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IF IT DOESN'T FIT, YOU MUST...

Why do prosecutors resist post-conviction DNA analysis?

By Julius (Jay) Wachtel. ...acquit! It's been twelve years since the late Johnnie Cochran urged a Los Angeles Superior Court jury to find O.J. Simpson not guilty of murdering ex-wife Nicole Brown and her friend Ron Goldman. Knowing full well that the blood-soaked leather glove recovered at the scene had shrunk, the wily lawyer was delighted when a prosecutor asked Simpson to pull it on -- over a protective latex glove, no less. And the rest, as they say, is history.

Johnnie and his crew of legal beagles were also anxious to discredit LAPD's DNA evidence. You would be too, if somebody's blood was discovered in and near YOUR car and on YOUR socks in YOUR bedroom. Good thing for O.J. that another sharp lawyer, Barry Scheck, got an expert to testify that the blood was deposited by police through cross-contamination. Scheck went on to co-found the Innocence Project, which has used DNA analysis to exonerate more than two-hundred wrongfully convicted persons.

Now a California prisoner, [Kenneth Clair](#), is trying to use DNA to reverse a 1987 murder conviction. Although the evidence that sent him up the river is circumstantial, it's also so compelling that his own lawyer apparently doubted Clair's innocence. For one thing, the victim was killed only hours after Clair was released from jail for ransacking her home. For another, Clair's ex-girlfriend swore that she saw him with items that were reportedly in the victim's house shortly before the murder. Perhaps most damaging was a taped phone call the ladyfriend placed for detectives, in which Clair neither admitted nor denied the killing.

After the trial some of the proof began unraveling. The ex-girlfriend took back much of what she said. A child witness insisted that the man he saw had really been white, but that the victim's live-in boyfriend, a white motorcycle gang member, forced him to say that the suspect was black like Clair. And so on.

Recantations and newly discovered evidence, often of doubtful veracity, aren't unusual. What makes this case different is that recent DNA analysis excludes Clair as the donor of biological material found on the victim's body and clothing. This the Orange County D.A. readily concedes. But he vigorously denies that it exculpates Clair. No, he didn't deposit the DNA, but neither is there any proof that whoever did was the killer.

Technology often leads to as many questions as answers. Sometimes it also offers a possible solution. Orange County could submit a profile of the crime scene DNA to the FBI's databank, which contains more than four million DNA profiles of convicted felons and sex offenders. If there's a match, that person could be investigated to determine whether they had a motive and opportunity to commit the crime. This isn't just of trivial interest: Clair is on death row.

But the D.A. says no, no way. Rules stipulate that the FBI databank be queried only when the perpetrator is unknown. In this case, he is not only "known" but convicted and condemned. End of story!

Sad to say, the D.A.'s attitude isn't surprising. In exoneration after exoneration prosecutors have forcefully resisted every step of the process, from submitting DNA for analysis, to holding hearings, to admitting evidence in court, even to [releasing a clearly innocent man](#), all supposedly for the sake of defending the "finality" of the judicial process (and, one suspects, to avoid lawsuits and embarrassment.)

By most accounts the facts weigh heavily against Clair. Still, the perception that justice is being served is also important. The attitude of the Orange County D.A., [itself no stranger to the problem of wrongful conviction](#), does nothing to enhance our confidence in the criminal justice system. Indeed, it's the precise opposite of what one would expect from public servants for whom truth should be the most important objective.

Perhaps the wise men and women in that office are confused about why Lady Justice wears a blindfold. It's there to assure fairness, not to make herself purposefully ignorant.