

**SUMMARY: ISSUES ON WHICH INNOCENCE NETWORK  
BOARD HAS ADOPTED A POLICY POSITION**

**DNA Testing**

1. Prisoners have the right to injunctive relief under § 1983 to obtain DNA evidence in cases where there is no post-conviction DNA statute or where the statute is inadequate (and testing is denied).
2. The statute of limitations should not bar claims for postconviction DNA testing under § 1983, because such rights do not accrue until access to DNA is denied, equitable tolling applies, and every refusal to allow access to DNA is a continuing violation.
3. Prisoners have right to postconviction DNA testing under state DNA statutes and the U.S. constitution in every case where favorable test results might create a reasonable probability of a different outcome.
4. Prisoners have a right to postconviction DNA testing, regardless of perceived “strength” of state’s case, where the DNA might help establish innocence not just by an exclusion of defendant, but also by a match to a third-party or by redundant crime scene DNA profiles that all exclude defendant.
5. State postconviction DNA statutes, which mandate DNA testing if the testing might create a “reasonable probability” of a different outcome, do not create “outcome determinative test” (in which defendant must prove that a different result is more likely than not), but rather an “undermines confidence” test, as understood in *Strickland* and *Brady (Moran)*.
6. The standard of review on appeal of a trial court’s denial of a DNA motion should be de novo.
7. Postconviction DNA testing statutes permit DNA testing in cases in which the defendant pled guilty or confessed.
8. State postconviction DNA testing statutes—and in particular provisions such as those requiring “articulable doubt” and a “reasonable likelihood” that testing will show innocence—should be interpreted liberally.
9. Denial of post-conviction DNA testing on the basis of fallible confession evidence is fundamentally unfair.

**Access to Evidence (beyond DNA)**

10. Prosecutors should be obligated to disclose exculpatory evidence at a preliminary hearing; defendants should have discovery rights, including access to police reports, prior to the preliminary hearing.
11. A right of access to *Brady* materials exists under FOIA.
12. The attorney-client privilege should not prevent an attorney from revealing, once his or her client has died, that the client told counsel that he alone committed a crime for which another person was wrongly convicted.
13. Failure to disclose information about benefits conferred on jailhouse snitch constitutes a *Brady* violation that necessitates a new trial.
14. Because open public records and access to police files are critical to re-investigating old cases in which the prisoner has maintained innocence, open record laws should be interpreted in a manner that allows broad access to old investigative files (except for well-established exceptions, such as when disclosure of the files would put a witness at risk).

### **Interrogations/Confessions**

15. Custodial interrogations of all suspects must be electronically recorded in their entirety.
16. Expert testimony on false confessions (should be admissible and) can provide basis for new trial.
17. Confession evidence is fallible and therefore should not alone prevent a new trial based on other newly discovered evidence.
18. An innocent person's confession should not be a bar to wrongful conviction compensation.

### **Eyewitness Identifications**

19. Showup evidence should be inadmissible in all cases unless state can prove that a showup was truly necessary.
20. Courts should abandon or modify the *Brathwaite/Biggers* five-prong test for evaluating "reliability" of suggestive eyewitness identification procedures. [Note: We should make a policy decision as to how we believe the test should be modified.]
21. Expert testimony on eyewitness identifications should be per se admissible in any case in which disputed eyewitness evidence is presented.
22. Courts should adopt a rule that failure to caution a witness that the culprit might not be present at an identification procedure renders that procedure unnecessarily suggestive, requiring, at the very least, a curative jury instruction.
23. Flawed eyewitness ID evidence should not be the basis for denying postconviction relief.
24. Reviewers should have full access to study protocols and underlying raw data related to field studies purporting to measure the effectiveness of eyewitness identification reforms.

### **New Trials Based on New Evidence**

25. Courts have authority to consider new evidence of actual innocence without regard to the statutory one-year limitation period for newly discovered evidence, and that the standard for granting a new trial based upon newly discovered evidence should not be a strict "outcome-determinative" test, at least where the state relied at trial upon facts that turned out to be false.
26. Statutes of limitations, limiting the time in which a prisoner can seek a new trial based on newly discovered evidence, cannot limit courts' ability to consider new evidence of actual innocence.
27. Federal courts must apply the *Chapman* harmless error standard, which imposes the burden on the state to prove errors harmless beyond a reasonable doubt, in any case in which the state courts erroneously found no error and hence undertook no *Chapman* analysis.
28. Rules barring or limiting third-party perpetrator evidence should be abolished; such evidence should be considered on an equal footing as any other type of evidence, which is evaluated by considering relevance and the risk of undue prejudice, and not some heightened relevance or presumed prejudice standard. Third-party perpetrator evidence cannot be excluded simply because the state or a court views the state's evidence as "overwhelming".
29. Relevant exculpatory DNA evidence can satisfy the *Schlup v. Delo* actual innocence gateway standard for permitting habeas review of otherwise procedurally defaulted claims.

30. Imposing a “due diligence” requirement on a defendant’s actual innocence claim is impermissible when actual innocence is raised as a gateway claim for federal habeas relief under *Schlup v. Delo*.
31. Leave to file successor habeas petition should be granted based on new DNA evidence on hairs and on scientific research undermining ballistics evidence that was used at trial.
32. A claim of actual innocence in habeas proceedings cannot be deemed a waiver of the attorney/client and work product privileges.
33. A new trial based on newly discovered evidence should not be denied solely because other evidence in the case includes a confession and/or eyewitness identification (*Avery, Duncan*).
34. Equitable tolling should be available when petitioner makes out a colorable claim of actual innocence.
35. Courts should not impose categorical bans on types of newly discovered evidence (*Grissom*).
36. Procedural bars should not prevent a prisoner who has new evidence supporting a colorable claim of innocence from having a hearing to demonstrate that he or she has been the victim of a wrongful conviction.

#### **Non-DNA Forensic Science**

37. Challenges to unsound forensic sciences should be basis for granting a new trial.

#### **Assistance of Counsel**

38. Defense counsel at trial may conclude that her client will commit perjury (in which case the attorney may refrain from presenting that client’s testimony) only when the attorney “knows” the client will lie because the client has expressed a clear intent to lie.

#### **Trial Procedures**

39. Confrontation clause rights—prosecution should not be permitted to introduce prior testimony of an interested witness who would not be available for cross-examination at trial.
40. Confrontation clause rights—crime laboratory reports are “testimonial” within the meaning of *Crawford v. Washington*, and hence forensic science test results may be introduced only through live testimony, and not just through written lab reports.

#### **Compensation**

41. The statute of limitations on civil claims against trial counsel for ineffective assistance of counsel should begin to run when exoneree is officially exonerated, not when he or she first discovers grounds to believe counsel was ineffective.
42. Administrator of prosecutor’s office should not be shielded by absolute immunity from suit for failure to implement procedures to ensure compliance with.
43. An innocent person’s confession should not be a bar to wrongful conviction compensation.
44. Wrongful conviction compensation statutes should be broadly construed in favor of exonerated individuals, with reasonable burdens of proof required.

### **Equitable Tolling**

45. Equitable tolling should be available when petitioner makes out a colorable claim of actual innocence.
46. The statute of limitations should not bar claims for postconviction DNA testing under § 1983, because such rights do not accrue until access to DNA is denied, equitable tolling applies, and every refusal to allow access to DNA is a continuing violation.
47. The *Schlup* actual innocence exception recognized for successive petitions applies to the one-year statute of limitation for filing an original petition for habeas corpus relief

### **Actual Innocence**

48. Post-conviction petitioners, who can establish their actual innocence through newly-discovered evidence of any type, are entitled to seek relief.
49. Procedural bars should not prevent a prisoner who has new evidence supporting a colorable claim of innocence from having a hearing to demonstrate that he or she has been the victim of a wrongful conviction.
50. The constitutionally proper standard of review to be applied by state courts to a federal actual-innocence claim is provided by *Schlup*.

### **Informant Testimony**

51. Informant testimony is inherently unreliable and the use of such testimony can have dangerous consequences.

### **Open Public Records**

52. Because open public records and access to police files are critical to re-investigating old cases in which the prisoner has maintained innocence, open record laws should be interpreted in a manner that allows broad access to old investigative files (except for well-established exceptions, such as when disclosure of the files would put a witness at risk).