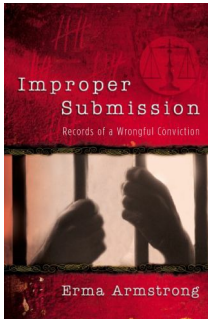


## Improper Submissions: Records of a Wrongful Conviction

By Erma Armstrong

This is the story of Karlyn Eklof, a young woman delivered into the hands of a psychotic killer. She witnessed him commit a murder and she is currently serving two life sentences in Oregon for that crime. *Improper Submissions* documents:



- The killer's psychotic bragging was used by the prosecution against Karlyn.
- Exculpatory and witness impeachment evidence was hidden from the defense.
- Erroneous assertions by the prosecution were used by the media, judges reviewing the case, and even by her own lawyers to avoid looking at the record that reveals her innocence.

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## Justice Denied Article Was 7th Most Important 2014 News Story In Las Vegas



### Lawyer lied during Kirstin Lobato's Nevada Supreme Court arguments

By Hans Sherrer  
A minimum wage construction crew chief who has under oath in court said he cannot recall any self-employment, his conviction, a highly paid lawyer and his role in the case, the head of a law firm, a public defender, the Nevada Supreme Court, and the Nevada Supreme Court.



KIRSTIN LOBATO

nothing incriminating regarding her husband, in her public testimony or common affidavit to her - none of which ever included the date, location, or manner of her husband's death. In fact, the public defender, the Nevada Supreme Court, and the Nevada Supreme Court.

## An Exoneration Can Be Judicial Or By Executive Or Legislative Clemency

By Hans Sherrer\*

### What is an exoneration?

Exoneration is derived from the Latin word *exoneratio*, which means "an unloading, lightening."<sup>1</sup> The first known use of exoneration in English was in 1640, and in 1660 it was expressly used to describe relief from a government decree: "An act concerning the exoneration of the Kings subjects from exactions and impositions."<sup>2</sup> The *Oxford English Dictionary* is the world's most authoritative English dictionary, and it defines "exoneration" as: "2. The action of disburdening or relieving, or the state of being relieved from a duty, office, obligation, payment, etc.; also, from blame or reproach; an instance of this, a formal discharge."<sup>3</sup> The historical and modern definition of exoneration makes it clear that it broadly describes relief or discharge from an imposition by a governmental authority.<sup>3</sup> Consequently, exoneration can refer to an official declaration retrospectively relieving a person of "blame or reproach" for the imposition of being convicted of committing a crime.

As its definition suggests, there is not a single degree of relief or discharge that constitutes an exoneration. That is borne out by the differences in how an exoneration of convicted crimes is achieved by way of judicial, executive, or legislative action.<sup>4</sup> The following are brief explanations of those three processes.

### Judicial Exonerations

A judicial exoneration that restores a person's presumption of innocence most conclusively absolves that person of "blame or reproach" for a criminal conviction.

The presumption of innocence shielding a person who is suspected or charged with committing a crime, but not convicted of doing so, is recognized by the legal systems of countries around the world - including every country whose legal system is a descendant of the British common law. "Innocent until proven guilty" is such a universal principle that it was incorporated in 1948 in the United Nations' Declaration of Human Rights (Article eleven, section one); in 1953 in the European Convention

for the Protection of Human Rights (Article 6, section 2); and in the United Nations International Covenant on Civil and Political Rights (Article 14, section 2) that went into force in 1976.<sup>5</sup>

When a defendant in the United States pleads guilty or no contest that public admission/confession to committing the crime is considered sufficient to overcome his presumption of innocence. Consequently, the defendant's plea relieves the prosecution of needing to present testimonial or documentary evidence of his guilt.

However, when a defendant pleads not guilty and asserts his right to a trial the prosecuting authority is faced with overcoming his presumption of innocence by presenting credible evidence that proves beyond a reasonable doubt to the judge or jury the defendant's guilt of every essential element of his charged crime(s).<sup>6</sup> For example, to prove a defendant robbed a bank the prosecution may have to present evidence: 1) The defendant was present at the bank; 2) The defendant unlawfully obtained something of value from the bank; and, 3) The defendant had the intent to unlawfully obtain something of value from the bank. To lawfully convict a defendant the prosecution is required to present admissible evidence proving *each* of those elements of the crime beyond a reasonable doubt.

During several stages of a state or federal case in the U.S. a defendant can typically directly or indirectly raise variants of the issue the prosecution's evidence presented at trial is not sufficient to overcome his presumption of innocence. Those include:

- \* A motion for the judge to declare an acquittal prior to deliberations by the judge or jury.
- \* A post-verdict/pre-sentence motion to vacate the conviction and acquit the defendant.
- \* A direct appeal argument to vacate the conviction and acquit the defendant.
- \* A post-conviction ineffective assistance of counsel claim for a new trial.
- \* A post-verdict motion for a new trial based on new evidence that undermines the factual or legal basis of the conviction.
- \* A post-conviction *habeas corpus* petition for a new trial based on new evidence that undermines the factual or legal basis of the conviction.
- \* A post-conviction motion/petition for dismissal of the charges based on new

### Exoneration cont. on p. 15

The *Las Vegas Tribune* [has recognized](#) *Lawyer Lied During Kirstin Lobato's Nevada Supreme Court Arguments* as the seventh most important 2014 Las Vegas news story. The article was published in the *Las Vegas Tribune* on November 12, 2014. It was a condensation of the full article [published online](#) by *Justice Denied* on November 7, and which is in *Justice Denied Issue 58* beginning on page 16.

The *Tribune's* article listing the top 10 Las Vegas news stories for 2014 can be read [by clicking here](#).

[Click here to read](#) *Justice Denied's* full 2,700 word article: *The State Of Nevada's Lawyer Lied And Lied During Kirstin Lobato's Nevada Supreme Court Arguments*, that was written by Hans Sherrer, *JD's* Publisher and Editor.

## Exoneration cont. From p. 14

evidence of actual innocence.

\* A post-completion of sentence *coram nobis* petition for a new trial based on new evidence undermining the factual or legal basis of the conviction.

A brief explanation of these options follows.

After the prosecution has presented its evidence at trial, but before the jury or judge begins deliberating, many jurisdictions allow a defendant to make a motion for the presiding judge to declare a judgment of acquittal based on the prosecution's failure to present evidence sufficient to prove the defendant's guilt beyond a reasonable doubt of every essential element of his charged crime(s).<sup>7</sup>

If that trial court motion is denied and the defendant is convicted, he may have several opportunities to later assert the prosecution failed at trial to present evidence sufficient to overcome his presumption of innocence. One is a post-verdict/pre-sentence motion to vacate the conviction; and another is a direct appeal argument to vacate the conviction.

For one of those motions to prevail in federal court and typically in a state courts, a defendant must demonstrate "that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."<sup>8</sup> That standard is so high because vacating a conviction based on insufficient evidence is the legal equivalent of an acquittal, with the defendant's retrial barred under double jeopardy, and his charges must be dismissed in the U.S. and many other countries.<sup>9</sup> With restoration of a defendant's presumption of innocence, his legal rights revert to what they were before he had been charged.<sup>10</sup>

If a defendant is unsuccessful in having his conviction overturned pre-sentencing or during his direct appeal, in the U.S. he can then attempt to do so during the post-conviction appeal process. Generally a post-conviction petition cannot raise an issue that either was, or could have been raised on direct appeal. Consequently, a defendant is generally barred from *directly* bringing a claim the prosecution introduced insufficient evidence at trial, because that challenge could have been made in his direct appeal.

In that circumstance a defendant can assert in his post-conviction appeal that either pre-verdict, pre-sentencing, or on direct

appeal, his lawyer provided ineffective assistance of counsel for failing to raise the issue the prosecution introduced insufficient evidence.<sup>11</sup> If successful, the defendant will be granted a new trial, and not dismissal of the charges, because to prevail the defendant must meet the relatively low standard that by less than a preponderance of the evidence there is a "reasonable probability" that but for his counsel's deficient conduct he would have had success on appeal.<sup>12</sup>

In addition to challenging the sufficiency of the prosecution's trial evidence, a defendant may have several other avenues available to contest his conviction in an effort to have his charge(s) dismissed, which would restore his presumption of innocence.

A defendant can file a post-verdict motion for a new trial if new evidence is discovered after trial or that was not known at the time of his guilty or no contest plea that materially undermines the factual basis of his conviction.<sup>13</sup> There are generally time limits from the date of the verdict for filing that motion.<sup>14</sup> That evidence can be a new eyewitness, new forensic evidence, new alibi evidence, recantation by a key prosecution witness, etc. After the time limit expires for a post-verdict motion, or a conviction becomes final with the denial of the defendant's direct appeal, a post-conviction/habeas corpus petition asserting new evidence can be filed by a defendant who hasn't completed all conditions of his sentence.

In the United States the general standard in federal and state courts for evaluating a post-verdict motion or post-conviction petition based on new evidence is whether it is more likely than not a reasonable juror would have voted to convict the defendant when the trial evidence supporting the conviction is viewed in light of the new evidence. Some statutes and court rules, such as Federal Rules of Criminal Procedure Rule 33, apply the "interest of justice" standard for evaluating a post-verdict new trial motion.<sup>15</sup>

Regardless of when it is filed, to be granted a motion or petition requesting a new trial based on new evidence must meet a lower standard of proof than a motion or direct appeal based on insufficiency of the evidence at trial. That is because granting of the former results in the prosecution having the option to retry the defendant, while granting the latter results in dismissal of the charge(s). The longer the period of time that has elapsed from the time of trial, the more

likely it is that the granting of a new trial motion will result in the prosecution electing not to retry a defendant. In that case the prosecution typically moves to dismiss the charges, however, when granted by the presiding judge it is a dismissal "without prejudice." That means that if new evidence of the defendant's guilt is discovered the charges can be refiled depending on the charge and the statute of limitations.<sup>16</sup>

The high courts of several states have ruled a defendant can file a post-conviction petition asserting his actual innocence based on new evidence not presented at trial or known at the time of his guilty plea that establishes he is actually innocent. Those states include Texas, New Mexico, Missouri, Connecticut, New York, Nevada, Illinois, and California.<sup>17</sup> Most of those states require that a defendant's actual innocence be proven by clear and convincing new evidence for the petition to be granted and the charges dismissed.<sup>18</sup> The rationale underlying consideration of a defendant's petition is the conviction and imprisonment of an actually innocent person violates his constitutional rights to due process, a fair trial, and barring cruel and unusual punishment.<sup>19</sup>

In addition to the foregoing post-conviction remedies, one state, North Carolina has established an innocence inquiry commission that considers new evidence of a convicted person's actual innocence in determining if his case warrants being referred for judicial consideration of his conviction in light of the new evidence.<sup>20</sup> For relief to be granted a three-judge panel must unanimously determine the person is "innocent of the charges" by "clear and convincing evidence" under NCGS 15A-1469(h).<sup>21</sup>

A defendant who discovers new evidence undermining the factual basis of his conviction *after* he has completed *all* affirmative conditions of his sentence (imprisonment, probation and/or payment of a fine/restitution) is barred from filing a post-conviction *habeas corpus* petition (*Habeas corpus* means "release the body."). In that situation the defendant's only judicial option may be to explore if filing a *coram nobis* petition is an option to overturn his conviction.

In 1954 the U.S. Supreme Court ruled that under certain circumstances *coram nobis* is available to overturn the federal court conviction of a person who has completed his sentence, "Otherwise a wrong may stand

## Exoneration cont. on p. 16

uncorrected which the available remedy would right.”<sup>22</sup> Each state can determine legislatively or judicially if *coram nobis* is available to a person who has completed his sentence for a state court conviction.

U.S. Circuit Courts of Appeal have ruled that for a federal conviction to be overturned by way of *coram nobis* the petition must satisfy four requirements: First, the petition has to be filed in the federal district court where the conviction occurred; second, the person filing the petition continues to suffer significant *legal* consequences from his or her conviction that may be remedied by granting the petition; third, there must be sound reasons for the failure to seek appropriate relief earlier; and fourth, the petition must set forth proof compelling that it be granted to alleviate a manifest injustice.<sup>23</sup> Although it isn’t necessary for a petitioner to meet a specific standard of proof, it is so difficult to meet all four requirements that in the 60 years from 1954 to June 2014 there are less than two dozen known cases of an exoneration resulting from the filing of a federal *coram nobis* petition.<sup>24</sup>

### Executive Clemency

If a defendant’s efforts are unsuccessful to restore his presumption of innocence by having a court overturn his conviction(s) on the basis of insufficient evidence of guilt, new evidence, or actual innocence, then pursuit of executive clemency, commonly referred to as a pardon, is an option in many countries.<sup>25</sup> However, with few exceptions a pardon – even when granted based on new evidence of actual innocence – only relieves a defendant of some or all penalties and forfeitures imposed as a result of his conviction, and it may restore some rights of citizenship.<sup>26</sup> Seeking a pardon can constitute an admission of guilt, and “By the modern view, the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal, but rather is an executive action that mitigates or sets aside the punishment for a crime.”<sup>27</sup> Since the effect of a pardon is to forgive and not to forget, a full and unconditional pardon “cannot erase the basic fact of a conviction, nor can it wipe away the social stigma that a conviction inflicts.”<sup>28</sup> Consequently a defendant can be pardoned based on a convincing argument his continued imprisonment is unjust for reasons unrelated to new evidence of his innocence – such as that he has been rehabilitated and no longer poses a threat to society, or his sentence

was disproportionate to the crime, etc.

Illinois is unusual in that after a defendant’s indictment has been dismissed post-conviction by a court, he must satisfy the procedural step of being granted an executive pardon before being eligible for statutory compensation from the State of Illinois. In that circumstance a pardon in Illinois doesn’t have any legal effect on the defendant’s conviction.

Thus with few exceptions a pardon “symbolically” – but not legally – exonerates a defendant convicted on shaky evidence or who is unable to judicially overturn his conviction based on new evidence that substantively undermines the factual basis of his conviction. The irony of that is the U.S. Supreme Court has deferred to the historical power of executive clemency in declining to rule on whether a state prisoner has a constitutional right to base a federal *habeas corpus* petition challenging his conviction solely on new evidence of his actual innocence.<sup>29</sup> The Supreme Court stated in *Herrera v. Collins* (1993): “Executive clemency has provided the “fail safe” in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.”<sup>30</sup>

### Legislative Clemency

Legislative clemency acknowledging an injustice is a rarely used alternative to executive clemency. It is a remedy that has typically been used to retrospectively adjudge the convictions of multiple defendants to have been beyond the bounds of a law’s intention or its misuse by the executive and/or judicial branches of government. It has also been used to posthumously rehabilitate the reputation of deceased persons who were unjustly convicted of a crime. An example is legislative clemency has been used in Germany to absolve many elderly or deceased individuals of guilt who were convicted of treason or lesser charges during the Nazi era, including the persons convicted for their involvement in creating, printing, and distributing White Rose anti-Nazi literature during World War II.<sup>31</sup> In the United States it has been used to posthumously absolve of guilt individuals who were convicted of witchcraft in Salem, Massachusetts in 1692.<sup>32</sup>

As the foregoing briefly explains there are different paths a person can pursue to be exonerated of his or her criminal conviction(s).

A challenging path with the highest standard of proof a defendant must meet for exoneration are the procedures available to overturn a conviction and dismiss the charges based on the prosecution’s reliance on insufficient evidence. The next highest standard of proof that must be met to overturn a conviction and dismiss the charges is by way of a motion or petition based on new evidence of a defendant’s actual innocence. The lowest standard of legal proof that must be met to overturn a conviction is by way of a motion or petition asserting new evidence that undermines the factual basis of the defendant’s conviction(s), with dismissal of the charges at the discretion of the prosecuting authority and the presiding judge. The difficulty of meeting all four requirements for the granting of a federal *coram nobis* petition is consistent with its status as the judicial option of last resort. The granting of executive or legislative clemency is a political and not a judicial action, so the the authorities and/or politicians involved determine if the defendant/applicant’s circumstances warrants public absolution.

Although an exoneration accomplished judicially by the overturning of a person’s conviction and dismissal of his charges most completely absolves him, executive or legislative clemency based on evidence of a miscarriage of justice also falls under the general umbrella of an exoneration.

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### Endnotes:

<sup>1</sup> Etymology of the entry for “Exoneration” in the *Online Etymology Dictionary* available at, [www.etymonline.com](http://www.etymonline.com).

<sup>2</sup> Exoneration, n. 2. “1660. R. Coke *Elements Power & Subjection* 211 in *Justice Vindicated*, An act concerning the exoneration of the Kings subjects from exactions and impositions.”, *Oxford English Dictionary*, available online at, [www.oed.com](http://www.oed.com).

<sup>3</sup> An artificial entity such as a business can also be

## Exoneration cont. From p. 16

exonerated of an imposition.

<sup>4</sup> This article was suggested by Zieva Konvissar to explain the breadth of cases included in the Innocents Database that doesn't artificially filter out exonerations, and includes all documentable exonerations from all countries regardless of when they occurred. As of October 28, 2014 the Innocents Database listed 5,004 cases online at, <http://forejustice.org/innocentsdatabase.htm>.

<sup>5</sup> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.", International Covenant on Civil and Political Rights, Article 14, section 2, available at, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last viewed June 28, 2014).

<sup>6</sup> *In re Winship*, 397 U.S. 358, 361 (1970), established the prosecution's constitutional due process obligation to introduce evidence proving a defendant's guilt beyond a reasonable doubt.

<sup>7</sup> There are variations of a motion for a judgment of acquittal in some jurisdictions. In Nevada, for example, NRS 175.381(1) only allows a defendant to make a motion for the judge to issue a non-binding instruction to the jury to acquit based on the prosecution's failure to introduce evidence sufficient to prove every essential element of the alleged offense(s) beyond a reasonable doubt. The jury can consider the judge's advisory during its deliberations.

<sup>8</sup> See, *Jackson vs. Virginia*, 443 U.S. 307, 324 (1979). In cases which the prosecution presented no direct evidence supporting the defendant's guilt, but relied solely on circumstantial evidence, some states have adopted the standard that for a conviction to be sustained on appeal "the facts proved must all be consistent with guilt and inconsistent with innocence." *People v. Borrero*, 26 N.Y.2d 430, 434-435 (NY Ct. of Appeals, 1970).

<sup>9</sup> See, *Burks v. United States*, 437 U.S. 1, 18 (1978) ("the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient."); see also, *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981) (Double Jeopardy Clause bars retrial if conviction vacated based on insufficient evidence.). Since states must meet the minimum requirements of the federal Constitution, most, if not all state high courts have similarly ruled. See, e.g., *State v. Purcell*, 110 Nev. 1389, 887 P.2d 276, 279 (1994) ("If there is truly insufficient evidence, a defendant must be acquitted."). Some countries, including the United Kingdom, have repudiated absolute double jeopardy, and made it conditional for serious crimes such as murder, with it possible for charges to be refiled if new evidence of the defendant's guilt is discovered after their acquittal. See, e.g., "Change in double jeopardy law led to Gary Dobson's retrial," *The Guardian* (London), January 3, 2012.

<sup>10</sup> In the United States a conviction does not become final until a defendant has either exhausted his direct appeal options, or waived exercising them. For example, if the conviction of a defendant in a state court is affirmed on direct appeal by the state's highest court, and the defendant files a writ for review of his conviction with the U.S. Supreme Court, the conviction doesn't become final until the Supreme Court decides how it will dispose of the case.

<sup>11</sup> In the U.S. that claim of trial counsel's constitutionally ineffective assistance of counsel would be brought in federal court under the U.S. Supreme Court's ruling in *Strickland v. Washington*, 466 U.S. 668 (1984), and in state court under rulings consistent with *Strickland*.

<sup>12</sup> *Strickland's* reasonable probability standard for effective assistance of trial counsel was applied to appellate counsel by subsequent U.S. Court of Appeal and U.S. Supreme Court rulings. See, *Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991); and, *Smith v.*

*Robbins*, 528 U.S. 259, 289 (2000).

<sup>13</sup> The most expansive legal view of new evidence is evidence that wasn't presented to the fact finder for consideration in arriving at the verdict. Consequently, "new evidence" applies to conviction obtained by way of a guilty or no contest plea, as well as by the verdict of a judge or jury after a trial.

<sup>14</sup> For example, federal court [Rule 33. New trial.](#), provides that "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty."

<sup>15</sup> FRCP Rule 33. New Trial (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment. The U.S. Supreme Court has recognized that "some federal courts have interpreted Rule 33 of the Federal Rules of Criminal Procedure, which authorizes a new trial "if required in the interest of justice," to permit the trial judge to set aside a conviction that is against the weight of the evidence." *Tibbs v. Florida*, 457 US 31, 39 note 13 (1982).

<sup>16</sup> E.g., in the U.S. there is no state or federal statute of limitations for a murder charge.

<sup>17</sup> *State ex rel Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. 2003); *Montoya v. Ulibarri*, 163 P.3d 476, 487 (N.M. 2007); *Ex parte Elizondo*, 947 S.W.2d 202, 210 (Tex. Crim. App. 1996); *People v Hamilton*, 115 A.D.3d 12, 979 N.Y.S.2d 97 (2014); *People v. Washington*, 171 Ill.2d 475, 479-80, 665 N.E.2d 1330 (1996); *Miller v. Comm'r of Corr.*, 242 Conn. 745, 700 A.2d 1108, 1132 (1997); *State ex rel. Orsborn v. Fogliani*, 82 Nev. 300, 417 P. 2d 148 (Nev Sup Ct 1966); and, *In re Clark*, 5 Cal.4th 750, 21 Cal. Rptr.2d 509, 855 P. 2d 729 (CA Supreme Court 1993). California allows a post-conviction claim of actual innocence by statute.

<sup>18</sup> Illinois only requires new evidence that proves actual innocence by a preponderance of the evidence for a new trial to be granted. *People v. Washington*, 171 Ill.2d 475, 479-80, 665 N.E.2d 1330 (1996).

<sup>19</sup> The states that allow a petition asserting actual innocence do not distinguish between a claim made by a prisoner sentenced to death and a prisoner sentenced to prison, which is consistent with the U.S. Supreme Court's suggestion in *Herrera v. Collins*, 506 U.S. 390, 405 (1993) that there is no fundamental difference between the innocence claim of a prisoner on death row and a prisoner sentenced to prison: "It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison." *Id.* at 405.

<sup>20</sup> Three countries have established commissions for post-conviction review of criminal convictions. The Criminal Case Review Commission reviews possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland; Scotland has the Scottish Criminal Case Review Commission; and, Norway has the Norwegian Criminal Case Review Commission.

<sup>21</sup> The North Carolina Innocence Inquiry Commission's enabling statute establishes it as a non-independent organization and imposes structural deficiencies that hamstring its ability to effectively function as a tool to exonerate persons, as explained in the following articles written *before it began* operating: "North Carolina Innocence Inquiry Commission Created," *Justice Denied* magazine, Issue 34, p. 20; "House Bill 1323 — North Carolina Innocence Inquiry Commission," *Justice Denied* magazine, Issue 34, p. 20; "Analysis of NC Innocence Inquiry Commission Statutory Provisions," By Hans Sherrer, *Justice Denied* magazine, Issue 34, p. 21; "Worse Than Nothing — The North Carolina Innocence Inquiry Commission is a huge step in the wrong direction," Editorial, *Justice Denied* magazine, Issue 34, p. 22. The NCIC has been even more important than predicted because it has assisted in only seven

exonerations in its first seven years of operation.

<sup>22</sup> *U.S. v Morgan*, 346 U.S. 502, 512 (1954). The Court ruled 28 U.S.C. § 1651 provides a federal court with jurisdiction to consider a *coram nobis* petition in a criminal case.

<sup>23</sup> See e.g., *Hirabayashi v. U.S.*, 828 F. 2d 591, 604-607 (9th Cir 1987), and, *Foont v. US*, 93 F. 3d 76, 79 (2nd Cir Ct. 1996).

<sup>24</sup> The Innocents Database lists more than a dozen exonerations by way of a federal *coram nobis* petition from 1954 to 2014. See, [http://forejustice.org/search\\_idb.htm](http://forejustice.org/search_idb.htm) (last visited October 19, 2014).

<sup>25</sup> "The term "clemency" refers not only to full or conditional pardons, but also commutations, remissions of fines, and reprieves. See Kobil, "The Quality of Mercy Strained: Wrestling the Pardoning Power from the King," 69 *Texas L. Rev.* 569, 575-578 (1991)", quote from *Herrera v. Collins*, 506 U.S. 390, 411, note 12 (1993). Historically the English Common Law did not provide for the direct appeal of a conviction, or a post-conviction judicial appeal based on *any* ground. Consequently, an innocent person's only option was an executive pardon until Courts of Appeal were legislatively established as a mechanism to review convictions. See, e.g., Marshall, Peter D. "A Comparative Analysis Of The Right To Appeal" (2011) Duke J. Comp. & Int'l L. 1 (Vol. 22, No. 1), esp. 4-11. Available at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1014&context=djcl>

<sup>26</sup> In the United States a full presidential pardon and a full pardon by most state governors or a pardon/parole board only directly relieves a defendant of some or all direct *consequences* of his conviction that can include the sentence and restrictions of civil rights. An excellent general discussion of the pardon power in the United States, and specifically as it relates to Nevada, is the Nevada Attorney General's 25-page informal opinion dated November 18, 2003 submitted to Dorla M. Salling, Chairman of the Nevada Board of Parole Commissioners about the legal effect of a pardon in Nevada. Available online at, <http://pardons.nv.gov/uploadedFiles/pardonsnv.gov/content/About/PardonInformalOpinion.pdf> (last viewed June 22, 2014). An exception to this is Texas has a statute that specifically provides for a pardon based on new evidence of actual innocence. Tex. Admin. Code Title 37, Pt. 5, Chap. 143, SubChap. A, §143.2. The statute states: "(b) Evidence submitted under subsection (a)(1) of this section shall include the results and analysis of pre-trial and post-trial DNA tests or other forensic tests, if any, and may also include affidavits of witnesses upon which the recommendation of actual innocence is based."

<sup>27</sup> See, 59 AM. JUR. 2D Pardon and Parole § 60 (2003). One exception to this is Texas' pardon statute under which, "A pardon based on innocence exonerates a person of the crime and erases the conviction when there is evidence of actual innocence or a court has determined the person is innocent." See the Texas Board of Pardons and Paroles website, [http://www.tdcj.state.tx.us/bpp/exec\\_clem/Pardon\\_for\\_Innocence.html](http://www.tdcj.state.tx.us/bpp/exec_clem/Pardon_for_Innocence.html)

<sup>28</sup> *Bierkan v. United States*, 529 F.2d 125, 126 (7th Cir. 1975).

<sup>29</sup> See, *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>30</sup> *Herrera v. Collins*, 506 U.S. 390, 411-417 (1993).

<sup>31</sup> Michael Stolleis, "The Law Under The Swastika: Studies on Legal History in Nazi Germany," *The University of Chicago Press* (1992), p. 157, and endnote 21 at p. 243.

<sup>32</sup> "Executed Salem Witches Exonerated," by Steve LeBlanc (AP), *Worldwide Religious News*, November 2, 2001, available at, <http://wwwn.org/articles/9431/?&section=occult>

