

## **Procedures Matter: Why the Innocent Don't Get Out on Technicalities**

Daniel S. Medwed\*

What an honor to be selected as this year's Bodiker Lecturer. I have long admired the Ohio State criminal law faculty and the chance to see my beloved longtime co-author Josh Dressler is a special treat.

I am particularly grateful to Lincoln Davies for extending this invitation. When we hired Lincoln as a junior faculty member at the University of Utah many years ago, I told my colleagues that he was the missing link to our team. I trust that you felt the same way about our pal Linc during his deanship, despite his football loyalties to a certain Big Ten school "up North."

Another thing that makes this special is that I can now count myself as a card-carrying member of the "Bod Squad" (not just the Dad Bod Squad), the inner circle of friends and colleagues of the late, great David Bodiker. I have learned so much about Dave over the past few days, including from my college friend Wendolyn Holland. I hope this talk will do justice to both his memory and his deep commitment to the underserved.

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Before entering academia, I spent six years as an appellate and post-conviction litigator, first with the Legal Aid Society in New York City, then running a small innocence project at Brooklyn Law School where my students and I investigated and litigated post-conviction claims of innocence by New York state prisoners.<sup>1</sup> During that time, I got into a series of skirmishes with prosecutors and judges in New York, not to mention my mother-in-law whose front door in rural southwestern Nebraska is festooned with a wood plaque featuring a picture of a pistol and the slogan "We Don't Call 911." She claimed I'd dedicated my life to "getting criminals out on

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<sup>1</sup> For information about the Second Look Program at Brooklyn Law School as well as a discussion about "innocence project" operations more generally, *see* Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a Law School Innocence Project*, 81 NEB. L. REV. 1097 (2003).

technicalities,” and that I shouldn’t worry about the innocent because there are “endless appeals” to spring them from their cells. How many of you have heard something to that effect? That the guilty are often freed after trial? And that there are endless appeals available even if an innocent person is convicted? How many of you believe that? I assured her that wasn’t the case: that usually the only way to prevail after trial is to show a profound constitutional error or prove a person’s actual innocence, neither of which is a technical argument. Technicalities don’t free prisoners, I insisted, even innocent ones. On the contrary, they often serve to keep them behind bars.

Those debates with my mother-in-law (along with my experiences in the trenches) inspired me to write a book that tries to explain as clearly as possible why technicalities, namely, procedural obstacles, can keep innocent people locked up.<sup>2</sup> Examples of those obstacles include requirements that legal issues must be adequately “preserved” at trial even to be reviewed on appeal, or that defendants must file post-conviction petitions within strict time frames. These procedural bars help explain why the exonerations that we know about—roughly 375 documented exonerations based on post-conviction DNA testing of biological evidence from the crime scene,<sup>3</sup> and more than 2,000 non-DNA cases<sup>4</sup>—are just the tip of the iceberg. Many credible wrongful convictions presumably lie beneath the surface, unseen and unheard, kept under water by draconian procedures.

I will do two things in this lecture. First, I will briefly discuss the appellate and post-conviction remedies that are typically available to a prisoner claiming innocence and mention their shortcomings. Second, I will offer a case study—really, a war story—that shows the limitations of those procedures in action.

A talk about procedure may seem dry, arcane, or boring. But without adequate procedures, prisoners cannot get a fulsome review of the substance of their innocence claims. And that, my beloved Buckeyes, is far from dry, arcane, or boring. Though I guess you’ll have to let me know at the end of the talk if I’m right about that.

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<sup>2</sup> Daniel S. Medwed, *BARRED: WHY THE INNOCENT CAN’T GET OUT OF PRISON* (2022).

<sup>3</sup> This is the number of DNA-based exonerations documented from 1989 to 2020. See Innocence Project, *DNA Exonerations in the United States (1989-2020)*, INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> [https://perma.cc/86BS-BLSU] (last visited Jan. 28, 2024).

<sup>4</sup> The National Registry of Exonerations keeps track of all documented exonerations, both DNA and non-DNA, and is a joint project of the University of California-Irvine Newkirk Center for Science & Society, University of Michigan Law School, and Michigan State University College of Law, see *The National Registry of Exonerations*, UNIV. OF MICH., <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> [https://perma.cc/JKV2-CC2W] (last visited Jan. 20, 2024).

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I think it is helpful to divide the remedies available to a prisoner after trial into three categories: (1) the direct appeal; (2) post-conviction or collateral procedures and (3) executive branch remedies.

Let's start with the direct appeal. Contrary to popular opinion, there is no federal constitutional right to appeal a criminal conviction to a higher court. The Constitution doesn't refer to it at all, in contrast to the right to a jury trial, which is mentioned not once but twice. As the Supreme Court declared in 2017, "the criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not . . . The trial is the "main event.""<sup>5</sup>

Now, for good reason, every state and the federal government has granted defendants a *statutory* right by law to appeal their conviction once and once only. If a jurisdiction took away that remedy, it would likely violate due process; fortunately, we have not faced that question yet. Still, the fact that the right to an appeal is absent from the Constitution—that it is the undercard to the main event, the trial—has a powerful ripple effect on its role in the system.

The "direct appeal" is a vertical attack. It allows a defendant to file a brief up the ladder with a higher court alleging that errors occurred at a lower rung, at the trial court level. In making these claims of error, the defendant is confined to the trial record, to what precisely happened below. Anything "off-the-record" is not recognizable on appeal. What's more, only legal issues that are sufficiently "preserved" at trial for review—where the defense lawyer made an adequate and contemporaneous objection—can be cited as errors on appeal.<sup>6</sup>

To add insult to injury, assuming your appellate attorney can identify strong claims of legal error that were preserved at trial, that is ordinarily not enough to win on appeal. Trial judges receive ample deference for their evidentiary decisions, and those decisions will normally stand unless the defendant can prove the judge "abused" her discretion, which is not easy to do.<sup>7</sup> Also, there's something known as the "harmless error doctrine" that permits courts to affirm convictions, even in the face of multiple errors at trial, if they are considered harmless in the context of the case as a whole.<sup>8</sup> These restrictions—being hemmed in by what happened at trial,

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<sup>5</sup> *Davila v. Davis*, 137 S.Ct. 2058, 2066 (2017).

<sup>6</sup> *See, e.g.,* William Cassel & Anneliese Wright, *Preservation of Error for Appellate Review*, NEB. L. BULL., (2010).

<sup>7</sup> *See Identifying and Understanding Standards of Review*, THE WRITING CTR., GEORGETOWN UNIV. LAW (2019), <https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf> [<https://perma.cc/K4XD-AJN2>].

<sup>8</sup> For background information about the harmless error doctrine in the recent scholarly literature, *see* Daniel Epps, *Harmless Error and Substantial Rights*, 131 HARV. L. REV. 2117, 2126-2129 (2018); Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The*

the bar on new evidence, the preservation requirement, deferential standards of review, and harmless error—all make the direct appeal a poor vehicle for litigating a claim of actual innocence.

That leads us to a group of post-conviction or “collateral” remedies beyond the direct appeal that allow you to attack a conviction from the side, often in a trial court, rather than vertically in a superior court. There are two chief collateral remedies in the state and federal legal systems: the “great writ” of habeas corpus, which you have probably heard about, and the more obscure writ of error coram nobis, which I suspect is new to many of you. I urge students to refrain from mentioning coram nobis while flirting with prospective dates at parties this weekend because otherwise you are guaranteed to go home alone.

For centuries, observers have praised the “great writ” of habeas corpus as an opportunity to free people unlawfully detained by the state.<sup>9</sup> Inherited from England, habeas corpus lets litigants demand that the government justify why they “have the body” in custody either before or after trial. The writ is enshrined in Article I of the federal constitution, and Congress codified it through legislation. Federal trial courts may even conduct habeas review of *state* court convictions, which ensures a modicum of uniformity and standards of justice in all fifty states.

In reality, though, habeas corpus is less-than-great when it comes to correcting the most fundamental of errors wrought by our criminal justice system: the conviction of a factually innocent person. Not only does habeas contain a number of procedural booby traps, such as rigid statutes of limitations, but age-old case precedent requires detainees to cite constitutional or jurisdictional defects as grounds for habeas relief. As the Supreme Court declared in a notorious 1993 case, a “freestanding” claim of actual innocence by itself is generally inadequate.<sup>10</sup> That’s right. Amazingly, it is not unconstitutional to convict or even execute an innocent person.

That leaves the writ of error coram nobis, which means “before us” in Latin. It emerged in sixteenth century England as a way for prisoners to present the original trial judge with “newly discovered evidence” that casts doubt on the integrity of a conviction.<sup>11</sup> If the prisoner succeeds in convincing the judge that a mistake may have occurred, he receives a new trial.

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*Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433 (2009); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 56-62 (2005); Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORD. L. REV. 1411 (2021).

<sup>9</sup> For a discussion of habeas corpus and how Congress and the Supreme Court have curtailed its application, see Daniel S. Medwed, *Ineffective Assistance of Case Law: The Supreme Court’s Deficient Habeas Jurisprudence*, 17 HARV. L. & POL’Y REV. 345 (2022).

<sup>10</sup> *Herrera v. Collins*, 506 U.S. 390 (1993).

<sup>11</sup> For a primer on coram nobis, see Daniel S. Medwed, *Up the River without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*,

Sounds great, right?

Once again, as with habeas corpus, procedural restrictions make this remedy less than ideal for the innocent. For one thing, “newly discovered” doesn’t just mean new to the client or defense team. It means evidence that could not have been discovered through due diligence at the time of trial, and that can be a very high hurdle to clear. For another, a coram nobis motion normally goes to the original trial judge based on the notion that that person has the best recollection of the case and is therefore in the best position to assess whether this new evidence would have made a difference. Do you buy that? Suppose the judge even recalls the trial: how many of them are likely to admit they presided over a wrongful conviction? That they made a mistake? Ninety-nine percent of people think they are of above-average intelligence, and that can’t be true. (Incidentally, many of the mistaken ones go to Michigan law school).

The third category takes us away from the courtroom and into the halls of the executive branch. A remedy known as “clemency,” which is the power of the government to pardon people of crimes or commute their sentences, is often touted as a mechanism for aiding the innocent.<sup>12</sup> Chief Justice Rehnquist once even referred to it as a “fail-safe” for the wrongfully convicted.<sup>13</sup> But clemency is not well-suited to innocence cases for a variety of historical and practical reasons. The term “clemency” derives from the Roman goddess Clementia, the deity of mercy and forgiveness. Julius Caesar famously cited Clementia when sparing the lives of fallen opponents on the battlefield. My wife Sharissa and I even named our second child Clementine.

But are innocent prisoners strong candidates for forgiveness? How can you be forgiven for something you did not do? Factually guilty people, maybe those who committed crimes when they were young or under unusually adverse circumstances and/or have made steps toward self-improvement behind bars, are more likely to receive clemency from governors and pardon boards than the innocent. Worse yet, pardon officials might be inherently skeptical of an innocence claim because it has not yet been vindicated in court and they may ascribe the claim to the psychological phenomenon of “denial” as opposed to being legitimate. And even if those executive authorities were open to helping the innocent, consider the political variables at play. Many government actors are plagued by fears of freeing someone who later goes on a crime spree, a phenomenon known as the “Willie Horton Effect” based on a high-

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47 ARIZ. L. REV. 655, 669-674 (2005); see also Daniel F. Piar, *Using Coram Nobis to Attack Wrongful Convictions: A New Look at an Ancient Writ*, 30 N. KY. L. REV. 505 (2003).

<sup>12</sup> Daniel S. Medwed, *Not Just Mercy: The Untapped Potential of Clemency to Right Wrongful Convictions*, 17 L.J. SOC. JUST. 41 (2023).

<sup>13</sup> *Herrera*, 506 U.S. at 391-92.

profile case from the 1980s in my home state that is often associated with Mike Dukakis's loss in the 1988 presidential election.<sup>14</sup>

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To see how these remedies can operate to keep an innocent person imprisoned, it's time for the second part of my talk: a war story.<sup>15</sup> Is anyone from Long Island? Suffolk County? Brentwood?

Let's go back in time. At 8:20 pm on February 3, 1999, a large white man entered a strip mall restaurant in Brentwood. It was not a popular restaurant. Only the cook and a waitress were on the premises. The man ordered a shrimp dinner and while the cook prepared it in the kitchen, the man put a knife to the cashier's throat and demanded money from the cash register. Thirty-two dollars, that was all that was in the till. She screamed; he fled; and the cook rushed out from the kitchen. They caught a glimpse of the perpetrator as he fled in what they described as a late-model white car with a New York license plate featuring a "T" and "1."

In response to a call for help, the police came to the restaurant with a "six-pack." Not of Wolf's Ridge, but a photo array of six men who loosely matched the initial description of the robber: tall, white, male, heavysset, mid-thirties. Then the cook and waitress separately identified the same person, Stephen Schulz, as the culprit.

Stephen fit the bill in two chief respects. First, he was 6'2," 250 pounds, and thirty-something. Second, he had a lengthy criminal record. But things didn't add up in another, pivotal respect. *Nothing* on his rap sheet indicated a proclivity for violence. His convictions were for theft, drug-related crimes, things like that. Nothing remotely violent.

When confronted by the police, Stephen claimed innocence. He insisted that, at the time of the crime, he was home watching the short-lived ABC sitcom *Dharma and Greg* with his roommate. Anyone know that show? If you do, then you understand why that's a credible alibi—no one would confess to watching that show unless it were true.

Stephen didn't have the money for a private lawyer so the court assigned him an attorney who picked up indigent defense cases to supplement his meager solo practice. Lawyers who did this work back then got paid a paltry \$25 an hour for out

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<sup>14</sup> See, e.g., John Pfaff, *The Never-Ending 'Willie Horton Effect' Is Keeping Prisons Too Full for America's Good*, L.A. TIMES, May 14, 2017.

<sup>15</sup> This war story is based on the experiences of my former client Stephen Schulz. The case also serves as a throughline in my book, *Medwed*, *supra* note 2. In addition to my recollections, much of this information stems from the judicial opinions in the matter, see *Schulz v. Marshall*, 528 F.Supp.2d 77 (E.D.N.Y. 2007); *People v. Schulz*, 829 N.E.2d 1192 (N.Y. 2005); *People v. Schulz*, 5 A.D.3d 799 (App. Div.2d Dept. 2004).

of court work and \$40 for in-court work.<sup>16</sup> That meant their incentives were aligned with generating a volume business and filing as many motions and arguing for as many adjournments as possible. Stephen's lawyer didn't bother to investigate his alibi, let alone anything else about the case.

Meanwhile, Stephen was detained in the county jail awaiting trial. Like many a Long Islander, he passed the time by reading the local paper, *Newsday*. One day he stumbled upon an article with the headline, and I'm paraphrasing here, "Man Pleads Guilty to Six Robberies." A local man named Anthony Guilfoyle had evidently pled guilty to six storefront robberies in the Brentwood vicinity from January to March 1999, effectively bookending the crime Stephen was charged with. Guilfoyle's *modus operandi* was to use his bulk, and the threat of force, to intimidate employees into handing over money from the register. Guilfoyle's mugshot accompanied the article. Messy hair, chubby cheeks, basically Stephen's doppelgänger.

Stephen immediately tried to contact his lawyer, with no success. Eventually his sister Linda got through. She urged the lawyer to read the paper and investigate the Guilfoyle angle. The attorney didn't bother to do anything, and essentially said "let's see what happens."

Well. Here's what happened:

Stephen maintained his innocence and turned down a generous plea deal of three years in prison, setting up the case for trial. The cook testified first, and identified Stephen as the man who ordered the shrimp dinner and who fled in the late-model white car. Then an astonishing thing happened. The actual crime victim, the waitress, took the stand. In the movies what usually happens at this point? The cinematic trope normally involves either the "empowered victim" (enraged survivor stares at the defendant, points him out, and declares "That's the man who harmed me") or the "cowering victim" (traumatized witness averts her eyes and casts a tentative finger in the defendant's direction before murmuring "He did it").

Something else took place at Stephen's trial, something that I have never seen before or since. The waitress testified, in effect, "Now that I see him in person, not in a picture, I realize he's not the guy. The man who robbed me was taller and heavier." Guess what? Recall that Stephen was 6'2" and 250 pounds. Guilfoyle was 6'4" and 350 pounds, two inches taller and 100 pounds heavier.

The lawyer faced a vexing choice.

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<sup>16</sup> See *Background on Assigned Counsel Programs*, 73 N.Y. ST. B.J. 8 (May 2001); Sheri Bonstelle & Christine Schessler, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 FORDHAM URB. L.J. 1151, 1152 (2001) ("The attorneys, known as "18-Bs" based on New York County Law Article 18-B authorizing assigned counsel for indigent criminals and Family Court litigants, have not had a raise since 1986. Section 722-b of this Article currently authorizes each county to pay the attorneys \$25 per hour for out-of-court time and \$40 per hour for in-court time").

He had Guilfoyle's mugshot from the newspaper, so Option A was to show it to the waitress on cross-examination, ask her if this guy did it. But he had not conducted a pretrial investigation, much less interviewed her. What is a fundamental axiom of cross-examination? Never ask a question you don't know the answer to. What if the waitress said "no, he didn't do it either!" That would undermine her shocking refusal to identify Schulz, and create the odd inference that there were multiple heavysset white men in the thirties going around Brentwood committing this type of idiosyncratic crime.

The lawyer went with Option B, which was to try to introduce the photograph of Guilfoyle into evidence to let the jury decide for itself whether Stephen might have been mistaken for this taller, heavier man who'd fessed up to six analogous crimes. Under New York state law at the time, circumstantial evidence alone was not enough to introduce evidence of "third-party culpability."<sup>17</sup> You had to show a "clear link" between the alternative suspect and this particular crime. And the lawyer had nothing to connect Guilfoyle with the events of February 3, 1999. The trial judge, John Copertino, denied the request to admit the photo, and the jury was left with barely an inkling about this possible perpetrator. Stephen chose not to testify and instead he asserted his Fifth Amendment privilege against self-incrimination. He went this route not because he was guilty, not because he was scared to testify. Rather, he was worried about being impeached on the stand with his prior criminal record and punished by the jury for who he was, not what he did on the day in question.

The jury deliberated and seemingly credited the cook over the waitress: Guilty, first-degree robbery. The judge sentenced Stephen to eleven years in prison, nearly four times the sentence he would have received had he accepted the pretrial plea offer. The offer to plead guilty to something he didn't do.

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A colleague and I formed our innocence project at Brooklyn Law School in early 2001.<sup>18</sup> We needed cases to fuel that venture and Stephen's letter landed on my desk at precisely the right time. Had it come in a few months later it likely would have gathered dust, obscured by the hundreds of similar inquiries. Intrigued by the case, we decided to take it on – both the direct appeal from his original conviction and any possible post-conviction remedies. And we started to investigate. Guess what we found?

- We interviewed Schulz's roommate, who verified that they were home watching *Dharma & Greg* at the time of the robbery. He noted that

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<sup>17</sup> The New York Court of Appeals later rejected the "clear link" standard, see *People v. Primo*, 753 N.E.2d 164 (N.Y. 2001).

<sup>18</sup> Medwed, *Actual Innocents*, *supra* note 1.

he had offered to testify for the defense, but that Stephen's lawyer had rejected that overture. He signed an affidavit. We also verified that the particular episode of *Dharma & Greg* aired during the 8 p.m. slot on February 3, 1999.

- We investigated the cook and, lo and behold, it turned out that he had a gun possession charge that was pending at the time of his testimony against Schulz, a charge that miraculously disappeared thereafter. We could not prove it was a *quid pro quo*, that he testified for the prosecution in exchange for leniency on his own charge, but we had a hunch.
- We tracked down the waitress, who was hard to locate. We showed her an amateur photo lineup—with pictures of just Schulz and Guilfoyle—and she identified Guilfoyle with 90% certainty as the man who had robbed her.
- One of my students somehow got access to New York state motor vehicle records. (That axiom about cross-examination also applies to certain inquiries of students). Alas, Anthony Guilfoyle did not have a late-model white car registered in his name. Rats. But his wife Kim did, an Oldsmobile. And guess what it had in the license plate? A “T” and a “1.”

We then reviewed our appellate and post-conviction options. We knew that we could not present any of this evidence in the direct appeal, so we focused on the trial court's decision to exclude the photograph from evidence in pursuing that remedy. We lost – the appeals court considered that choice a matter of discretion for the judge and deferred to his reasoning that there was no clear link between Guilfoyle and this particular robbery. Depressing, but not unexpected given the barriers to litigating innocence on direct appeal.

As you know, the direct appeal is not the only avenue for the innocent. We decided to seek relief under New York's statutory version of the writ of error coram nobis. We cobbled together all our newly discovered evidence, affidavits, records, and photos, and submitted them to the original trial judge, John Copertino. The court scheduled us for oral argument – not on the motion itself but on whether the judge should simply hold an evidentiary hearing. We weren't asking for the moon, a complete reversal of the conviction. We weren't even asking, at least not yet, for a star in the form of a new trial. We were just asking for some of that freeze-dried astronaut food that you can get at the national air and space museum gift shop in Washington, D.C. Just a hearing to let us put our witnesses through their paces and subject them to cross-examination, which the famed evidence scholar John Henry

Wigmore termed the “greatest legal engine ever invented for the discovery of the truth.”<sup>19</sup>

Copertino said no. Don’t rev up that engine at all. He summarily denied our motion without even holding a hearing. We appealed that decision and lost in the intermediate appellate court. Later on, we failed in the state’s highest court where a lone dissenter expressed concern that New York’s appellate and post-conviction procedure did not permit cases with this many questions to be thoroughly heard.

I thought we were done, that we didn’t have a path forward. And I had already headed for the hills. Literally. I had accepted a tenure-track job at the University of Utah.

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A few years later, Stephen called me in Salt Lake City. He had filed a federal habeas corpus petition on his own, *pro se*. He had raised a constitutional claim of ineffective assistance of counsel, an issue that we had preserved as an alternative legal theory to our innocence claim throughout the appellate and post-conviction litigation proceedings. Better yet, the federal judge had granted a hearing and Stephen asked if we wanted to be involved. Like any good legal eagle, er, vulture, I said “yes” and roped in my former colleague to handle it in New York.

In late 2007, a federal judge granted Stephen habeas corpus relief, yet not on the grounds of actual innocence.<sup>20</sup> Instead, the judge found that the performance of Stephen’s lawyer fell below the constitutional threshold for effective assistance of counsel by failing to conduct a pretrial investigation and neglecting to develop an alibi defense through the roommate.

Stephen was free, if not exonerated. And just a few months before he would have been released anyway for good time served.

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Stephen has had an interesting life in the years since his release. Do you want the good news or bad news first? The bad news is that he lives in New Jersey. Even worse, because he was not declared innocent, he never won damages under New York’s wrongful conviction compensation law.

The good news is that he landed a job as a long-haul truck driver. He reaches out to me from time to time on the road. He called me once from Maine to report that he had tried lobster for the first time and loved it. He also fell in love with a woman, and currently lives with his longtime partner Lisa and their dog Christmas, a stray they found on the 25th of December a few years ago.

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<sup>19</sup> John Henry Wigmore, 5 EVIDENCE IN TRIALS AT COMMON LAW § 1367, 32 (James H. Chadbourne, ed. 1974).

<sup>20</sup> Schulz v. Marshall, 528 F.Supp.2d 77 (E.D.N.Y. 2007).

Stephen gave me permission to tell his story in *Barred* and the narrative of his case serves as a throughline in the book. One day I called him in search of a juicy quote to put in my conclusion. I asked him, “what do you like most about your freedom?” I fantasized about his possible responses. Walks on the beach with Lisa and Christmas (probably). Driving along the open road out west in his truck (maybe). Reconnecting with me, his old lawyer (exceedingly unlikely).

His answer surprised me. He said, “My debit card.”

Debit card?

It turns out that he likes to use it as often as possible, on his long-haul routes and in his neighborhood. It creates an alibi just in case the police come around to tag him for a crime he didn’t commit, as they once did a quarter-century ago.

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Stephen Schulz was an innocent man, a white man, who spent eight years in prison for a crime he didn’t commit in a so-called blue state, New York. He had enough moxie, not to mention the help of a devoted sister, to navigate the system and secure the *pro bono* services of two law professors and multiple students. Then, after we abandoned him, he had the wherewithal to file a *pro se* federal habeas corpus motion on issues that we had raised in earlier proceedings.

Yes, his conviction was eventually overturned, months before he would have been freed anyway. But he was not released on the grounds of innocence. He has not been, nor likely ever will be, officially exonerated and declared innocent of robbing a waitress at knifepoint.

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I got a call from Stephen recently. As the criminal defense lawyers in this room can attest, as David Bodiker would undoubtedly have proclaimed, a phone call from a former client triggers complex emotions and thoughts. The main reaction is often fear about what may have happened now. Stephen opened the conversation with a request: “Dan, can you find me a lawyer in New Jersey?”

Gulp.

He needed a housing lawyer because his landlord was trying to evict him from the extended-stay apartment he’d been living in with Lisa and Christmas.

People don’t get out of prison on technicalities. Technicalities instead keep both the innocent and the guilty behind bars. What about the countless, unknown prisoners out there who lack the privilege and good fortune to get the aid of an innocent project? Who aren’t white? Who don’t have a bad-ass sister? Who didn’t read a news account of a viable alternative suspect? What chance do they have to steer through the perilous shoals of America’s unforgiving appellate and post-conviction regime and sail into port, free and clear, exonerated by a system that appears dedicated to keeping the innocent lost at sea.

For those of you who are passionate about criminal justice, who want to pay tribute to the late, great David Bodiker, I urge you to try to do something about that in the years ahead. Join me on the ship of the Bod Squad.