We often hear about criminal convictions overturned years later when DNA or other evidence exonerates the accused. But how does this come about? What are the legal procedures available to challenge a conviction, especially a long-standing conviction? What are the basics of other types of post-conviction relief?

Introduction

Gloria Killian served 16 years in prison after being convicted of masterminding a home invasion robbery that resulted in the death of the homeowner. Gloria was a law student in Sacramento at the time of the robbery, she had no criminal record, she was nowhere near the home during the robbery, and she denied any wrongdoing.

Killian’s conviction rested on the testimony of Gary Masse, the sole witness against her. Masse had been convicted of first-degree felony murder for killing the homeowner, and was sentenced to life without parole. After his conviction, he contacted law enforcement to try to strike a deal to reduce his sentence. Masse then told prosecutors that Killian masterminded the robbery.

At trial, Masse testified he had received no leniency from prosecutors in exchange for his testimony. The prosecutor assured the jury in closing argument that there was no deal for Masse’s testimony. In fact, there was a deal, but it was kept from the jury. Killian was convicted and sentenced to 32 years to life.

Shortly after the trial, Masse wrote to the prosecutors about his own re-sentencing, and said that he should receive a lower sentence because he “lied [his] ass off on the stand” against Gloria.” The prosecution failed to disclose that letter to Gloria’s defense. Masse’s sentence was reduced to life with possibility of parole in exchange for his testimony against Killian. Killian unsuccessfully appealed her conviction. Years later, another defendant against whom Masse had testified discovered Masse’s letter to the prosecution stating that he had “lied his ass off” and passed that letter to Killian’s attorney. With the new evidence, Killian took her case to federal court and argued she deserved a new trial because Masse had perjured himself.
At a hearing before a federal magistrate judge, Masse admitted that he had lied during the trial and that Killian had not planned the robbery. Despite Masse’s admissions, the magistrate judge recommended upholding the conviction, and the district judge agreed on the ground the prejudice from Masse’s perjury, even though he was the only witness implicating Killian, was insufficient.

Gloria appealed the denial of her habeas petition to the Ninth Circuit Court of Appeals. Finally, after Gloria spent 16 years in prison based on perjured testimony, the Ninth Circuit reversed her conviction, ruling not only that Masse’s perjury was prejudicial, but also that the prosecution exploited that perjury by misrepresenting to the jury during closing argument that “we have nothing to do with how much time Gary Masse serves.”

I. Appeal

The usual remedy for a defendant convicted of a crime in California is to appeal the conviction and/or sentence to the appellate court, namely, the Court of Appeal for state convictions and the U.S. Court of Appeals for federal convictions. Gloria pursued that remedy. If an initial appeal is unsuccessful, defendants may seek further review in the state or federal supreme courts, depending on whether the conviction was a state or a federal conviction. Unlike the intermediate appellate courts, the state and federal supreme courts have discretion whether to accept an appeal, and in practice accept very few.

The issues that can be raised on appeal are limited. For example, most issues are appealable only if the defendant’s lawyer made a timely and specific objection at trial. For example, she may challenge a ruling admitting or excluding evidence only if she objected when the trial court made the ruling. Similarly, a defendant may argue that a prosecutor committed misconduct at trial only if her attorney objected when the misconduct occurred and requested a curative instruction be read to the jury. Some issues, such as insufficient evidence, may be raised on appeal without an objection.

Where a timely objection is not possible (for example, because the defendant did not learn of the information to support the objection until after the conviction) the defendant can raise the issue in a new trial motion brought before the sentencing hearing. A new trial motion may be based on various grounds, including ineffective assistance of counsel or the discovery of new evidence, such as DNA or newly discovered witnesses. If the court denies the motion, that ruling can be challenged as part of the appeal.

But Gloria could not bring a new trial motion – and thus could not appeal the denial of a new trial motion – because she was sentenced before she learned about the prosecution’s deal with Masse and about Masse’s admission that he perjured himself at trial. Thus, appeals provide no remedy where evidence of a defendant’s innocence – e.g., new forensic evidence, witness recantation, or proof that the prosecution team withheld exculpatory evidence – is discovered after sentencing.

II. Habeas Corpus Petition
Even if a defendant’s conviction and sentence are affirmed on appeal, a defendant in custody, which can include being on probation or parole, may file a habeas corpus petition challenging the conviction on the ground that her rights were violated at trial. Normally, a habeas petition may not raise issues that could have been raised on appeal.

Unlike an appeal, the court usually will not appoint an attorney to file the petition (although the court may do so if it finds some merit in the initial petition). Generally, a prisoner who cannot afford an attorney must prepare the initial petition on her own.

A state prisoner may bring a habeas petition in state court raising violations of state and federal constitutional law. A prisoner who obtains no relief in state court, may bring a habeas petition in federal court, raising only federal constitutional law claims that were raised in the appeal or the state habeas petition. That is what Gloria did. Further, a state prisoner may raise federal claims in federal court only if he or she first raised the claims before the state Supreme Court in the state appeal or in the state habeas petition.

Federal prisoners may only bring a federal habeas petition raising federal constitutional law claims. Typical federal constitutional claims raised in a habeas petition include:

- A denial of the 6th Amendment right to effective counsel
- A denial of the 14th Amendment right to due process because of fundamental unfairness in the trial proceedings (e.g., jury bias, prosecutorial misconduct, failure to properly instruct the jury)
- The admission of the defendant’s statements in violation of *Miranda* or because the statements to police were involuntary, in violation of the 14th Amendment.
- Insufficient evidence to support one of the elements of the crime (e.g., specific intent), in violation of due process.

Gloria’s habeas petition included a claim of prosecutorial misconduct.

### III. Claims Of Factual Innocence

Because the evidence supporting the claims of factual innocence often is not discovered until after the *appeal* process is over, claims of factual innocence often are raised in a *habeas* petition.

Such claims of course should require special consideration for two reasons. First, an innocent person may be labeled a criminal and may be serving a long prison sentence – or even be sentenced to death – for a crime he or she did not commit. That happened to Gloria. Second, the actual perpetrator may still be on the loose and be preying on other victims. On the other hand, the criminal justice system has a strong interest in finality; prosecutors argue that the system would break down if every conviction was repeatedly subject to re-litigation simply because a convicted defendant claimed innocence.
There are many well-known cases besides Killian’s terrifying tale where factual innocence was established years after a defendant was sent to prison:

**DNA evidence: Wrongly convicted for rape in the Central Park jogger case.** In some cases, DNA testing long after trial raises, or adds to, serious questions about the validity of a guilty verdict. In recent years, the media have reported many stories of defendants exonerated by DNA after years of incarceration. An example is New York City’s Central Park jogger case from 1989, where five teenagers were convicted for assaulting and raping a jogger in Central Park based on their confessions – later determined to be coerced. In 2002, another man, Matias Reyes, who was not among the men convicted, confessed to the attack and a DNA test confirmed his involvement. Based on the DNA and Reyes’s confession that he had acted alone, the court granted the district attorney’s motion to withdraw the charges and vacate the judgment of conviction against five young men who had been convicted.

Most states have a procedure permitting post-conviction DNA analysis. In California, the convicted person must show that DNA testing would raise a reasonable probability that the verdict in the case (or the sentence) would be more favorable had the results of DNA testing been available at the time of the conviction. Penal Code §1405. Federal courts have a similar procedure allowing the testing of evidence. 18 USC §3600.

**False expert evidence: Wrongly convicted of murder based on junk science.** Not all claims of actual innocence are based on DNA testing. Some are based on scientific and legal developments showing that critical evidence in the case had no scientific merit. An example is the case of Bill Richards, who was convicted in 1997 of murdering his wife based on expert testimony that a bite mark on his dead wife contained a unique feature that only belonged to “one or two or less” people out of a hundred. His conviction was affirmed on appeal in 2000.

But the bite-mark “science” supporting the expert testimony was later discredited, see attached article, and the expert recanted his testimony. Richards filed a state habeas petition in 2007, and, although the trial court granted the petition in 2009, in 2012 the California Supreme Court reversed that ruling and upheld his conviction. The state Supreme Court reasoned that expert testimony was merely an opinion and was never true or false evidence, and therefore the recanting of the expert’s opinion was not “false evidence” that would permit the court to overturn a conviction. In response, California lawmakers amended Penal Code section 1473 to state that “false evidence shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.” Richards filed a new state habeas petition asserting that the new law supported his claim of “false evidence.” Just last May, the California Supreme Court unanimously agreed. Further, it held there was a reasonable probability that the false evidence affected the jury’s verdict, and overturned the conviction.
Recantation plus Ineffective counsel: Wrongly convicted of child rape. Other claims of actual innocence are based on eyewitness or victim recantation. For example, an eyewitness may later claim that the police pressured him to identify the accused as the perpetrator, may simply conclude that he misidentified the accused, or, like Masse in Gloria’s case, may admit he lied for some other motive.

Howard Dudley was convicted in 1992 of child rape in North Carolina state court and sentenced to life in prison. The evidence against him was his daughter’s statement to police that Dudley, along with another man, had raped her when she was 9 years old. Soon after the trial, his daughter recanted her statement.

After Dudley served 24 years in prison, he brought a “motion for appropriate relief” (the North Carolina version of a habeas petition) arguing that his inexperienced trial lawyer provided ineffective assistance of counsel by failing to investigate the case and prepare adequately for trial, by failing to request a psychological expert or to seek psychological testing to see if Dudley’s daughter was competent to testify, and by failing to file any pretrial motions. At an evidentiary hearing, the defense presented evidence that Dudley’s daughter suffered from a host of mental health issues, including mental retardation and psychotic episodes. After the hearing, the court ruled that Dudley’s trial counsel provided ineffective assistance and vacated Dudley’s conviction. See attached article.

There Must Be A Constitutional Violation

Common to all claims of factual innocence, like any other issue raised in a federal habeas petition, is that the defendant’s federal constitutional rights were violated. The most likely claims are that trial counsel failed to investigate the case or introduce exculpatory evidence (denial of the right to effective assistance of counsel), because new evidence shows the defendant’s factual innocence (denial of the due process right to proof beyond a reasonable doubt), or because the prosecution team hid exculpatory evidence (denial of the due process right to a fair trial).

Timing And Procedure

States have different time limits for bringing a habeas petition. California gives defendants a “reasonable time.” North Carolina (the Dudley case, above), apparently sets no time limit in non-capital cases.

For most types of cases, a federal habeas petition must be filed within one year after the last state court denied the appeal, plus 90 days if no petition for writ of certiorari is filed, or 90 days after the U.S. Supreme Court denies a petition for writ of certiorari. 28 U.S.C. §2244(d)(1)(A). Generally, a defendant’s failure to observe these deadlines will not be excused because the defendant cannot read and write, was pro se and lacked legal knowledge, or relied on his cellmate or another jailhouse lawyer. However, there is an important exception for federal habeas claims of actual innocence. In such cases, the filing deadline is one year after the defendant could have learned, using due diligence, of
the evidence that proves his innocence. 28 U.S.C. §2244(d)(1)(D). In 2013, the Supreme Court lowered that bar by holding that a defendant may file a habeas petition after that deadline if he or she has good cause for missing the deadline. Specifically, courts must now consider “unjustifiable delay on a habeas petitioner’s part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.” *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013)

Another barrier to habeas relief is that multiple or “successive” petitions about the same issue must be dismissed. 28 USC §2244(b)(1). Successive petitions that raise new issues also must be dismissed unless (1) the claim is based on a new rule of Constitutional law that was previously unavailable, or (2) the claim is based on a fact that could not have previously been discovered through the exercise of due diligence.

A habeas petition faces still other high hurdles such as that a federal court will defer to a state court determination of factual issues and that an evidentiary hearing is rarely granted. Even if the magistrate judge grants the petition, a district judge can reject the decision, but as in Gloria’s case, the losing party can appeal to the U.S. Court of Appeals.

**IV. Pardons And Commutations**

A pardon is an official act of forgiveness but it does not “prove innocence” and is often based on grounds other than innocence. A pardon does not erase or expunge the record of conviction. A pardon typically restores civil rights lost due to a conviction, such as the right to carry a firearm. It can also be useful in obtaining professional licenses or permits that a convicted person could not normally obtain.

A commutation is a remedy for someone currently serving the sentence. A commutation, if granted, reduces the convicted person’s sentence. Like a pardon, it is often not based on innocence. For example, a commutation may be granted if the sentence seems much higher than the sentences that other people convicted of the same crime typically receive.

**The President’s Power To Pardon And Commute Federal Sentences**

The President can only pardon or commute the sentence of someone convicted in federal court, including in military court-martial proceedings. A person applies for a federal pardon or commutation by submitting a petition to the Office of the Pardon Attorney, Department of Justice. For a pardon, the applicant must wait a minimum of five years before eligibility. The waiting period for a pardon begins upon release from confinement. A person can apply for a waiver of the waiting period, but this is rarely granted.

**The President Commuted Chelsea Manning’s Sentence.** Chelsea Manning, who received a military sentence of 35 years for giving thousands of sensitive or classified military documents to WikiLeaks, is an example of a presidential commutation with the sentence recently being shortened to time served. Manning’s sentence was deemed to be much higher than that given other people convicted of similar offenses.
The President Commuted Patty Hearst’s Sentence And Then Pardoned Her. Patty Hearst was convicted of bank robbery in 1976 and sentenced to seven years in prison. After she served 22 months, President Carter commuted her sentence. President Clinton later pardoned her.

Presidential pardons and commutations can be controversial. Some people thought Manning and Hearst did not deserve reduced sentences, and there were accusations that Marc Rich, a financier pardoned at the very end of President Clinton’s term, “bought” his pardon. Other controversial pardons and commutations include President Ford’s prospective pardon of Richard Nixon, who had not been indicted, and President Bush’s commutation of the sentence of Lewis “Scooter” Libby, convicted of perjury, obstruction of justice, and making false statements in an investigation about leaked information imperiling a CIA agent. But no matter how controversial, a pardon or commutation cannot be overturned by the courts or blocked by Congress.

The Governor’s Power To Pardon And Commute Sentences

A person who has been convicted in a California court may apply to the governor for a pardon. A person currently serving a sentence may apply for a commutation to reduce the sentence. Like the corresponding presidential power, the governor’s power is entirely discretionary. Governor Wilson pardoned only 13 prisoners during his entire time as governor. On the other hand, in 2016 alone, Governor Brown pardoned or commuted the sentence of 112 prisoners (and 854 since 2011). A convicted person may apply for a direct pardon by submitting an application to the governor.