



2018

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Recommended Citation

Smith, Jacey (2018) "Evolving Science Meets the Stagnating Appeals Process: Integrating Daubert into the Post-Trial Phase," *University of Baltimore Law Review*: Vol. 47 : Iss. 2 , Article 5.
Available at: <https://scholarworks.law.ubalt.edu/ublr/vol47/iss2/5>

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EVOLVING SCIENCE MEETS THE STAGNATING APPEALS
PROCESS: INTEGRATING *DAUBERT* INTO THE POST-TRIAL
PHASE

Jacey Smith*

I. INTRODUCTION

Dr. James Grigson, also known as “Doctor Death,” testified at the sentencing phases of over 100 convicted murderers in Texas.¹ He did so until 1995, when he was expelled from the American Psychiatric Association.² His testimony at most of these dispositions was that the defendant, unless put to death, would kill again.³ This type of testimony, often provided by forensic psychologists such as Dr. Grigson, is styled in death penalty cases as “future dangerousness,” evidence which tends to predict a defendant’s risk of violence upon reentry into society.⁴

One such trial in which Dr. Death testified was the trial of Mr. Randall Dale Adams, a twenty-eight-year-old man wrongly convicted of shooting a police officer in Dallas, Texas, in 1977.⁵ In that case, sixteen-year-old David Harris picked Adams up in a stolen vehicle on November 27, 1976.⁶ The two spent the day together doing recreational drugs and drinking alcohol, and later, Harris dropped Adams off at a motel.⁷ Thereafter, Harris was pulled over by Officer

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1. *Texas ‘Dr. Death’ Retires After 167 Capital Case Trials*, WASH. TIMES (Dec. 20, 2003), <http://www.washingtontimes.com/news/2003/dec/20/20031220-113219-5189r/>.

2. *Id.*

3. *See id.* (“In more than 100 of the 167 capital cases in which he was involved, he testified strongly that a defendant would kill again if given the opportunity . . .”).

4. *See* Mark Douglas Cunningham & Jon R. Sorensen, *Capital Offenders in Texas Prisons: Rates, Correlates, and an Actuarial Analysis of Violent Misconduct*, 31 LAW & HUM. BEHAV. 553, 553–55 (2007).

5. Alexandra Gross, *Randall Dale Adams*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2984> (last updated Sept. 23, 2014).

6. *Id.*

7. *Id.*

Robert Wood because he had been driving with no headlights.⁸ Harris shot Officer Wood at least four times and sped away.⁹ He later pinned the murder on Adams, his companion earlier in the day.¹⁰

At Adams's sentencing, before the jury, Dr. Grigson testified as an expert witness, stating: "I would place Mr. Adams at the very extreme, worse or severe end of the scale. You can't get beyond that. There is nothing known in the world today that is going to change this man; we don't have anything."¹¹

It appears this testimony, among other factors, caused the jury to sentence Adams to death.¹² After being confined on death row for twelve years, Adams was exonerated in 1989, when local attorneys took an interest in his case.¹³ During a three-day hearing on his motion for a new trial, Adams's attorneys argued that the State had committed prosecutorial misconduct, withheld exculpatory evidence, knowingly allowed its witnesses to perjure themselves, and convicted Adams with insufficient evidence.¹⁴ Additionally, Harris later recanted his statement against Adams.¹⁵ After the hearing, the court granted Adams's motion, and the State thereafter dismissed all charges.¹⁶ Fortunately, due to other errors in Adams's trial, he was exonerated.¹⁷

Adams walked out of prison; he was free.¹⁸ Yet in his case, a doctor took the stand in front of a jury and confidently testified with 100% certainty that Adams would kill again.¹⁹ This so-called "scientific evidence" admitted at Adams's trial, while perhaps considered acceptable in 1977, certainly would be considered suspect

8. *Id.*

9. *Id.*

10. *Id.*

11. Press Release, Death Penalty Info. Ctr., Future Dangerousness Predictions Wrong 95% of the Time: New Study on Capital Trials Exposes Widespread Unreliable Testimony, <https://deathpenaltyinfo.org/node/1099> [hereinafter Future Dangerousness Predictions Wrong].

12. Gross, *supra* note 5.

13. *See id.* Adams was exonerated in part because of publicity his case received from a notable documentary, *The Thin Blue Line*. *See* Douglas Martin, *Randall Adams, 61, Dies; Freed with Help of Film*, N.Y. TIMES (June 25, 2011), <http://www.nytimes.com/2011/06/26/us/26adams.html>.

14. *See* Gross, *supra* note 5.

15. *Id.*

16. *Id.*

17. *See infra* note 168 and accompanying text. Mr. Adams was eventually released on grounds unrelated to the testimony of Dr. Grigson. *See infra* note 168 and accompanying text. I argue that he should have been granted a different kind of remedy based upon Dr. Grigson's questionable testimony. *See infra* Part IV.

18. *See* Gross, *supra* note 5.

19. *See id.*

today,²⁰ especially in light of Dr. Grigson's expulsion from the American Psychiatric Association for his inaccurate predictions of "future dangerousness" predicated solely on hypotheticals.²¹

This Comment proposes a procedural mechanism stemming from the executive branch, rather than the judiciary, as a solution to the quandary in which Adams found himself:²² sitting in prison for a conviction with a sentence that is materially supported by suspect scientific evidence.²³ This mechanism would introduce the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁴ (*Daubert*) standard of admission of scientific evidence into a convicted defendant's post-trial proceedings.²⁵ Using this mechanism, a defendant would have a chance to challenge the validity of suspect scientific evidence, that if scrutinized by the modern scientific community, would not meet the *Daubert* standard.²⁶ This Comment will focus on the Federal Rules of Criminal Procedure and defendants being held in federal custody only, as an example of a workable mechanism which states could choose to adapt to fit their own post-trial procedure.²⁷

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20. The future dangerousness test today is a highly controversial topic, with an increasing number of studies and reports showing its potential weaknesses. *See, e.g.*, Cunningham & Sorensen, *supra* note 4; James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449, 458 (1989); Elizabeth S. Vartkessian, *What One Hand Giveth, the Other Taketh Away: How Future Dangerousness Corrupts Guilt Verdicts and Produces Premature Punishment Decisions in Capital Cases*, 32 PACE L. REV. 447, 451 (2012); 2 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 11:11, Westlaw (database updated Dec. 2016) ("Practically no research exists on the interrater reliability of descriptions of personality and psychopathology made by psychologists using projective techniques."); Future Dangerousness Predictions Wrong, *supra* note 11 ("The American Psychiatric Association has stated since 1983 that '[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.'"). Only four states consider the assessment of future dangerousness in capital sentencing mandatory, and in twelve states, future dangerousness is permissive. Mark D. Cunningham et al., *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCHOL., PUB. POL'Y, & L. 223, 225 (2009).
21. Kristine Phillips, *In Texas, a Man Who Didn't Kill Anybody Is About to Be Executed for Murder*, WASH. POST (Aug. 12, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/12/in-texas-a-man-who-didnt-kill-anybody-is-about-to-be-executed-for-murder/?utm_term=.0cdebfe812d4.
22. *See infra* Section IV.A.
23. *See* Gross, *supra* note 5.
24. 509 U.S. 579 (1993).
25. *See infra* Section IV.B.2.
26. *See infra* Part IV.
27. *See infra* Section II.B.

First, this Comment will examine the current state of the law, delving into the pretrial standards of admissibility of scientific evidence, then highlighting federal post-trial procedure generally.²⁸ Next, this Comment will propose a mechanism through the executive branch to challenge the validity of scientific methodology material to the defendant's conviction that could be filed after all judicial procedural remedies have been exhausted.²⁹ The passage of time would serve as a way for petitioners to revisit the science in their convictions after new technology has evolved and old scholarship has been discarded.³⁰ This could protect a defendant in Adams's shoes, that is, a person in jail whose sentence or conviction, once supported by *Daubert* approved science, now hinges on suspicious science.³¹

II. CURRENT STATE OF THE LAW

Because this Comment will propose a hearing in the post-trial phase that incorporates important characteristics of the pretrial *Daubert* hearing, it is necessary to detail the essence of *Daubert*.³² By analyzing how scientific evidence is handled pretrial, a parallel of how it could be done in the post-trial phase may be drawn.³³

A. Pretrial Determination of the Validity of Scientific Evidence

The predominant common law test of admissibility of scientific evidence was introduced in 1923 in the landmark case *Frye v. United States*.³⁴ The scientific methodology at issue in *Frye* was a "systolic blood pressure deception test," which was akin to an early form of a lie detector test.³⁵ However, the *Frye* Court noted that "when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define."³⁶ This was a novel opinion because it distinguished a previously established scientific methodology from cutting edge technology.³⁷ This

28. See *infra* Part II.

29. See *infra* Part IV.

30. See *infra* Section IV.B.1.

31. See *infra* Part IV.

32. See *infra* Section II.A.

33. See *infra* Section II.A.

34. See 293 F. 1013, 1014 (D.C. Cir. 1923).

35. *Id.* at 1014 ("[T]he theory seems to be that truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure.").

36. *Id.*

37. *Id.* ("Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from

distinction is the common thread that runs from *Frye* to modern scientific evidence jurisprudence.³⁸

The brief 1923 opinion developed into what became known as the “‘general acceptance’ test” of scientific methodology, which permeated the common law both federally and in the states for seventy years.³⁹ A *Frye* hearing at its very essence determines whether the proffered testimony is “generally accepted in the particular field in which it belongs.”⁴⁰

This test is indisputably vague.⁴¹ The actual case, concise and without citation, does not provide for a specific procedural mechanism.⁴² Rather, it established a broad framework of inquiry that a court should follow before admitting scientific evidence.⁴³ After *Frye*, most states followed a two-step inquiry.⁴⁴ First, the courts identified the relevant field under which the evidence would fall.⁴⁵ Second, the court determined whether the particular methodology had been generally accepted within that relevant scientific field.⁴⁶

Because of the lack of specificity that the *Frye* case bequeathed to the courts, states began to examine factors that could help them determine the reliability of the disputed evidence.⁴⁷ Factors the states employed included the following: the methodology’s acceptance in the scientific field,⁴⁸ the qualifications of the expert,⁴⁹ the technique’s general use compared to its specific use in the case at issue,⁵⁰ the potential error rate,⁵¹ the availability of literature and research

which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”).

38. *See* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

39. *Id.* at 585.

40. 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1:5, Westlaw (database updated Dec. 2016).

41. *Id.*

42. *Frye*, 293 F. at 1013–14; FAIGMAN ET AL., *supra* note 40, § 1:5.

43. FAIGMAN ET AL., *supra* note 40, § 1:5.

44. *See id.*

45. *See id.*

46. *See id.*

47. John W. Parry, *Expert Evidence and Testimony: Daubert Versus Frye*, 28 MENTAL & PHYSICAL DISABILITY L. REP., Mar.–Apr. 2004, at 136, 136 n.10 (citing JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN’S EVIDENCE §§ 702–03, 708–19 (1987)).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

relating to the technique,⁵² the novelty of the technique,⁵³ and the degree to which the technique's interpretation relied upon the expert's subjective opinion.⁵⁴

In 1975, the Federal Rules of Evidence codified a different procedure for the admission of expert testimony.⁵⁵ The original text of Rule 702 read: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."⁵⁶

Rule 702 allowed a more lenient entrance for scientific evidence into the courtroom than *Frye*.⁵⁷ What was missing from the Federal Rule was the requirement that a methodology be "generally accepted" within the scientific community.⁵⁸ Members of the jury, as the triers of fact, could determine the weight of the evidence themselves, thereby diminishing the trial judge's prior role as a "gatekeeper" in determining the reliability of the evidence in the relevant scientific community.⁵⁹ Because the Federal Rule's advisory committee notes and legislative history were silent on *Frye*, the debate over whether Rule 702 overruled *Frye* brewed in the legal community until the seminal Supreme Court case of *Daubert*.⁶⁰

Daubert finally determined that Rule 702 had superseded *Frye*'s general acceptance test for admissibility of scientific evidence.⁶¹ The *Daubert* Court came to this conclusion, holding that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony."⁶²

A similarity between the old *Frye* standard and *Daubert*'s definition of Rule 702 is that both allow the judge to serve a

52. *Id.*

53. *Id.*

54. *Id.*

55. FED. R. EVID. 702 (1975) (amended 2000).

56. *Id.*

57. 29 CHARLES ALAN WRIGHT & VICTOR GOLD, FEDERAL PRACTICE AND PROCEDURE § 6267, at 306 (2016).

58. Richard B. Racine et al., *The Battle over Science in the Courtroom: Can a Balance Be Found When Applying the Gatekeeping Principles of the Supreme Court's Daubert Decision?*, 42 FED. LAW., Feb. 1995, at 36, 38.

59. *Id.*

60. Craig Lee Montz, *Trial Judges as Scientific Gatekeepers After Daubert, Joiner, Kumho Tire, and Amended Rule 702: Is Anyone Still Buying This?*, 33 UWLA L. REV. 87, 93 (2001).

61. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993).

62. *Id.* at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

“gatekeeping role” in the admission of scientific evidence.⁶³ *Daubert* requires a judge to determine that the scientific evidence sought to be introduced is relevant and reliable.⁶⁴ *Daubert* provides suggestions for how courts should evaluate scientific evidence to determine its reliability as an alternative to the strict “general acceptance” test.⁶⁵ The recommended list includes:

(1) [W]hether the expert’s technique or theory can be or has been tested—that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.⁶⁶

After *Daubert*, the existing Federal Rule was reworked to match the case’s holding.⁶⁷ Federal Rule of Evidence 702 now reads:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.⁶⁸

63. *Id.* at 596.

64. *Id.* at 589.

65. *Id.* at 593–94; FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

66. FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

67. *Id.* This amendment is also based in part on the holding of *Kumho Tire Co., Ltd. v. Carmichael*, in which the Supreme Court held that the “basic gatekeeping obligation” applied to “all expert testimony,” rather than just scientific testimony. 526 U.S. 137, 147 (1999).

68. FED. R. EVID. 702.

Furthermore, the *Daubert* Court held that Rule 702 does not preclude the testimony of two experts who may have drawn two different conclusions using the same methodology, stating that “[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.”⁶⁹ The Court also held that the burden of proof in a *Daubert* hearing is incumbent upon the proponent of the witness to show, by a preponderance of the evidence, first, that the expert is qualified to testify as such, and second, that the witness’s opinions are both relevant and reliable.⁷⁰

Having surveyed the procedure of pretrial determinations of the admission and exclusion of scientific evidence, an examination of post-trial procedure is necessary to determine where and how a *Daubert*-style hearing would play out in the post-trial phase.⁷¹

B. *Post-Trial Procedure*

Federally, a criminal defendant has an array of appeals and collateral attacks that he may use to argue the validity of his conviction or sentence.⁷² Generally, a convicted defendant’s first attack must be done on direct appeal.⁷³ The federal circuit courts must hear appeals from all final decisions of the federal district courts.⁷⁴

Generally, the next step for a defendant is to appeal to the Supreme Court of the United States.⁷⁵ 28 U.S.C. § 2106 provides:

69. *Daubert*, 509 U.S. at 594–95.

70. *Id.* at 592–93, 592 n.10; DANA G. DEATON: THE DAUBERT CHALLENGE TO THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE § 3, Westlaw (database updated Oct. 2017).

71. *See infra* Section II.B; *see also infra* Part IV (proposing a procedural mechanism for post-trial criminal procedure).

72. 28 U.S.C. § 2255 (2012); *see also* FED. R. CRIM. P. 32–38 (providing post-conviction procedures).

73. NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 29:13 (2d ed.), Westlaw (database updated June 2017).

74. 28 U.S.C. § 1291 (2012). This provision states:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Id.

75. *See* 28 U.S.C. § 2106 (2012).

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.⁷⁶

Review on a writ of certiorari is subject to judicial discretion and not an automatic right, and thus will only be granted for “compelling reasons.”⁷⁷

After a convicted defendant has exhausted his direct appellate remedies, the next step is to attack his conviction collaterally.⁷⁸ There are strong interests in both preserving the finality of judgments and in maintaining orderly trial procedure.⁷⁹ These interests “must be overcome before collateral relief can be justified.”⁸⁰

28 U.S.C. § 2255 (Section 2255) is the overarching statute by which a petitioner may move the court on collateral grounds to reconsider his conviction.⁸¹ The remedies available to a petitioner, if successful under a Section 2255 claim, include release, a new trial, or the court may vacate, set aside, or correct the sentence.⁸²

A petitioner seeking a remedy pursuant to Section 2255 has three broad grounds by which he may collaterally attack his conviction.⁸³ The prisoner “must allege as a basis for relief: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid.”⁸⁴ If the claim is not one of constitutional significance, the petitioner must show that there are

76. *Id.*

77. SUP. CT. R. 10.

78. COHEN, *supra* note 73, § 29:13. A collateral attack is “a tactic whereby a party seeks to circumvent an earlier ruling of one court by filing a subsequent action in another court.” 21A TRACY BATEMAN ET AL., FEDERAL PROCEDURE: LAWYER’S EDITION § 51:221, Westlaw (database updated Sept. 2017).

79. Henderson v. Kibbe, 431 U.S. 145, 154 n.13 (1977).

80. *Id.*

81. See 28 U.S.C. § 2255 (2012).

82. *Id.* § 2255(a)–(b).

83. Pough v. United States, 442 F.3d 959, 964 (6th Cir. 2006).

84. *Id.* (citation omitted). For an explanation of why part (3) of this framework is inapplicable to the proposal in this Comment, see Part III.

“‘exceptional circumstances’ that make the need for redress evident.”⁸⁵

If seeking relief under Section 2255, allegations of error regarding trial court procedure, such as sufficiency of the evidence to support conviction, grand jury issues, or other general trial procedure mistakes which constitute errors of constitutional dimension, will not be reviewed by the collateral court.⁸⁶ Commonly attempted, but generally unsuccessful, claims made pursuant to Section 2255 include attacking the petitioner’s charging document or the admission of certain evidence at trial.⁸⁷ Types of successful claims cognizable under Section 2255 include attacks on effectiveness of counsel pursuant to the Sixth Amendment,⁸⁸ the validity of a guilty plea,⁸⁹ and constitutionally deficient jury instructions.⁹⁰

In addition to the claims of constitutional dimension that can be brought pursuant to Section 2255, if a petitioner can prove that he is actually innocent of the crime for which he was convicted, he will be exempted from the general procedural bar against claims that should have been raised on direct appeal.⁹¹ The Supreme Court has held that

85. *Tavares v. United States*, 230 F. Supp. 2d 126, 131 (D. Mass. 2001) (quoting *David v. United States*, 134 F.3d 470, 474 (1st Cir. 1998)).

86. *Jackson v. United States*, 495 F.2d 349, 351 (8th Cir. 1974).

87. *See, e.g., Crimson v. United States*, 510 F.2d 356, 357 (8th Cir. 1975) (“[E]rror in the admission of testimony at trial is an improper ground upon which to base a claim for post-conviction relief in a proceeding under s[ection] 2255.”); *Kelly v. United States*, 350 F.2d 398, 399 (5th Cir. 1965) (holding that a petitioner’s attacks on admissibility of the evidence and sufficiency of the evidence to establish the petitioner’s *mens rea* were suited for direct appeal and not reviewable pursuant to 28 U.S.C. § 2255).

88. *See, e.g., United States v. Tarbell*, 728 F.3d 122, 128–29 (2d Cir. 2013) (“When faced with a claim for ineffective assistance of counsel on direct appeal, . . . [the Court of Appeals] may: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before . . . [it].” (citation omitted)).

89. *See, e.g., Oliver v. United States*, 961 F.2d 1339, 1341 (7th Cir. 1992) (“Collateral relief is available to Oliver under section 2255 only if any legal error in taking Oliver’s guilty plea is ‘jurisdictional, constitutional, or is a fundamental defect which inherently results in a complete miscarriage of justice.’” (citation omitted)).

90. *See, e.g., Williams v. United States*, 98 F.3d 1052, 1054–55 (8th Cir. 1996) (“An instructional error must be of ‘constitutional dimensions’ to warrant post-conviction relief That requires a showing that ‘the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely [that] the instruction is undesirable, erroneous, or even universally condemned.’” (citation omitted)); *Merrill v. United States*, 599 F.2d 240, 243 (8th Cir. 1979) (“Generally, an improper jury instruction is not cognizable in a s[ection] 2255 proceeding unless it is ‘of constitutional magnitude or “inherently results in a complete miscarriage of justice.”’” (citation omitted)).

91. *United States v. Jones*, 758 F.3d 579, 584 (4th Cir. 2014).

“[t]o establish actual innocence, [a] petitioner must demonstrate that, ‘in light of all the evidence,’ ‘it is more likely than not that no reasonable juror would have convicted him.’”⁹²

The final remedy available to a federal prisoner is executive clemency.⁹³ The Supreme Court has held that “[c]lemency, while not required by the Due Process Clause, was a significant, traditionally available remedy for preventing miscarriages of justice when judicial process was exhausted.”⁹⁴ Historically, pardon and commutation decisions have been outside the scope of judicial review.⁹⁵ The goal of this executive remedy “is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.”⁹⁶

Throughout the post-trial phase, a petitioner must always be wary of the doctrine of waiver.⁹⁷ Certain types of claims not raised on direct appeal are considered waived and may not be reviewed by the court later pursuant to a Section 2255 motion.⁹⁸ Generally, errors of constitutional dimension cannot be waived, but non-fundamental errors are subject to waiver.⁹⁹ This doctrine is important, as the purpose of it is to balance two opposing, but compelling, judicial

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92. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Schulp v. Delo*, 513 U.S. 298, 327–28 (1995)).
 93. See U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have the power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”).
 94. *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 278 (1998).
 95. *Id.* at 276 (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).
 96. *Id.* at 280–81.
 97. See generally George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977) (analyzing waiver in criminal procedure).
 98. See Jerald J. Director, Annotation, *Consideration of, or Failure to Raise or Consider, Question on Appeal from Conviction or on Postconviction Remedy, as Precluding Its Consideration on Subsequent Motion to Vacate Sentence Under 28 U.S.C.A. § 2255*, 10 A.L.R. Fed. 724 (1972); see also, e.g., *Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994) (“Normally, failure to raise a constitutional issue on direct appeal will bar raising the issue on collateral attack unless the defendant can show cause for the failure and actual prejudice.”); *Ingram v. United States*, 299 F.2d 351, 352 (5th Cir. 1962) (holding that a collateral proceeding is not a direct substitute for an appeal); *Sanders v. United States*, 230 F.2d 127, 127 (4th Cir. 1956) (holding that because the Petitioner failed to raise his current claims on direct appeal, he was unable to use them to collaterally attack his sentence).
 99. See *Hunter v. United States*, 160 F.3d 1109, 1115 (6th Cir. 1998) (“Relief is not available in a section 2255 proceeding for a claim of nonconstitutional, sentencing-guideline error when that error was procedurally defaulted through the failure to bring a direct appeal.”).

interests: maintaining the finality of criminal judgments, while affording those rare criminal defendants who are innocent or convicted on insufficient evidence the right to collaterally challenge their convictions.¹⁰⁰

III. THE PROBLEM OF CONSTITUTIONAL DIMENSION

A. *Timing*

There does not seem to be a logical location to raise the proposed challenge to scientific evidence. The two main ways to attack a conviction, on direct appeal and collaterally, do not provide a meaningful way for a petitioner, years later after these remedies have already been exhausted, to have a court take another look at the scientific evidence.¹⁰¹ In many cases, direct appeal could be too soon after the conviction for the relevant scientific community to change the way it sees the underlying scientific evidence.¹⁰² A challenge made pursuant to Section 2255 also has a short time-period, with only a year-long statute of limitations.¹⁰³ It seems likely that new scientific evidence in certain fields would take longer than one year to emerge from the alleged date that the error occurred, as that would be either the trial date or the pretrial *Daubert* hearing date. Because there is not a natural place in the currently established post-trial phase, this Comment proposes a new solution.¹⁰⁴

B. *Due Process: The Basis for the Proposed Procedural Mechanism*

Due Process, as established by the Fifth Amendment of the United States Constitution,¹⁰⁵ and as applied to the States by the Fourteenth Amendment,¹⁰⁶ gives this “problem” constitutional dimension: Americans are afforded the right to due process of law.¹⁰⁷ The importance and meaning of due process of law is summarized well by Justice Stewart in *Hawkins v. United States*: “Any rule that impedes

100. Dix, *supra* note 97, at 195.

101. See *infra* notes 102–04 and accompanying text.

102. See 28 U.S.C. § 2107 (2012) (providing the time limits for filing an appeal in the federal courts); see also *infra* note 103 and accompanying text (noting that a § 2255 challenge is subject to a one-year statute of limitations).

103. 28 U.S.C. § 2255(f) (2012).

104. See *infra* Part IV.

105. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

106. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

107. *Id.*

the discovery of truth in a court of law impedes as well the doing of justice.”¹⁰⁸

The precise definition of due process of law is difficult to pin down.¹⁰⁹ For example, in *Davidson v. New Orleans*, Justice Miller described the essence of due process in a workable manner:

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.¹¹⁰

Using Justice Miller’s definition, one can see that the given definition of “due process of law” can change with the times.¹¹¹ Furthermore, *Hurtado v. California* suggests that due process of law “refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States.”¹¹² The origin of this right may permit the current government to define the bounds of due process “exercised within the limits therein prescribed, and interpreted according to the principles of the common law.”¹¹³

Due process of law, then, is the ever-evolving procedural fairness and justice for every criminal defendant.¹¹⁴ With that workable definition of due process of law in mind, it is easy to see how the privilege to have a trial that is based upon valid scientific evidence would be derived from basic due process of law principles.

IV. PROPOSAL: A PROCEDURAL MECHANISM TO FIX THE PROBLEM

A. *The Governmental Body*

The governmental body presiding over the proposed procedural mechanism would be derived from the executive branch, as opposed

108. 358 U.S. 74, 81 (1958) (Stewart, J., concurring).

109. See *Hurtado v. California*, 110 U.S. 516, 533–34 (1884).

110. 96 U.S. 97, 104 (1877).

111. See *id.*

112. 110 U.S. at 535.

113. *Id.*

114. *Id.* at 535–36.

to the judicial.¹¹⁵ This body would preside over a hearing, acting as a last resort remedy available to a petitioner serving a sentence imposed using junk science.¹¹⁶ Removing the body from the grasp of the judiciary would serve two purposes: first, a diverse group of people could bring a fresh perspective to an old case,¹¹⁷ and second, it would create consistency with the other executive branch checks to the judiciary.¹¹⁸

1. The Board Make-up

The proposed make-up of the board would not be limited to attorneys: it would include laypeople. Similar to a parole board,¹¹⁹ this board would be comprised of three members appointed for several year terms by the President, with the advice and consent of the Senate.¹²⁰ No specific qualifications or disqualifications for membership would be statutorily prescribed.¹²¹

For example, the 2017 make-up of the parole board includes one attorney, one politician, and one former police officer.¹²² The professional experiences that the members had prior to their appointments create a diverse background of approaches to and perspectives on the legal system that reinforce the Commission's mission "to promote public safety and strive for justice and fairness in the exercise of its authority to release and revoke offenders under its jurisdiction."¹²³

In this case, the members of the scientific evidence review board would come from diverse backgrounds as the parole board

115. *See infra* Section IV.A.2.

116. *See infra* Section IV.A.1.

117. *See infra* Section IV.A.1.

118. *See infra* Section IV.A.2.

119. The federal parole system underwent a massive change in 1987, discontinuing the current parole system. COHEN, *supra* note 73, § 5:2. The former system was replaced by legislation which requires a prisoner to complete eighty-five percent of his sentence before becoming eligible for release. *Prison Time Surges for Federal Inmates*, PEW CHARITABLE TRUSTS (Nov. 18, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates>. The U.S. Parole Commission still exists to serve as the parole board for those prisoners convicted prior to November 1, 1987. *Parole Commission*, FED. REG., <https://www.federalregister.gov/agencies/parole-commission> (last visited Dec. 30, 2017).

120. COHEN, *supra* note 73, § 5:2.

121. *Id.*

122. *Meet the Chairman*, U.S. DEP'T JUST., <https://www.justice.gov/uspc/meet-chairman> (last updated Feb. 8, 2016); *Meet the Commissioners*, U.S. DEP'T JUST., <https://www.justice.gov/uspc/meet-commissioners> (last updated Sept. 3, 2015).

123. *Meet the Chairman*, *supra* note 122; *Meet the Commissioners*, *supra* note 122; *About the Commission*, U.S. DEP'T JUST., <https://www.justice.gov/uspc/about-commission-0> (last updated Mar. 3, 2016).

encourages.¹²⁴ Moreover, the President could appoint members who have backgrounds in science, similarly to how the President may appoint cabinet members based on relevant professional backgrounds.¹²⁵

2. The Executive Checks on the Judiciary

This proposed body would extend from the executive branch, similar to the United States Parole Commission, as an important check on the judicial system.¹²⁶ In the federal parole system, the Commission has the power to grant parole, despite the court's independent determination to put an offender away for a set period of time.¹²⁷

The United States Constitution does not contain an express provision prohibiting “the officials of one branch of government from exercising functions of the other branches.”¹²⁸ In fact, Justice Warren once observed:

This ‘separation of powers’ was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.¹²⁹

For example, sentencing is not inherently or exclusively a judicial function.¹³⁰ Under this rationale, the parole board was designed to serve as a permissible, additional check on the judicial power to restrain an individual's liberty.¹³¹ Just like sentencing is not

124. See *supra* notes 122–23 and accompanying text.

125. See Ann K. Wooster, Annotation, *Construction and Application of Appointments Clause of United States Constitution, Article II, Section 2, cl. 2*, 59 A.L.R. Fed. 2d 1 (2011). The presidential appointment power is derived from Article II, section 2, clause 2 of the United States Constitution, coined the “Appointments Clause.” *Id.*

126. See *id.*

127. See 28 C.F.R. § 2.2(a)–(b) (2007).

128. *Geraghty v. U.S. Parole Comm'n*, 719 F.2d 1199, 1210 (3d Cir. 1983).

129. *United States v. Brown*, 381 U.S. 437, 443 (1965).

130. *Ex parte United States*, 242 U.S. 27, 41–42 (1916).

131. See *Geraghty*, 719 F.2d at 1211–12 (“As we emphasized earlier, *Addonizio* reiterated this three-way sharing of responsibility in which Congress sets the statutory maximum sentence, the courts impose sentences within those limits, and the

inherently designated to one branch, the validity of a conviction also should not be inherently designated to one branch.¹³²

B. *The Workable Standard*

Finally, it is necessary to determine first, the circumstances under which a petitioner may bring a claim before this board,¹³³ and second, the standard under which the board may evaluate the claim.¹³⁴ First, the petitioner must meet four elements in his petition before he may be afforded the privilege of being heard by the proposed body, and if he fails, the petition will be summarily dismissed.¹³⁵ Next, the petitioner has a full hearing before the proposed body.¹³⁶ Finally, the petitioner's remedy will be selected by the proposed body and properly administered.¹³⁷

1. Petitioner's Prima Facie Showing

In order to bring a claim pursuant to this proposed mechanism, there are elements that a petitioner would have to show in order to be afforded the right to a hearing before the board.¹³⁸ The petitioner would have to make a prima facie showing of four elements in order to be granted a hearing before the board.¹³⁹

First, the petitioner would have to exhaust all post-trial remedies and collateral attacks.¹⁴⁰ The waiver doctrine of post-trial procedure is still relevant and would still apply in this stage of the petitioner's proceeding.¹⁴¹ It is important to recall the waiver's justification, which is to maintain the integrity of the finality of a court's final judgment.¹⁴² Therefore, waiver applies, and this challenge could only be made after all other judicial remedies have been exhausted.¹⁴³

Second, the petitioner would have to make a showing that science has changed from the generally accepted standard under which he

Commission establishes release dates within the eligibility range of the courts' sentences.").

132. *See id.*

133. *See infra* Section IV.B.1.

134. *See infra* Section IV.B.2.

135. *See infra* Section IV.B.1.

136. *See infra* Section IV.B.2.

137. *See infra* Section IV.B.3.

138. *See infra* notes 140–53 and accompanying text.

139. *See infra* notes 154–56 and accompanying text.

140. *See supra* Section II.B.

141. *See supra* notes 97–100 and accompanying text.

142. *See supra* note 100 and accompanying text.

143. *See supra* Section II.B.

was convicted to the contemporary approach.¹⁴⁴ The petitioner would first have to show the baseline: testimony from experts at the time of his hearing recorded in the transcripts. If there was not a *Daubert*-like hearing at trial, the petitioner would have to provide scientific studies, contemporaneous to his conviction date, that reflect the general opinion of the relevant scientific community at that time. Then, the petitioner would discuss in his petition what testimony he hopes to elicit at the hearing to show that science has, in fact, evolved in some substantive way since the date of his conviction that could materially call into question the legitimacy of his conviction or sentencing.

The third and fourth elements would be modeled off of the *Strickland v. Washington* effectiveness-of-counsel standard.¹⁴⁵ To satisfy the third element, the petitioner would be required to show that the evidence at issue was material either to the validity of his conviction or sentence imposed. This is similar to the first prong of the *Strickland* test, counsel's deficient performance.¹⁴⁶ To show deficient performance of counsel, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."¹⁴⁷ Similarly, the petitioner in his prima facie case would have to show that the scientific evidence in his trial was material to his case and that its faultiness deprived him of his Fifth and Fourteenth Amendment rights to due process of law.

The "materiality" standard would be borrowed from *Brady v. Maryland*.¹⁴⁸ In that case, the Supreme Court required that for every accusation that the State withheld discovery, the petitioner must show that the evidence that was withheld was "material either to [the] guilt or to [the] punishment" of the petitioner.¹⁴⁹ This threshold showing of materiality would work in the instant situation: the petitioner would have to show that the introduction of this shoddy science was

144. See *supra* Section II.A.

145. 466 U.S. 668, 687 (1984) (holding that to determine whether a petitioner wins a challenge to the constitutionality of his attorney's performance, the petitioner must first show that his counsel acted in a constitutionally deficient manner, and second, that this deficient performance prejudiced the outcome of his trial).

146. *Id.*

147. *Id.*

148. 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

149. See *id.*

material either to his guilt or to his punishment, just as *Brady* requires.¹⁵⁰

Finally, the fourth showing would be akin to *Strickland*'s prejudice prong.¹⁵¹ *Strickland* requires that the deficient performance be so serious "as to deprive the defendant of a fair trial, a trial whose result is unreliable."¹⁵² In the instant situation, the petitioner also would have the burden of showing that this material scientific evidence was so seriously wrong that it deprived the petitioner of a fair trial, rendering the result unreliable.¹⁵³

The petitioner would then have to make a prima facie case of the four elements in order to be granted a hearing.¹⁵⁴ If the petitioner failed to meet any of these four elements, then his petition would be summarily denied.¹⁵⁵ The rationale behind this screening process is to allow the board to review only serious claims and to weed out the frivolous ones, to preserve the finality of criminal opinions, and to reserve collateral review for only the most serious of cases.¹⁵⁶ Therefore, this preliminary screening function would allow for only the strongest of cases to enter the hearing phase.

2. The Board's Evaluation Standard

The petitioner's hearing before the board would resemble that of a *Daubert* hearing and would borrow many of the portions of this pretrial proceeding. As stated previously, in a *Daubert* hearing, the judge is the gatekeeper who decides what evidence may be admitted based on a variety of factors.¹⁵⁷ Similar to the judge's role in a *Daubert* hearing, the board would have a majority vote to determine the outcome of the validity of the evidence.

As discussed previously, in a *Daubert* hearing, it is incumbent upon the proponent of the expert witness to show, by a preponderance of the evidence, first that the expert is qualified to testify as an expert, and second, that the witness's opinions are both relevant and reliable.¹⁵⁸ In the proposed hearing, the board would require the

150. *See id.*

151. *See Strickland*, 466 U.S. at 687.

152. *Id.*

153. *See id.*

154. *See supra* notes 139–53 and accompanying text.

155. *See supra* notes 139–53 and accompanying text.

156. *See* ERIC J. MAGNUSON & DAVID F. HERR, FEDERAL APPEALS JURISDICTION AND PRACTICE § 7:5, Westlaw (database updated Nov. 2016) (noting that there is a "strong interest of both the parties and society as a whole in speedy resolution of criminal cases").

157. *See supra* notes 63–68 and accompanying text.

158. *See supra* note 70 and accompanying text.

petitioner to bear this burden.¹⁵⁹ Once the burden is met, the expert may testify as to the validity of the science currently supporting the petitioner's conviction or sentence.

This proposed hearing, like *Daubert*, would be adversarial in nature.¹⁶⁰ The defense would be permitted to present expert testimony related to the validity of the science, and the State could recall an expert or find a new one to support its position; this structure would prevent the defense from any attempt to buy out an expert witness, and would create a two-sided picture for the proposed body to consider.¹⁶¹

3. The Remedy

If the petitioner is successful in the pleading and hearing, the remedy would be within the board's discretion to impose. The options from which the board could choose would be the same remedies available upon a successful petition pursuant to Section 2255, which include immediate release, a new trial, a vacated sentence, a set aside sentence, or a corrected sentence.¹⁶²

If the petitioner is unsuccessful, the case would return to the judiciary to address any residual due process concerns, just as it would in the parole system.¹⁶³ Like probation or parole revocation, the proposed conviction review is not a stage of a "criminal prosecution."¹⁶⁴ However, because a petitioner may be similarly subject to a loss of liberty as a result of this proposal, a denial of due process should be grounds for judicial review.¹⁶⁵

V. CONCLUSION

Mr. Randall Adams sat in prison unable to find a remedy for his unconstitutional conviction.¹⁶⁶ He was fortunate to have received interest in his case and an excellent pro bono team to help find him a

159. See *supra* note 70 and accompanying text.

160. See Jeffrey S. Parker, *Daubert's Debut: The Supreme Court, the Economics of Scientific Evidence, and the Adversarial System*, 4 SUP. CT. ECON. REV. 1, 53 (1995).

161. The adversarial bias that can result from only allowing one party to present evidence at a *Daubert* hearing may be harmful to the party who cannot bring in an expert. See David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451, 458 (2008).

162. See *supra* note 82 and accompanying text.

163. See *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82, 782 n.4 (1973).

164. *Id.* at 782.

165. See *id.*

166. See *supra* notes 1–21 and accompanying text.

suitable remedy.¹⁶⁷ While Texas allowed Adams a procedural protection to move for a new trial upon grounds independent of Dr. Death's testimony, the federal system lacks any procedural protection for a defendant incarcerated based on suspect science.¹⁶⁸ For a country proud of its devotion to science and technology, our judicial system should recognize that, as science changes, convictions, too, may change. A grave constitutional issue has gone without remedy long enough, and it is time for our judicial system to afford one.

167. See *supra* notes 13–14, 17–18 and accompanying text.

168. See *Ex parte Adams*, 768 S.W.2d 281, 293–94 (Tex. Crim. App. 1989) (holding that *Brady* violations and failure of the State to disclose that it knew of perjured witness testimony warranted a new trial for Adams). After a state court habeas proceeding, the Court of Criminal Appeals of Texas made findings of fact and conclusions of law recommending that a new trial be granted. *Id.*