The national media has spent much ink and airtime on the efforts of people held as enemy combatants to get a federal court to consider their habeas corpus writ challenging the legality of their imprisonment. However, there is virtually no coverage of how the habeas/post-conviction "right" of millions of Americans convicted of a crime has been emasculated to the point that it is little more than a procedural formality to rubber-stamp their conviction and sentence. We have to thank law Professor Anthony Amsterdam for frankly addressing this grave problem.

Lady Justice's Blindfold Has Been Shredded

By Anthony G. Amsterdam

Without question, the American criminal justice system is now in an acute state of denial, epitomized by its fetish for finality. Over the past quarter century, legislatures and courts have created ever more rigorous barriers against corrections of mistakes and of violations of the fundamental rights of defendants in the criminal justice system, either on appeal or in postconviction proceedings. On the one hand, there is increasing insistence that violations of defendants' rights before and at trial are not enough to warrant setting aside a conviction and awarding a new trial unless the appellate or postconviction court thinks that the defendant is probably not guilty. Conversely, there is a remarkable unwillingness to take claims of innocence at all seriously. The fixation of courts on the issue of guilt or innocence almost always takes the form of denying claims of error because the judges believe that a convicted defendant is guilty, not of willingness to provide forums for the vindication of convicted persons who present colorable claims of innocence.

A key feature of this development is the wholesale abandonment of the rights-based theory of justice that was long supposed to be the glory of Anglo-American law. That theory posited that individuals have a body of legal rights protected by fundamental law. It said that when these rights were violated, a remedy would be forthcoming. As the ancient maxim put it, *ubi jus, ubi remedium* — where there is a right, there is a remedy. The laws of the land were supposed to prescribe our rights, including the ways in which government had to treat any criminal defendant. If anyone was treated in a way that violated these rights, the courts were supposed to provide appropriate redress.

This is still the way law is taught in law schools and described in treatises, but it bears no relationship to the way courts behave in criminal cases. I am not talking about individual judges. I am talking about something more systemic and radical. We have witnessed a subversion of the very idea that criminal defendants have rights. The blindfold that Lady Justice is supposed to wear to assure that cases are decided with indifference to the outcome has been shredded. Now, as a matter of law, judges are supposed to peep through the blindfold, survey the outcomes which their rulings would produce, and tip the scales to avoid unwelcome outcomes, most notably the releases or even the retrials of guilty-looking perps.

For example, most claims of error made to appellate courts today are rejected on the ground of harmless error, without a ruling on the merits. Suppose you get convicted at a trial at which your coerced confession is admitted into evidence or the prosecutor insinuates to the jury that your failure to take the stand means you're guilty. Your constitutional right against self-incrimination has unquestionably been violated. Do you get a new trial? Not necessarily, or even ordinarily. Doctrines of harmless error originally created to avoid appellate reversals for trivial failures to observe procedural formalities have now evolved into a broad blanket rule upholding convictions whenever appellate judges conclude that even the most indefensible violations of core constitutional guarantees didn't make a difference in the outcome. Theoretically, the test of harmless constitutional error is whether appellate judges can say beyond a reasonable doubt that the error did not contribute to the guilty verdict or sentence. But in practice, it much more often boils down to whether the appellate judges think that the prosecution's evidence of guilt was potent and the sentence well deserved.

One reason why the standard gets watered down in practice is that harmless error analysis is seldom written up in appellate opinions in a way that forces the authoring judge, or his or her concurring colleagues, or anybody else, to examine it critically. Most harmless error rulings on appeal are made without explanation or are explained in such cursory terms that even lawyers familiar with the record cannot understand them. And to the rest of the world, unfamiliar with the record, such rulings are completely opaque, immune to criticism, providing no guidance in subsequent cases. Rulings made under these conditions are unrestrained by precedent or methodological discipline; little wonder that they end up turning simply on the appellate judge's sense that, on a cold record, the defendant looks damned guilty.

But harmless error analysis is only one symp tom of a more pervasive trend toward result-oriented jurisprudence in criminal cases. Increasingly, courts are developing the very sub-

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U.S. Sup. Ct. issued a stay on December 5, one day before Arthur's scheduled execution.]

A stay, however, would have no effect on Arthur's conviction. Arthur's conviction resulted from a pop-gun defense by a grossly underpaid and ill-equipped court appointed lawyer, a prosecutor hell-bent on concealing the truth and getting Arthur's conviction by any tactic no matter how unethical or even illegal, and a judge all too eager to be a modern day Judge Roy Bean. Arthur's inability to get his conviction overturned is not because he doesn't have issues that compel the granting of a retrial that comports with basic notions of due process, but because with very few exceptions, state and federal judges worship at the alter of maintaining procedural regularity at the price of disregarding the substance of a defendant's claims. The hurdles a defendant must overcome to successfully challenge a conviction – no matter how shaky or insubstantial it may be – is indicated by the fact that the very considerable legal and investigative efforts for six years by the New York law firm representing Arthur *pro bono* have been for naught.

If Arthur had pled guilty to Troy Wicker's murder he would have been sentenced to life in prison. So his punishment for insisting on his innocence and going to trial was having his sentence upgraded from life to death. That was his "trial penalty." Consequently, Arthur is not facing execution by the State of Alabama because he was convicted of Wicker's murder, but because he demanded his constitutional right to a trial. Arthur's conviction, and his sentence, are products of this country's intolerance for the small percentage of people foolhardy enough to buck the assembly-line plea bargaining system by publicly asserting they are in fact not guilty.

Thomas Arthur's case exposes for anyone who cares to look, that the underbelly of the United States' legal system is sordid: Its obsession with extracting guilty pleas to keep the system smoothly operating is based on a fundamental disregard for the truth of whether a conviction is based on the reality of the person's guilt or innocence. Arthur may be actually innocent of Tony Wicker's murder, but the legal system doesn't care to find out as it hurtles toward his execution that every court, including the U.S. Supreme Court, has thus far sanctioned without considering if his conviction is actually legitimate.

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stantive rules that define constitutional rights in ways that make the requirement of harmful effect a precondition to finding a constitutional violation. The *Strickland* rule defining ineffective assistance of counsel requires not only grossly substandard attorney performance, but prejudice. *Brady* violations require not only prosecutorial nondisclosure but also materiality, which is another name for prejudice. The test of improper prosecutorial argument is whether the argument was prejudicial. An indigent defendant's right to expert witnesses and other resources under *Ake v. Oklahoma* depends on whether these are necessary, which always means in appellate hindsight whether their denial was prejudicial. In all of these settings, appellate judges customarily squint at the record, conclude that the defendant looks damned guilty, and deny relief.

Consider the array of rules dealing with postconviction remedies. After a 40-year period of expansion contemporaneous with the growth of modern-day constitutional criminal procedure, the Supreme Court in the early 1980s began to cut back sharply on the availability of federal habeas corpus remedies for people convicted at state trials in which their federal constitutional rights had been violated. In 1996, swept away by the tide of rage that followed the Oklahoma City bombing, Congress enacted the so-called Antiterrorism and Effective Death Penalty Act, building on issue-preclusion and review-curbing ideas that the Court had initiated and ratcheting them up so as to make federal habeas relief for constitutional violations still more difficult to obtain. State courts and state legislatures flocked to follow the lead of the U.S. Supreme Court and Congress, restricting state court postconviction remedies for constitutional violations in a similar manner.

The rules that now govern postconviction procedure are intricately complicated, but a couple of points stand out.

First, postconviction remedies are restricted by standards of harmless error that allow even more violations of constitutional rights to go unredressed than the harmless error rules applied on appeal. Constitutional violations are disregarded unless they are found to have had a substantial and injurious effect or influence. This standard, in practical effect, leads postconviction judges to dismiss almost all claims of constitutional error in trial and sentencing proceedings by saying that the prosecution had a powerful case and therefore nothing else that happened at trial or on appeal matters.

Second, at the postconviction stage, errors that were not preserved at trial and on appeal are treated as procedurally defaulted unless the postconviction petitioner can show what is called cause and prejudice. In most cases, the only way to show cause is to prove a *Brady* violation or ineffective assistance of counsel under *Strickland*, so the result-oriented rules of those cases become an obstruction to getting even a merits hearing of most other postconviction claims. And the prejudice half of the cause-and-prejudice requirement is, as its name implies, still another device for telling judges to decline to entertain constitutional claims unless they are convinced that a criminal conviction was undeserved because of the defendant's likely innocence.

> "We have witnessed a subversion of the very idea that criminal defendants have rights." Law Professor Anthony Amsterdam

You'd think that, with all of this emphasis on the importance of innocence in the doctrines restricting appellate and postconviction relief, the courts would recognize that people with a strong claim of wrongful conviction resulting from the several common causes of factual error in criminal trials — incorrect eyewitness identifications or perjurious testimony by snitches, for example — should be entitled to have those claims heard in a postconviction forum without also showing some additional failure of justice in their cases. But, for the most part, the courts are inhospitable to postconviction claims of factual innocence. They resolutely enforce an array of technical limitations to deny applications for new trials on the ground of newly discovered evidence. Morever, they either refuse to recognize that there is any due process or other constitutional right to redress for a claim of mere innocence or they set the standard for relief so high that it cannot be met by anything short of divine revelation manifested by the physical appearance of God in the courtroom, bearing a habeas petition for the convicted defendant in his right hand and a confession by the true perp in his left.

So we have a system that concerns itself with guilt or innocence almost exclusively as an excuse for refusing to set aside convictions marred by procedural error on the ground that the convicted defendants are very likely guilty, while at the same time it seizes on every possible procedural obstacle to refuse to hear the claims of people who present convincing evidence that their convictions were factually erroneous and that they are actually innocent. The justification for this apparent paradox is said to be the system's interest in finality.
The code word finality betrays its real function as soon as you stop and ask, "Finality for whom?" My clients who have been denied postconviction relief in the interest of finality have not thereby had the books closed upon the consequences of their convictions. Some of them have been electrocuted or strapped on a gurney and poisoned to death, and others have spent lifetimes in prison after this great victory for finality was declared. Finality means finality for the courts. It means that they can close their books on a case; and often it allows them to do so with comfort only because the rules of closure are tailored to prevent inquiry into whether their judgments of prolonged incarceration or death were imposed as a result of factual error.

In saying this, and saying it sickens me, I do not at all ignore that our courts are badly overburdened and that, in order to do their difficult and vital job, they need to be relieved of any litigation that can properly be lifted from the shoulders of the judges. But we may rightly ask whether much of the work that weighs so heavily on our judges is not less important than inquiring into colorable cases of factually mistaken convictions. In answering that question, we should keep in mind that legislatures and prosecutors are every day imposing on our judges the work of administering the most punitive and over-extended system of criminal punishment in the world.

The crime rate in our country has fallen sharply since 1991, yet in that time our prison population has risen 49 percent. This is largely the result of harsher sentencing practices: mandatory minimum sentence laws, three strikes laws, and so forth.

So I ask, in closing, should we continue the course that our country has taken over the past third of a century — forever broadening the roster of crimes and increasing the severity of criminal punishments, while at the same time restricting the corrective processes available to convicted persons to secure redress for legally and factually questionable judgments of prolonged imprisonment or death?

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