*, 410 U.S. at 458.
[104] *See, e.g.,* Williamson v. United States, 512 U.S. 594 (1994).

established that the constitutional guarantee against double jeopardy does not preclude retrial of a defendant who has consented to mistrial.[105]

Having recognized that a prosecutor who is performing poorly at trial may wish to exploit a defendant's double jeopardy waiver, courts have carved out an exception to prohibit retrial even if the defendant's counsel has moved for a mistrial.[106] Under the original standard, retrial is barred if the prosecutor's conduct was in bad faith or done to harass the defendant.[107]

Less than a decade later, in *Oregon v. Kennedy*, the Court lowered the standard to bar retrial to situations "where the governmental conduct in question" was "intended to 'goad' the defendant into moving for a mistrial."[108] Although there is no checklist for what constitutes "goading" the defendant, court cases have given examples of indicia of the egregious practice. For example, one court found that a prosecutor did not overreach by failing to disclose exculpatory evidence.[109] However, another court concluded that a prosecutor's knowing presentation of false evidence prejudiced the defendant's right to a fair trial.[110]

C. *Prevailing Justifications for why Double Jeopardy Does Not Bar Reprosecution*

This section reviews the likely arguments opponents would raise for a double jeopardy bar that would prohibit the reprosecution of wrongly convicted defendants. These arguments covered in this section include that such exception would: (1) be inconsistent with the Founding Fathers' intent for the Double Jeopardy doctrine, (2) lead to uncertainty surrounding when to apply the Double Jeopardy bar, (3) undermine prosecutorial authority, (4) unconstitutionally abridge a state's powers to order its criminal justice system and sentencing procedures, (5) be unnecessary because the defendant is not technically convicted, and (6) present an unreasonable risk to public safety.

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[105] United States v. Dinitz, 424 U.S. 600, 611 (1976).
[106] Oregon v. Kennedy, 456 U.S. 667, 675-76 (1982).
[107] *Dinitz*, 424 U.S. at 610; United States v. Jorn, 400 U.S. 470, 485 (1971).
[108] *Kennedy*, 456 U.S. at 676.
[109] People v. Khuong, 818 N.Y.S.2d 674, 679 (N.Y. App. Div. 2006).
[110] United States v. Kessler, 530 F.2d 1246, 1257 (5th Cir. 1976).

1. *A Double Jeopardy Exception for Wrongfully Convicted Defendants is Inconsistent with the Founding Fathers' Intent*

Prosecutors might object to extending the Double Jeopardy Clause to prohibit the retrial of wrongfully convicted defendants on the grounds that it would be inconsistent with the Founding Fathers' intent and legislative enactments regarding double jeopardy principles.

Prosecutors would likely contend that at its core, the Founding Fathers intended that the Double Jeopardy Clause protect against repeated convictions for the same act, not to protect against egregious misconduct.[111] This is demonstrated by Congress's rejection of James Madison's version of the Double Jeopardy Clause. Madison's version stated, "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence . . . ." [112] The House rejected Madison's version, believing that courts would interpret a prohibition against a second trial after the defendant successfully appealed his case.[113] The Court in *Green v. United States* quoted:

> Debate on this provision in the Committee of the Whole evidenced a concern that the language should express what the members understood to be the established common-law principle. There was fear that as proposed by Madison, it might be taken to prohibit a second trial even when sought by a defendant who had been convicted. Representative Benson of New York objected to the provision because he presumed it was meant to express the established principle "that no man's life should be more than once put in jeopardy for the same offence; yet it was well known, that they were entitled to more than one trial.[114]

Similarly, prosecutors may claim that *Green v. United States* reaffirms courts' understanding that the Double Jeopardy Clause does not come into effect until the defendant's conviction is finalized.[115] Specifically, in *Green*, the United States Supreme Court stated that:

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[111] *See Pearce*, 395 U.S. at 721.
[112] *Id.* (quoting 1 Annals of Cong. 434).
[113] Green v. United States, 355 U.S. 184, 187-88 (1957).
[114] *Id.* (quoting 1 Annals of Cong. 753).
[115] *See id.* at 188.

> [C]ourts and legislatures provided that if a defendant obtained the reversal of a conviction by his own appeal he could be tried again for the same offense. Most courts regarded the new trial as a second jeopardy but justified this on the ground that the appellant had waived his plea of former jeopardy by asking that the conviction be set aside. Other courts viewed the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became final.[116]

And, like the Court noted, prosecutors would stress that "whatever the rationalization" the Court has "held that a defendant can be tried a second time for an offense when his prior conviction for that same offense had been set side on appeal,"[117] and that same rule should apply to a defendant who, by filing a habeas petition, has asked for relief of a new trial.

2. *An Exception Would Cause Uncertainty About When to Apply Double Jeopardy Bar for Wrongfully Convicted Defendants*

Prosecutors may be reluctant to endorse a Double Jeopardy Clause bar because there would be uncertainty at which stage of the litigation it would go into effect. Moreover, there would be conflict in determining how to implement it in a manner that reconciles with the prevailing theoretical underpinning holding that jeopardy continues until the trial is finalized.[118] As seen in the case of wrongfully convicted defendants, there are many levels of litigation.[119] A defendant may have a direct appeal, a petition for actual innocence based on newly discovered evidence or DNA testing, both state and federal habeas corpus petitions, and possibly a new trial.[120] Certainly, a prosecutor who questions the credibility of the newly discovered evidence and is adamant about the defendant's guilt, or uncertain as to when the trial has been finalized would be hesitant for the bar to apply too soon.[121] Thus opponents may argue that the finality concerns in extending the Double Jeopardy bar make the rule unworkable.

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[116] *Id*.
[117] *Id.* at 189.
[118] *See Tateo*, 377 U.S. at 474.
[119] *Id.*
[120] *Id.*
[121] MEDWED, *supra* note 48.

3. *An Exception Undermines Prosecutorial Authority*

Any double jeopardy limitation would pose a bar on a prosecutor's wide discretion in the manner in which to try his case and perform his prosecutorial duties. Under the principle of prosecutorial discretion, a prosecuting attorney has great latitude in performing his duties.[122] So wide, in fact, that his discretion cannot be interfered with by the courts unless he is exceeding his jurisdiction.[123] Additionally, it is normally understood that a prosecutor must exercise discretion in good faith and with respect to the dictates of professional responsibility rules and other office policies.[124] Thus, as long as neither the law nor the prosecutor's office policies provide otherwise, prosecutors likely would argue that a Double Jeopardy bar would be an unauthorized restraint on their prosecutorial authority.

4. *An Exception Unconstitutionally Abridges a State's Police Power to Order its Criminal Justice System and Determine Sentencing Procedures*

The guarantee against Double Jeopardy serves principally as a restraint on courts and prosecutors.[125] However, opponents of applying the Double Jeopardy Clause to wrongfully convicted defendants likely would view the extension problematic because the limitation, which would prevent the state from reprosecuting a person who allegedly violated state laws, curtails the state's exercise of its police power.[126]

States are endowed with broad police powers.[127] Police power has historically been a traditional state function and falls within the state's primary responsibility.[128] Police power includes the ability of a state to control its criminal justice system.[129] Critical to this control is the state's ability to determine which offenses are punishable and the sentences for violating those offenses.[130]

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[122] United States v. Armstrong, 517 U.S. 456, 464 (1996). *See also* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 125 BOST. U. L. REV. 183, 184 (2014).

[123] Wayte v. United States, 470 U.S. 598, 607 (1985).

[124] Berger v. United States, 295 U.S. 78, 88 (1935); United States v. Bartelho, 129 F.3d 663, 670-71 (1st Cir. 1997); *See also* Medwed, *supra* note 48.

[125] Ohio v. Johnson, 467 U.S. 493, 503 (1984).

[126] *See* E.N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232-33 (1945); Queenside Hills Realty Co. Inc. v. Saxl, 328 U.S. 80, 84 (1946).

[127] U.S. CONST. amend X; *Saxl*, 328 U.S. at 83.

[128] United States v. Morrison, 529 U.S. 598, 639 (2000).

[129] *See* Perry v. Southern Express Co., 81 So. 619 (Ala. 1919); State v. Hobson, 83 A.2d 846, 854 (1951).

[130] Waller v. Florida, 397 U.S. 387, 393-95 (1970); *Hahn*, 326 U.S. at 230.

Federal courts show extreme deference to these traditional and primary state functions, and therefore are reluctant to strike down a state's criminal justice practice unless it abridges the Federal Constitution or a Federal Act that clearly states the federal law will preempt state powers.[131]

Moreover, because society is constantly evolving and the state is best equipped to assess the state's needs, the state's police power cannot be restricted to narrow limits, and instead must be able to develop in the public interest, to meet such conditions.[132]

Additionally, the Supreme Court upheld the exercise of state power regarding criminal prosecution and sentencing, including those involving the Double Jeopardy Clause.[133]

As the Court noted in *Abbate v. United States*, states do not violate the Double Jeopardy Clause for prosecuting a person for the same act he is facing federal criminal charges:

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of Fox v. State of Ohio, . . . that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practi[c]ed on its citizens; and, in the case of the *United States v. Marigold*, . . . that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States.[134]

As was there pointed out, if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal

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[131] Bond v. United States, 134 S. Ct. 2077, 2089 (2014).
[132] *Saxl*, 328 U.S. at 80.
[133] *See, e.g.*, Abbate v. United States, 359 U.S. 187, 191-92 (1959).
[134] *Id.* (quoting Moore v. People of State of Illinois, 55 U.S. 13, 14 (1852)).

prosecutions based on the same acts, federal law enforcement must necessarily be hindered. For example, the petitioners in this case insist that their Illinois convictions resulting in three months' prison sentences should bar this federal prosecution which could result in a sentence of up to five years. Such a disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest. But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes. Thus, unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions. Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses.[135]

5. *Defendant Not Technically Convicted: "Wipe the Slate Clean"*

The constitutional guarantee against Double Jeopardy does not preclude retrial of a defendant who has consented to mistrial or filed a direct appeal.[136] In *North Carolina v. Pearce*, the United States Supreme Court articulated the premise from *Ball,* explaining in part why the court allows for the repeated prosecution and reconvictions of defendants. Justice Stewart explains that:

> [T]he rationale . . . rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate has been wiped clean. As to whatever punishment has actually been suffered under the first conviction, that premise is, of course, an unmitigated fiction, as we have recognized . . . . But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate has been wiped clean.[137]

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[135] *Abbate*, 359 U.S. at 195.
[136] *Burks*, 437 U.S. at 16; *Dinitz*, 424 U.S. at 610; *Tateo*, 377 U.S. at 465.
[137] *Pearce*, 395 U.S. at 721.

As Justice Stewart explained, because the defendant has either moved for a mistrial or appealed the trial court's ruling, procedure is all set anew, and whatever history or prejudice may have come before is gone with the new trial as if the slate has been wiped clean. Thus, it is appropriate to treat a wrongfully convicted defendant in the same manner. Similarly, the habeas corpus petition can be equated to a direct appeal for finding of judicial error. [138] The petitioning acts as a Double Jeopardy waiver and the relief granted is a new trial.[139]

Thus, because of the clean slate setting, the court, as previously discussed, will bar retrial only in a strict set of circumstances. As the Court noted in *Oregon v. Kennedy*, the "intent" test for prosecutorial overreaching is "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion."[140]

Under this standard, courts have rarely found prosecutorial overreaching sufficient to prohibit retrying the defendant when the defendant has moved for a mistrial. In the following instances, courts have found that the state's improper conduct did not constitute overreaching such as when: (1) a prosecutor failed to disclose to the defense exculpatory evidence in a murder trial;[141] (2) a prosecutor intentionally altered transcript so as to impeach the defendant when he testified;[142] (3) police officers told a juror to find the defendant guilty;[143] or (4) sheriff deputies took sequestered jurors on an unauthorized visit to the crime scene and conversed with them about the ongoing case.[144]

Opponents of a Double Jeopardy extension likely would argue that the above instances of improper prosecutorial conduct are similar in kind to the official misconduct findings by a court reviewing a habeas corpus petition. As such, because the conduct at these mistrials was insufficient to bar retrial, a wrongfully convicted defendant should not escape reprosecution.[145]

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[138] *Id.*
[139] *Id.* at 717-19.
[140] *Kennedy*, 456 U.S. at 676.
[141] Sheldon Shapiro, Annotation, *Double Jeopardy as Bar to Retrial After Grant of Defendant's Motion for Retrial,* 98 A.L.R. 3d 997, 1037 (1980).
[142] United States v. Lopez-Avila, 678 F.3d 955, 964 (9th Cir. 2012).
[143] People v. Townsend, 456 N.E.2d 938, 939 (Ill. 1983).
[144] State v. Clements, 334 S.E.2d 600, 604 (W.Va. 1985), *cert. denied* 474 U.S. 857 (1985).
[145] *See Dinitz*, 424 U.S. at 610.

6. *Prohibiting Retrial of a Wrongfully Convicted Defendant Because Technicalities Unreasonably Risk Public Safety*

Opponents of a Double Jeopardy bar may be reluctant to extend a retrial prohibition, claiming that to do so would present an unreasonable risk to the public. The habeas corpus proceeding is not a retrial of the defendant's guilt.[146] It is a civil proceeding that only determines whether the defendant's conviction was obtained by violating his constitutional rights.[147] Even if the court finds there has been a violation, in the prosecutor's mind, the defendant was still convicted of crime. And unless the court bars retrial due to insufficient evidence, the prosecutor should be able to retry the case, just as he would if there were a mistrial.[148]

As in the instances where there is a mistrial, prosecutors retry cases because to not do so would guarantee the defendant's liberty, giving the defendant the opportunity to victimize more people.[149] Similarly, a wrongful conviction finding is not a declaration of the defendant's innocence, but rather a determination that a constitutional violation tainted the ultimate conviction.[150] These constitutional violations range from failing to disclose a plea arrangement with the defendant's co-conspirator in exchange for testimony to the government assisting witnesses to appear more credible to juries by coaching witnesses' testimonies.[151]

Opponents of a Double Jeopardy extension may argue that allowing a mere technicality to bar retrial is unreasonable because such a technicality is insufficient to put the public at risk of the defendant committing future crimes, which was District Attorney Dobb's argument in the *Kerry Max* case.[152]

IV. DISCUSSION

In this section, I will counter the prosecutors' justifications for opposing a Double Jeopardy bar by arguing that: (1) extending Double Jeopardy protection to wrongfully convicted defendants is more consistent with the Double Jeopardy Clause's Attachment Principle; (2) a limited exception is unlikely to give rise to uncertainty about a decision's finality

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[146] Herrera v. Collins, 506 U.S. 390, 390 (1993).

[147] *See Hartung, supra* note 61, at 64.

[148] *See Williamson*, 512 U.S. at 594.

[149] Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. QUARTERLY 713, 737 (1999).

[150] *See Collins*, 506 U.S. at 399; Medwed, *supra* note 122, at 183.

[151] *See* Giglio v. United States, 405 U.S. 149, 150 (1972); Napue v. Illinois, 360 U.S. 264, 272 (1959); United States v. Dyess, 478 F.3d 224, 236 (4th Cir. 2007); *See Roe*, 260 F. Supp.2d at 917.

[152] FRONTLINE, *supra* note 27.

because the bar only applies upon a court finding that the government wrongfully convicted a defendant through police or prosecutorial misconduct in violation of that defendant's Fifth Amendment rights; (3) a retrial bar for wrongful convictions fosters the judicious exercise of prosecutorial powers; (4) Supreme Court interpretations extending the scope of rights protected under the Federal Constitution, which apply to a state under the Incorporation Doctrine do not unconstitutionally abridge state powers, (5) case law precedent equating a wrongful conviction to a mistrial technicality does not comport with the drastic differences in the defendant's procedural posture and duration of imprisonment he has served, and (6) prohibiting retrial of wrongfully convicted defendants promotes public safety by encouraging accurate arrests and convictions, and avoiding the possibility that the actual perpetrator may commit more crimes because the government has wrongfully attributed culpability to an innocent person.

A. *A Double Jeopardy Exception for Wrongfully Convicted Defendants is More Consistent with the Attachment Principle*

In the case of criminal prosecutions, the government generally has greater power and assets at its disposal than a typical defendant.[153] Double jeopardy seeks to protect citizens who have already been convicted from the threat of government harassment by subjecting the defendant to multiple proceedings and trials for the same act by the same sovereign.[154]

A court finding in favor of a defendant's habeas corpus petition because the government engaged in misconduct to convict the defendant is akin to instances in which a court bars a defendant's retrial because of prosecutorial overreaching.[155]

The standard for finding official misconduct is exceedingly high.[156] Circuits differ on the precise wording of what constitutes police and prosecutorial misconduct that would sufficiently deprive a defendant of his or her Fifth Amendment due process rights and warrant a new trial.[157] Nevertheless, courts generally find that the police engage in misconduct when investigators acted in "bad faith" when failing to pursue an alternative suspect, line of investigation, or exculpatory evidence that

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[153] United States v. Young, 470 U.S. 1, 8 (1985).
[154] *See Pearce*, 395 U.S. at 721.
[155] State v. Loza, 641 N.E.2d 1082, 1097 (1984), *cert. denied*, 514 U.S. 1120 (1995).
[156] City of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).
[157] *Compare Dyess*, 478 F.3d at 235*, with* Akins v. Epperly, 588 F.3d 1178, 1183 (8th Cir. 2009).

could have helped proved innocence.[158] Bad faith can constitute police knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.[159] Courts similarly have found prosecutorial misconduct occurs when the prosecutorial misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.[160] As demonstrated, both these standards require that the official misconduct be prejudicial.[161]

In the context of post-conviction litigation, not all investigative failures are treated equally. Police oversight or negligence from tunnel vision is insufficient to constitute deprivation of a defendant's due process rights for obtaining post-conviction relief.[162] A petitioner can seek redress for due process violation based on police misconduct if the petitioner establishes that the police acted in bad faith. Prime examples of bad faith conduct are the police knowingly fabricating evidence or suppressing evidence they know has possible exculpatory value.

A court likely would find that the police acted in bad faith if the police have fabricated or manipulated evidence to favor of the police's theory.[163] An example of fabricated evidence occurs when the police coach a witness's statement to comport with crime scene details so that at trial the fact finder will find the statement credible, and thus give greater weight to the witness's testimony.[164]

Oregon v. Kennedy made clear that courts are to refrain from finding that a defendant has waived his Double Jeopardy rights if the government

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[158] *See Dyess*, 478 F.3d at 233 ("[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."); *Lewis*, 523 U.S. at 847; *Epperly*, 588 F.3d at 1183-84, ("Conduct intended to injure will generally rise to the conscience-shocking level, but negligent conduct falls 'beneath the threshold of constitutional due process." However, "[a]n officer's negligent failure to investigate inconsistencies or other leads is insufficient to establish conscience-shocking misconduct.") (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998))).

[159] Ariz. v. Youngblood, 488 U.S. 51, 58 (1988) (stating that Police failure to preserve potentially useful evidence is insufficient to constitute denial of due process absent the defendant showing police acted in bad faith. However, Police actions that demonstrate an intent to injure the defendant constitute outrageous misconduct or bad faith and is sufficient grounds for finding the resulting conviction should be set aside because the state obtained the verdict by violating the defendant's due process rights. *Id.* Police coaching a witness's statements about crime scene details to make the witness's testimony more reliable rises to the level of outrageous misconduct because the acts were intentional and not merely negligent. *See Roe*, 260 F. Supp. 2d at 911.

[160] *See Wainwright*, 477 U.S. at 181.

[161] "To prove reversible error, the defendant must show (1) 'that the prosecutor's remarks or conduct were improper' and (2) 'that such remarks or conduct prejudicially affected his substantial rights so as to deprive him of a fair trial.'" United States v. Caro, 597 F.3d 608, 624-25 (4th Cir. 2010) (quoting United States v. Scheetz, 293 F.3d 175, 185 (4th Cir. 2002)).

[162] *See, e.g.*, *Wainwright*, 477 U.S. at 181 (1986).

[163] Nickerson v. Roe, 260 F. Supp. 2d 875, 917 (2003).

[164] *Id.* at 911-13.

has intentionally goaded the defendant into motioning for a mistrial.[165] In the instances of a wrongful conviction, the government has not engaged in official misconduct to obtain a new trial.[166] However, in both the *Oregon v. Kennedy* setting of mistrial due to prosecutorial overreaching and after the wrongful conviction finding, the court has determined that the prosecutor engaged in misconduct for the ultimate purpose of convicting the defendant.[167]

In fact, courts have elaborated on prosecutorial misconduct that can bar retrial. For example, in *Appling v. State*, retrial was prohibited on the basis of Double Jeopardy where the defendant established that the state intended to goad him into moving for a mistrial so that the state would avoid a reversal, or obtain a more favorable chance of a guilty verdict.[168]

As such, the official misconduct had goaded the defendant into seeking relief of a new trial. In the mistrial setting, the prosecutor overreaches so the defendant will move for a new trial in which the prosecutor believes he will be more successful at convicting the defendant.[169] The prosecutor's improper conduct is especially duplicitous because if the defendant does not consent to a mistrial, then the defendant suffers extreme prejudice because the jury will likely consider the overly prejudicial information in rendering its verdict even if the court instructs the jury to disregard the evidence.[170] As such, the government has goaded the defendant into consenting to a mistrial because the defendant sought to avoid the possibility of the jury convicting him based on the prosecutor's prejudicial improper conduct.[171]

The prosecutor similarly has goaded the defendant to waive the reprosecution bar through filing a habeas corpus petition in the instance where the government convicted the defendant based on official misconduct.[172] In such cases, the defendant would not be seeking a new trial but for the police and prosecution engaging in the prejudicial conduct that resulted in the defendant's initial conviction.[173]

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[165] *See Kennedy*, 456 U.S. at 673.

[166] *Id.* at 689.

[167] *See Dinitz*, 424 U.S. at 611; *Jorn*, 400 U.S. at 485; *Kennedy*, 456 U.S. at 676. *E.g.,* MEDWED, *supra* note 48.

[168] Appling v. State, 700 S.E.2d 626, 627 (Ga. 2010).

[169] Giannelli, *supra* note 98, at 1-7.

[170] *Id.*

[171] *Id.* at 1-2.

[172] *See* Oregon v. Kennedy, 456 U.S. 667, 675-76 (1982).

[173] *See id.*

A court granting habeas relief is distinguishable from an appellate court reviewing a judicial error on direct appeal.[174] For a direct appeal, the appellate court's concern is whether the trial court's procedural ruling was appropriate.[175] However, for a habeas corpus petition alleging the defendant's conviction was based on official misconduct, the reviewing court must determine whether the government engaged in such conduct to the extent it prejudiced the resulting verdict against the defendant.[176] The fact that a habeas corpus petition requires the court to make these findings provides ample support that the circumstances of egregious government misconduct are precisely those that the Double Jeopardy doctrine seeks to prohibit regarding retrial.[177]

Moreover, the fact that the government uses the threat of retrying the wrongfully convicted defendant in an effort to compel the defendant to accept an *Alford* plea (which allows the government to save face and the prosecutor's conviction record to remain intact) is the kind of government harassment sought to be prevented.[178]

B. *Limited Exception Does Not Upset Current System or Cause Uncertainty about Finality of Decision*

1. *Exception Applies When Court Finds Government Convicted Defendant by Police or Prosecutorial Misconduct, Violating Defendant's Fifth Amendment Due Process Rights*

This exception would apply when a court reviewing a habeas corpus petition finds that the government convicted the defendant based on official misconduct in violation of the defendant's Fifth Amendment rights to Due Process. Because the statutes for filing state and federal habeas corpus petitions have extensive exhaustion requirements,[179] which includes that there will be a final decision in the defendant's matter, it is not the

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[174] Daniel S. Medwed, Prosecution Complex: America's Race to Convict and Its Impact on the Innocent 125-26 (2012).

[175] *Id.* at 125

[176] *See, e.g.*, Hash v. Johnson, 845 F. Supp. 2d 711, 751-52 (W.D. Va. 2012).

[177] *See, e.g., id.*

[178] *See* Lee v. United States, 432 U.S. 23, 32-33 (1977) ("Where the defendant, by requesting a mistrial, exercised his choice in favor of terminating the trial, the Double Jeopardy Clause generally would not stand in the way of reprosecution. Only if the underlying error was motivated by bad faith or undertaken to harass or prejudice, … would there be any barrier to retrial."); Medwed, *supra* note 174, at 66-67, 130-31, 161; Sydney Schneider, Comment, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. Crim. L. & Criminology 277, 301 (2013).

[179] Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 7-12 (2007).

case that extending the Double Jeopardy doctrine to cover wrongfully convicted defendants would upset the existing procedural processes or give rise to uncertainty about when the extension would apply.[180]

In these cases, the defendant has already served some portion of the court-imposed sentence.[181] The National Center of State Courts reports that a wrongfully convicted defendant has served six years before filing a habeas corpus petition.[182] Additionally, according to The National Registry of Exonerations, the average wrongfully convicted defendant served two to five years in prison before a court granted his petition for new trial.[183]

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[180] *See* Schlup v. Delo, 513 U.S. 298, 324-26 (1995); Herrera v. Collins, 506 U.S. 390, 398-402, 416-17 (1993).

[181] Paul C. Giannelli, *Double Jeopardy: "Twice in Jeopardy,"* 20 CASE W. RESERVE U. 1, 4 (1998).

[182] NANCY J. KING ET AL., NCSC, EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 4 (2007) (Non-capital cases. Prior to AEDPA, the average time from state judgment to federal filing was about 5 years. After AEDPA, the average time had lengthened to 6.3 years. Capital cases. For capital cases filed in 2000, 2001, and 2002, the petitioner's state criminal judgment had been entered on average 7.4 years earlier, with a median interval of 6.5 years. Comparative figures before AEDPA are not available.)

[183] Hans Sherrer, *AEDPA has Reduced Federal Habeas Relief for State Prisoners*, 39 Justice Denied 17 (2008); Nancy J. King et al., NCSC, Executive Summary: Habeas Litigation in U.S. District Courts 7 (2007).

From the time of filing to disposition, noncapital cases take about a month longer on average to process after the AEDPA – 7 months compared with 6 months previously. Capital cases take almost twice as long to process after the AEDPA as before – 29 months compared with 15 months previously. None of the 13 federal districts studied, on average, complete capital cases within the 450-day time limit imposed by the AEDPA for states qualifying for fast track status.

Sherrer, *supra*.

Of the capital cases filed in 2000, 2001, and 2002, 1 in 4 was still pending in late November 2006, and had been pending for an average of 5.3 yrs. In 5 of the 13 districts, more than half of the cases remained pending. Only 8% of the noncapital cases started in 2003 and 2004 had failed to reach reached disposition by November 2006." Time in federal court. The average time from start to finish for non-capital cases was 9.5 months. The median disposition time of 7.1 months is more than a month longer than the median time of 6 months prior to AEDPA.

King et al., *supra* note 182.

In general, the time to exoneration is longer for more serious crimes. The median time from conviction ranges from four years for nonviolent crimes to 13.3 years for sexual assaults and 12.9 years for homicides (Table 4, left column). The likely explanation is that there is much less incentive to work to exonerate a defendant once he has been released, and those convicted of lesser crimes are released sooner than those convicted of major violent crimes. DNA exonerations also take longer than non-DNA exonerations; the median time from conviction is 14.9 years compared to 7.8 years. This is true for homicide cases, where the median time is 15 years with DNA and 11.9 years without; for sexual assault cases, where the comparable numbers are 14.6 years and 7.1 years; and for child sex abuse exonerations, where the median times are 17 years with DNA and 5.9 without DNA.

Samuel R. Gross & Michael Shaffer, Report by the National Registry of Exonerations, Exonerations in the United States, 1989 – 2012, at 24-25 (2012).

2. *Exception Would Still Allow for Retrial of Defendant Following Mistral or Appeal*

Because this exception would only apply after a habeas corpus petition court has determined that official misconduct caused defendant's conviction, the government could still retry a defendant under the current standards allowing reprosecution in the instances of a mistrial or direct appeal.[184] As such, this exception would continue to honor the balance of recognizing the defendant's right to a completed trial with the public's interest in fair trials designed to end in just verdicts.

C. *Wrongful Conviction Exception Does Not Undermine Prosecutorial Authority*

Prosecutorial authority is not so absolute that prosecutors can refrain from complying with constitutional and statutory prohibitions, professional and ethical standards of conduct, or office policies.[185] Additionally, broad prosecutorial discretion does not permit prosecutors to engage in misconduct even if it is done for the purpose of executing prosecutorial duties.[186]

Furthermore, the Supreme Court has limited prosecutorial authority specifically as it relates to the Double Jeopardy Clause.[187] For example, double jeopardy prevents prosecutors from retrying a defendant where prosecutorial overreaching caused a mistrial.[188] Similarly, if a jury has acquitted the defendant for a crime, the Double Jeopardy Clause prevents a prosecutor of the dame sovereign government from retrying the defendant for the same act under a lesser-included offense.[189] Thus, extending the Double Jeopardy Clause to cover defendants who were wrongfully convicted based on official misconduct is neither novel nor an aberration of currently imposed limitations on prosecutorial authority.[190]

Certainly, prosecutors are within their authority to offer a variety of plea deals and alternative sentencing options to a defendant accused of, or convicted of, committing a crime in exchange for that defendant providing beneficial information to the prosecutor, such as allocuting to a crime or agreeing to serve as a government witness by testifying against another

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[184] *See* Giannelli, *supra* note 98, at 4.
[185] *Id.*
[186] *Id.*
[187] *Id.* at 4-5.
[188] *Id.*
[189] *Id.* at 5.
[190] Giannelli, *supra* note 98, at 1,6.

person or co-defendant.[191] Nonetheless, it is particularly deplorable for a prosecutor to threaten reprosecution and the possibility of conviction in the instance where a court has already found that the prosecution deprived the defendant of his constitutional rights.[192]

As previously noted, the Double Jeopardy Clause seeks to prevent government harassment.[193] In the cases previously highlighted, such as Taylor, Elmore, and Cook, the government used the threat of a new trial to force the wrongfully convicted defendant to acquiesce to an *Alford* plea.[194] Those cases illustrate the severity of the prosecutorial misconduct needed to result in a court finding that the government had wrongfully convicted the defendant.[195] As shown, the defendants reluctantly agreed to an *Alford* plea because: (1) they could not be assured of the integrity of the retrial proceedings from a prosecutor's office that previously engaged in official misconduct to convict them for the same crime decades before, (2) they did not believe they would be able to survive in prison while awaiting retrial, or (3) that they could not psychologically endure another trial with the possibility of conviction after having suffered already extensive sentences and litany of judicial proceedings just to obtain the wrongful conviction finding.[196]

Especially in these instances of severely egregious official misconduct it appears fanciful, or at best, difficult for the government to argue that barring reprosecution of defendants who were wrongfully convicted based on sufficiently prejudicial official misconduct would severely curtail or harm the prosecutor's office from executing its duties.[197] This argument is hollow because, as previously discussed, broad prosecutorial discretion does not authorize the government to secure a defendant's conviction based on official misconduct, which is essentially the finding in these habeas corpus petition cases.[198]

Admittedly, as the exclusionary rule does not universally prevent officers from conducting unreasonable searches,[199] this limited exception would not prevent all forms of prosecutorial harassment identified as the ills the Double Jeopardy Clause seeks to prevent. Nonetheless, this exception would certainly be more consistent with the Clause's intent

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[191] *Ball*, 163 U.S. 662.
[192] *Kennedy,* 456 U.S. at 676.
[193] *Johnson*, 467 U.S. at 499.
[194] *See Innocence Project Deeply Troubled by Plea, supra* note 2.
[195] Giannelli*, supra* note 98.
[196] *See id.*; Schneider, *supra* note 37.
[197] Medwed, *supra* note 48, at 183-84.
[198] *See Young*, 470 U.S. at 7.
[199] *See* Mapp v. Ohio, 367 U.S. 643, 645 (1961); *supra* Part III.

rather than the current prosecutorial practice of using *Alford* pleas, which only further harass a wrongfully convicted defendant who was initially imprisoned because of the government's intentional and substantial disregard to abide by prosecutorial conduct standards permitted under the Constitution.[200]

D. *A Wrongful Conviction Exception Does Not Unconstitutionally Abridge State Powers*

States are endowed with broad police powers.[201] However, the Supreme Court repeatedly has held that a state's power is not unlimited to the extent it would enable the state to supersede individual rights guaranteed by the Bill of Rights to the Federal Constitution.[202] This is because the Incorporation Doctrine provides that a number of individual rights also apply to the states to restrict state government action.[203]

These incorporated individual rights include those that relate to a state's criminal justice and sentencing practices.[204] For example, the Supreme Court has interpreted that the Fifth Amendment requires the government to inform a person of his Miranda rights before questioning him in manner that would elicit an incriminating response while he is in a custodial setting.[205] Absent certain well-recognized exceptions, state courts must prohibit a prosecutor from using a defendant's confession in the prosecution's case in chief when the government obtained it in violation of the defendant's Miranda rights.[206]

Similarly, the Supreme Court has rejected state sentencing practices that undermine individual constitutional protections despite that the Court's ruling necessarily curtails a state's police power. For example, the Eighth Amendment prohibits cruel and unusual punishment.[207] Over the years, the Supreme Court has extended the reach of the Eighth Amendment to prohibit a state from executing juveniles and the mentally disabled.[208]

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[200] *See Hahn*, 326 U.S. at 232-33; Queenside Hills Realty Co. Inc. v. Saxl, 328 U.S. 80 (1946).

[201] *See* U.S. CONST. amend. X; *See* Queenside, 328 U.S. 80.

[202] *See, e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961) (state courts must apply the exclusionary rule to suppress inculpating evidence the government seized by violating the defendant's Fourth Amendment rights); Atkins v. Virginia, 536 U.S. 304 (2002) (state cannot execute a mentally disabled offender); Roper v. Simmons, 543 U.S. 551 (2005) (state cannot execute a juvenile offender); Graham v. Florida, 560 U.S. 48 (2010) (state cannot sentence a non-homicidal offender to a life sentence without the possibility of parole).

[203] Giannelli*, supra* note 98, at 1.

[204] U.S. CONST. amend. X; Queenside, 328 U.S. 80.

[205] Miranda v. Arizona, 384 U.S. 436 (1966).

[206] *See, e.g., id*.; New York v. Quarles, 467 U.S. 649 (1984).

[207] U.S. CONST. amend. VIII.

[208] *Atkins*, 536 U.S. at 304.

Additionally, the Supreme Court recently held in *Graham v. Florida*, that the prohibition on cruel and unusual punishment bars states from sentencing juveniles, convicted of non-homicidal offenses, from serving life sentences without the possibility of parole.[209]

The Supreme Court found that the extended coverage did not unconstitutionally abridge the state's police power.[210] Thus, as illustrated, extending the Fifth Amendment's Double Jeopardy Clause to cover wrongfully convicted defendants would not be unconstitutional, if Courts have interpreted the Federal Constitution to restrict state police powers regarding criminal justice and sentencing practices.[211]

E. *Facts Do Not Support Policy Justifying Legal Fiction That Purports Wrongfully Convicted Defendants Who Have Been Imprisoned Have Not Been Convicted of Crimes*

The number of years a wrongfully convicted defendant has been imprisoned is irrelevant to the legal applicability of Double Jeopardy. Instead, courts equate the procedural posture of a wrongfully convicted defendant as similar to a defendant who has consented to a mistrial or directly appealed his verdict based on legal error.[212] Thus, filing a habeas corpus petition is legally indistinguishable from a defendant moving for a mistrial or filing a direct appeal. In both instances, the defendant is deemed to have waived the Double Jeopardy bar.[213]

Even as seen in the case of a mistrial, if the state committed prejudicial improprieties, the new trial effectively "wipes the slate clean," and thereby removes any remaining prejudice to the defendant while still satisfying the public's interest for just judgments.[214] This justification embraces the notion that a new trial remedies all Due Process violations of a prior procedural error, as if they never occurred.[215] However, because most of these offenses carry a statute of limitation, retrials following mistrials and reversal based on appeals occur relatively shortly with these rulings.[216]

However, it is difficult to extend this rationale to warrant the retrial of wrongfully convicted defendants who have been imprisoned for a decade or more as opposed to the *de minimus* length of confinement defendants

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[209] *Graham*, 560 U.S. at 48.
[210] *See id.*; *Atkins*, 536 U.S. at 304.
[211] *See Graham,* 560 U.S. at 48; *Atkins*, 536 U.S. at 304; Giannelli*, supra* note 98.
[212] Giannelli*, supra* note 98, at 9.
[213] *Id.*
[214] *Id.*
[215] *Id.* at 9-10.
[216] *Id.* at 10.

serve when the government retries them because of mistral or appeal.[217] As previously discussed, the statute of limitations for mistrials and direct appeals ensures that the defendant has a new trial shortly following the initial erroneous proceeding.[218] In these instances, the defendant's relatively brief confinement while awaiting a new trial makes the justification plausible. The defendant has not yet been convicted in the case of a mistrial or that the slate has been wiped clean, in the case of a new trial based on an appellate court's finding.[219] But this technical temperament does not carry the same weight for a wrongfully convicted defendant who, depending on the offense, serves an average of six to fifteen years before granted a new trial.[220]

Most habeas petitions processing time can be very lengthy, and several years may pass before a petition is heard. Unsurprisingly, on average wrongfully convicted defendants spend about thirteen years in prison before exoneration.[221] This is distinguishable from the *de minimus* confinement mistrial and appellate reversal defendants face, and thus makes them a less than perfect comparison to the wrongfully convicted defendant, who on average spends more than six years in prison from the time he is sentenced, to the time that he has exhausted all administrative requirements so that he can file a habeas corpus petition.[222]

F. *A Double Jeopardy Bar for Wrongfully Convicted Defendants Does Not Pose a Risk to Public Safety*

1. *Bars on Criminal Prosecutions Because of Constitutional Defects Is Not an Aberration*

Opponents of a Double Jeopardy extension argue that preventing retrial will pose a risk to public safety.[223] Specifically, opponents claim that the defendant might be the actual perpetrator, and without a retrial to determine if the defendant is culpable, he will go free, which would endanger the community given the possibility that the defendant might commit future crimes. Essentially, the opponents contend that a judicial

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[217] *Id.*
[218] Giannelli, *supra* note 98, at 11.
[219] *See Pearce*, 395 U.S. at 721.
[220] GROSS, *supra* note 40, at 24-25; KING ET AL., *supra* note 182.
[221] *See* GROSS. *supra* note 40, at 26.
[222] *See id.*
[223] MEDWED, *supra* note 48.

rule prohibiting reprosecution is not worth adopting due to the potential safety risk.[224]

However, opponents seem to ignore that the judicial process already routinely uses the exclusionary rule that when applied, disposes of incriminating evidence against the defendant and often results in the prosecutor dropping the charges and thus enabling the defendant to remain free.[225] Unlike with a wrongfully convicted defendant where through the habeas proceeding evidence comes forth that strong implicates that the defendant did not commit the crimes he was convicted of, a defendant moving the court to suppress evidence under the exclusionary rule rarely lacks culpability. In fact, it is quite the opposite.[226]

Often it is the case that the defendant using the exclusionary rule is the actual perpetrator of a crime and is using that rule to suppress incriminating evidence the government seized from an illegal search or to suppress an involuntary confession.[227] Take, for instance, a case where officers enter a person's home without a warrant or exigent circumstances and seize child pornography from the home that a prosecutor will seek to introduce as incriminating evidence at the defendant's trial.[228] Or, for example, imagine that a person arrested for kidnapping and raping a child confesses to the crime because officers created a coercive atmosphere and did not warn him of the right to remain silent or have an attorney.[229] In both cases, the defendants committed the crimes they were accused of yet the courts excluded the incriminating evidence because the government obtained that evidence in violation of those defendants' constitutional rights.[230] In neither case was the actual perpetrators' potential risk to the community, or harm to minors able to outweigh the constitutional violations they suffered.[231] Thus, it seems disingenuous for opponents to a Double Jeopardy extension to say that the prohibition should be denied because it would pose a risk to public safety when our criminal justice system and communities are not unaccustomed to releasing potentially dangerous persons from the application of the exclusionary rule.

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[224] *See id.*
[225] *See* Mapp, 367 U.S. at 655.
[226] *Compare* Hash v. Johnson, 845 F. Supp. 2d 711 (2012), *with* Mapp, 367 U.S. at 655.
[227] *See e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966); *Mapp*, 367 U.S. at 656.
[228] *See Mapp,* 367 U.S. at 645.
[229] *See Miranda*, 384 U.S. 440.
[230] *See id.*; Mapp, 367 U.S. at 660.
[231] Giannelli, *supra* note 98.

2. *Denying a Double Jeopardy Exception is More Burdensome on the Public.*

In many wrongful convictions, the defendant was not the perpetrator of the crime.[232] Nevertheless, even if there is evidence of the defendant's innocence, time and time again prosecutors have dismissed that evidence and rather maintained that defendant is guilty no matter whether the theory of the crime is fanciful or that the inculpating evidence is shaky (as with the case of eyewitness identification) or lacks scientific merit (as with the scores of forensic disciplines that have been debunked over the years).[233] However, the public danger from prosecutors maintaining the belief in the defendant's guilt despite these fictions is that while the wrongfully convicted defendant is being confined or retried, the actual perpetrator of those offenses is able to continue to commit subsequent crimes.[234]

Aside from danger of enabling the actual perpetrator to continue committing crimes at the expense of the public, the community also suffers a financial burden when prosecutors insist on retrying a wrongfully convicted defendant or from the lengthy negotiations in trying to convince the defendant to accept an *Alford* plea.[235]

The average cost of retrial for a homicide case is two hundred thousand dollars to three hundred thousand dollars.[236] According to the Exoneration Registry, prosecutors who chose to retry defendants whose convictions were vacated are ultimately unsuccessful.[237] In these cases, defendants presented evidence of actual innocence which prosecutors were already aware of. The result was a resounding failure for prosecutors as they lost more than two hundred cases on retrial.[238]

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[232] *See DNA Exonerations Nationwide*, INNOCENCE PROJECT (Oct. 26, 2015, 12:18 PM), http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide; *See also* Lea-Andra Morgan, *supra* note 48.

Although it is thought that many of the exonerations that have been given in the past few decades have been based on the increase in the use of DNA evidence, it should be noted that fewer than 20 percent of violent crimes involve biological evidence. *Id.*at 2 (citations omitted).

The Death Penalty Information Center lists 116 persons sentenced to death between 1973 and 2004 who were later exonerated. As there were 7,529 individuals sentenced to death during this time period, this is indicative of a 1.55 percent exoneration rate in capital cases during this time.

[233] *See* Medwed, *supra* note 122, at 183-84; MEDWED, *supra* note 48.

[234] *See* DNA Exonerations Nationwide, *supra* note 232. (The true suspects and/or perpetrators have been identified in 163 of the DNA exoneration cases. Those actual perpetrators went on to be convicted of 144 additional crimes, including seventy seven sexual assaults, thirty four murders, and thirty three other violent crimes while the innocent sat behind bars for their earlier offenses.)

[235] *See* Schneider, *supra* note 37.

[236] *See* Russell Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases*, WSJ (Jan. 9, 2002 12:01 AM), http://www.wsj.com/articles/SB1010527927506582520.

[237] *See* THE FIRST 1,600 EXONERATIONS, *supra* note 40.

[238] *See id.*

At the same time, a report from the International Association of Chiefs of Police states that programs that train police on making rightful arrests have been shown to deter wrongful convictions, enhance the community's trust with the police and thus improve public safety overall.[239] Reformatting already existing police training programs and cultivating best practices poses little cost as compared to the expense of reprosecuting a defendant.[240] Communities implementing these programs have also experienced a decrease in wrongful convictions because of the additional training and resources extended to law enforcement.[241] Thus, in the end, devoting money and resources for fruitless cases at the expense of the community's tax-payer dollars is less beneficial than spending that money on police training and other programs that are proven to be better at improving public safety.

V. CONCLUSION

Convicting an innocent person means that the guilty perpetrator is not brought to justice and therefore threatens the public's safety. The actual offender is free to victimize and harm others, while the wrong person is prosecuted, convicted, sentenced and harmed.

Wrongful convictions significantly harm an innocent defendant when forced to face the dangers of imprisonment. Wrongfully convicted defendants experience life-threatening and psychological traumas while in prison. They are attacked by other prisoners, scalded with hot water, stabbed, and sexually assaulted. Many are left feeling depressed, hopeless, paranoid, and suffer from post-traumatic stress disorder. Wrongful convictions undermine the public's trust in the criminal justice system. A burden is placed on the integrity, reputation, and effectiveness of the criminal justice system and all of those who represent the system.

Prohibiting the retrial of a defendant whom the government wrongfully convicted by engaging in official misconduct is both more consistent with the purpose of the Double Jeopardy Clause, which seeks to prevent government harassment, and also better aligns with the realities of a wrongfully convicted defendant. These realities of serving decades-long confinement and the judicial determination that the government engage in sufficiently prejudicial misconduct to the extent that it deprived the defendant of his Fifth Amendment right of due process demonstrates that

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[239] INTERNATIONAL ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS (2013).

[240] *Id.*

[241] *See id.;* THE NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014 (2015).

for the state to threaten a wrongfully convicted defendant with reprosecution goes against the core of the Double Jeopardy Clause, which is to prevent harassing citizens so that they plead guilty despite their innocence. As Justice Blackmun noted, the Double Jeopardy Clause promotes "minimization of harassing exposure to the harrowing experience of a criminal trial."[242] Thus, the reprosecution prohibition "prevents the possibility of prosecutorial overreaching . . . and minimizes the possibility that an innocent defendant may be convicted."[243]

Realistically, wrongfully convicted defendants may not get relief through the courts, but through legislation. Just as Congress passed the Omnibus Crimes Act to raise the warrant requirement, legislatures can pass laws prohibiting the reprosecution of defendants who were wrongfully convicted in the manner described above. As such, this Comment can serve as the basis for why such remedial legislation is necessary.

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[242] *Bretz*, 437 U.S. at 38.
[243] *Id.*