

WRONGFUL CONVICTION ESSAYS

By

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.027 RULES!

***How many wrongful convictions have there been?
A lot more than what's known!***

By Julius Wachtel, (c) 2010

“Better that ten guilty persons escape than that one innocent suffer.” Known to first-year law students as the “Blackstone ratio”, these words by legal scholar William Blackstone were intended to frame critical legal decisions within a moral context and remind prosecutors of the need to exercise restraint when invoking an admittedly imperfect process.

Were he alive today Blackstone would be appalled that his numerical ratio has been turned on its head and used to justify serious miscarriages of justice. Unfortunately, that's exactly what's happened. Consider, for example, Supreme Court Justice Antonin Scalia's concurring opinion in [Kansas v. Marsh](#) (no. 04-1170, 6/26/2006):

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an *insignificant minimum*.

Scalia was upset at an [academic study](#) on wrongful conviction authored by Samuel Gross, a law professor at the University of Michigan. Examining 340 exonerations between 1989 and 2003, a number that they [took pains to emphasize](#) represented only a fraction of the wrongfully convicted, Mr. Gross and his colleagues concluded that these unfortunate events were not rare. Anxious to undermine their findings, Justice Scalia referred to a *New York Times* [opinion piece](#) by Clatsop County, Oregon D.A. Joshua Marquis deriding Gross' work, going so far as to insert a substantial chunk of the op-ed into the Court's written opinion:

Let's give the professor the benefit of the doubt: let's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime in any way. During that same 15 years, there were more than 15 million felony convictions across the country. That would make the error rate .027 percent--or, to put it another way, a success rate of 99.973 percent.

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Leaving aside for now D.A. Marquis' estimate of their prevalence, dividing wrongful convictions by all convictions seems an appallingly wrongheaded way to estimate the accuracy of the adjudication process. A goodly number of felony convictions -- probably a clear majority -- are what police call "slam-dunks". When officers find someone standing over a dead body, holding a smoking gun, or, more realistically, listen to a spouse tearfully admit they killed their partner, and so forth, the chances of prosecuting let alone convicting the wrong person are zero. When we choose a hospital for critical surgery, we're not interested in its record for treating hangnails; if we're interested in how well the system discriminates between the innocent and guilt *when it really counts*, cases where the evidence is essentially uncontested don't belong in the pool. Here's what the formula *should* look like:

$$\text{Accuracy of the process} = \frac{\text{Wrongful convictions}}{\text{All convictions subject to significant processing}}$$

What constitutes "significant processing" is something for another time. For now let's turn to the numerator, the number of wrongful convictions. According to the [Innocence Project](#), which handles only DNA-based cases, there have been 215 post-conviction DNA exonerations in the U.S. How did they come to be? Many can be blamed on faulty eyewitness identification. Other major causes include suggestive witness interviewing, false and coerced confessions, lying informants and junk science. Actually, since DNA is recovered in only a small proportion of violent crime, mostly rape and murder, these exonerees were in a sense "lucky", as once someone is adjudged guilty the burden of proof shifts to them to demonstrate their innocence, something that's awfully hard to do without DNA.

In a [recent column](#) a *New York Times* writer reported that the adjudicative system's opacity makes it impossible to estimate the prevalence of wrongful conviction. That hasn't stopped those who seem determined to make the issue go away. Only days ago D.A. Marquis posted a [blog entry](#) regurgitating his criticisms of Mr. Goss' work, and particularly the researcher's definition of "exoneration," which includes (the very few) instances where a convict was retried and acquitted. According to the D.A., "such a definition would seriously wound if not torture the true definition of exonerated, a word of great power that most people equate with actual innocence."

That, sadly, is how many prosecutors see it. Happy enough to convict based on a legal construct (beyond a reasonable doubt) that has sent innocents to prison, and a few probably to death, D.A. Marquis has the cheek to demand that the few who get a second bite of the apple and are found not guilty must somehow prove themselves "factually innocent" -- meaning, to his satisfaction -- before he'll add them to his formula's

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numerator. But not to worry, he coos, “Americans should be far more worried about the wrongfully freed than the wrongfully convicted.”

.027 rules!

Posted 11/3/24

A MATTER OF *FACTS*

Did flawed science place an innocent man on death row?



For Police Issues by Julius (Jay) Wachtel. Advocates of the wrongfully convicted have many compelling stories to tell. Few are more intriguing than the current imbroglio over Texas inmate Robert Roberson, who's been imprisoned for over two decades awaiting execution for murdering his two-year old daughter, Nikki. Convicted of capital murder in 2003, he's repeatedly dodged meeting his Maker – most recently, through [a last-minute stay](#) granted by the Texas Supreme Court. It was issued *about one hour* before his most recent death warrant was set to expire. Along the way, Roberson has gained a mountain of support, and not just from advocacy groups. Legislators and even a former police detective have joined his cause.

How did it all come to be?

For the “facts” let's turn to the June, 2007 [Texas Supreme Court decision](#) that affirmed Roberson's conviction. Its detailed account reveals that at the time of his child's death, Roberson was living with a lady friend, Teddie Cox, and her young teen daughter Rachel. Nikki, whom Roberson had fathered with a former girlfriend, was then being cared for by her maternal grandparents. Teddie Cox testified that at her urging Roberson took custody of Nikki, and she came to live with them in November 2001. But he proved disinterested as a father. He also “had a bad temper” and often yelled at, struck and shook the child.

Nikki was temporarily staying with her grandparents in January, 2002, when Teddie Cox was hospitalized for health issues. On January 30, 2002, as Ms. Cox readied to leave the hospital, she had Roberson bring Nikki home. He was displeased. And the next morning, when she called to be picked up, Roberson said that the child was unresponsive. Nikki supposedly fell from bed the previous evening. He had returned her to bed and went back to sleep. But when he awoke she wasn't breathing.

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Roberson brought the child to the hospital. She couldn't be revived. According to the E.R. nurse, Nikki's body was extensively bruised, far more than would have been caused by falling from bed. Fearing that the child had been severely abused, she had her staff call the Palestine Police Dept. They arrested Roberson for murder the very next day, February 1st. And one day after that, [an autopsy](#) – it was attested to by *seven* physicians – reported that the child's body evidenced “abrasions of face and extremities,” “contusions of head, lip, and left shoulder,” and subdural bleeding near the brain. Nikki, it concluded, died from a homicide caused by “blunt force head injuries.”

According to the Justices, medical testimony about the child's injuries and witness accounts of her past abuse conclusively pointed to Robinson's guilt. Curiously, “shaking” wasn't mentioned in their decision. But at Robinson's trial expert witnesses called by the prosecution [had indeed made extensive reference](#) to both “shaken baby syndrome” and “shaken impact syndrome.”

Between 1992 and 2024, courts around the U.S. [tossed thirty-four convictions](#) (including nineteen for murder) that were supposedly based on shaken baby syndrome. “SBS” has clearly fallen on hard times, and challenging it became a mini-industry. But with apologies to Jerry Lee Lewis, there was always a lot more than “shaking” going on. To address the misconception that “SBS” means shaking and nothing but, in 2009 the American Academy of Pediatrics renamed it and its fellow syndromes “[Abusive Head Trauma](#)” (AHT).



Alas, the Academy's attempt to clarify things failed to take hold with the criminal justice system. So in 2020 [it published a formal paper](#) re-emphasizing that “shaking” syndromes had *always* incorporated “multiple mechanisms” of injury. Such as the purposeful blows to the body and head that Nikki's autopsy declared caused her death:

Legal challenges to the term ‘shaken baby syndrome’ can distract from the more important questions of accountability of the perpetrator and/or the safety of the victim. The pediatric practitioner should be prepared to use the term ‘abusive head trauma’ rather than a term that implies a single injury mechanism, such as shaken baby syndrome, in their diagnosis and medical communications.

Judging by this case, the Academy's re-do had little effect. As rounds of appeals forestalled Mr. Roberson's execution, he accumulated champions in the unlikeliest places. Say, the police. Former Palestine police officer Brian Wharton, the lead detective in the case, now deeply regrets his involvement. Mr. Wharton – he left policing mid-

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career to become a Methodist pastor – authored [a detailed op-ed](#) last May that attributed his supposedly mistaken belief in Mr. Roberson’s guilt to the flawed “science” of shaken baby syndrome:

...I have come to believe that Nikki died of accidental and natural causes. I am convinced that she was not murdered. Roberson is innocent. There was no crime. I believe this because the science that was used to obtain Roberson’s arrest and conviction has changed drastically since his arrest....

“Junk science” has proven to be a splendid foundation for claims that Mr. Roberson wasn’t simply overcharged: he’s in fact *innocent*. Citing [a decade-old Texas law](#) that allows challenges to convictions “based on disproven or incomplete science,”

AN ACT
relating to the procedure for an application for a writ of habeas corpus based on relevant scientific evidence.
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
SECTION 1. Chapter 11, Code of Criminal Procedure, is amended by adding Article 11.073 to read as follows:
Art. 11.073. PROCEDURE RELATED TO CERTAIN SCIENTIFIC EVIDENCE. (a) This article applies to relevant scientific evidence that:
(1) was not available to be offered by a convicted person at the convicted person's trial; or
(2) discredits scientific evidence relied on by the state at trial.

[eighty-four members of the Texas House](#) recently called on the State Board of Pardon and Paroles to grant Mr. Roberson clemency. “Dismayed” that the law “has not been a pathway to relief — or even a new trial — for people like Robert,” they also recently [held a hearing about junk science](#). On its first day legislators vigorously encouraged medical and scientific experts “to poke holes in Roberson’s conviction, illustrate how the scientific understanding of shaken baby diagnoses had evolved and explain how the junk science law had been misapplied.”

Naturally, Mr. Roberson was subpoenaed to testify. Since his appearance was scheduled for October 21, 2024, four days *after* the scheduled execution, a court granted him the “last minute stay” mentioned at the start of this piece. Alas, [Mr. Roberson didn’t show](#). Texas Attorney General Ken Paxton (he’s definitely *not* on the condemned man’s team) nixed the condemned man’s personal presence. And his testimony by video was ruled out by the committee, which cited Mr. Roberson’s autism and inability to use modern technology.

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Still, the hubbub forced the State to seek a new execution date (it remains up in the air.) Meanwhile the hearing *did* take place, *sans* Mr. Roberson. Co-chair Rep. Jeff Leach opened the proceedings by calling Mr. Roberson “fully innocent.” In his view, the Committee’s purpose was “...to find the truth. To figure out where the system went wrong, where it failed Nikki and where it failed Mr. Roberson.” And there were witnesses. Say, psychologist Dr. Phil McGraw. According to “Dr. Phil,” Roberson never got due process. “I don’t think he’s had a fair trial and I think he should.” In his view, the child’s death was caused by pre-existing illnesses and the effects of drugs prescribed by the hospital. Traumatic brain injuries caused by physical abuse “were not present in this case.” Taking direct aim at the syndrome that ostensibly condemned an innocent man, another witness, a lawyer, roundly criticized the “outdated, unverified, unreliable science that was presented to the jury as fact.”

Texas Attorney General Ken Paxton is definitely *not* on board with Mr. Robinson’s defenders. [His vigorous objection to delaying the execution](#) (“Office of the Attorney General Sets the Record Straight About Nikki Curtis’s Death, Rebutting Jeff Leach’s and Joe Moody’s Lies About Convicted Child Murderer”) offers extensive details about the pummeling and physical abuse that Robinson allegedly inflicted on Nikki. Paxton also mentions that according to a cellmate, Roberson also admitted sexually abusing his child. “Syndromes,” the A.G. insists, were immaterial to the verdict:



Despite these eleventh-hour, one-sided, extra-judicial stunts that attempt to obscure the facts and rewrite his past, the truth remains: Robert Roberson murdered two-year-old Nikki by beating her so brutally that she ultimately died. The jury did not convict Roberson on the basis of “Shaken Baby Syndrome.” The “junk science” objection that has been used as a pretext to interfere with the proceedings has no basis in reality.

What’s more, the testimony had also revealed that Nikki wasn’t Roberson’s only victim:

The jury also heard that Roberson, who had over a dozen prior arrests, had strangled his ex-wife with a coat hanger, punched her in the face and broke her nose while she was pregnant, and beat her with a fireplace shovel.

Yet the most consequential decisions in this case weren’t made by lawyers, experts or jurors. They were made by an E.R. nurse who didn’t buy the “fall from bed” story and called the cops. And by the officers who showed up. Even if they didn’t know Roberson (unlikely, given the A.G.’s “dozen arrests” remark) a record check would have quickly

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labeled the father as a potential no-goodnik and placed his words into question. Here is Roberson's criminal conviction record from [Texas DPS](#):

Arrest			Conviction	
Date	Agency	Charge	Date	Sentence
2/1/2002	Palestine PD	Murder	2/19/2003	Death
8/19/1997	Waco PD	Misd. trespass	9/19/1997	45 days jail
10/16/1992	Smith Co. SO	Larceny (2 cts.)	Not given	7 yrs. prison
5/6/1992	Corrects. Dept.	Larceny	Not given	4 yrs. prob.
11/27/1989	Not given	Burg of resid.	7/11/1991	10 yrs. prison
8/19/1989	Houston SO	Burg of veh.	7/11/1991	10 yrs. prob

In "[Switching Sides](#)" we related the tale of Marcellus Williams, who was recently executed in Missouri for a fatal stabbing. While we, too, [have long opposed](#) the death penalty, "facts" do matter, and those that were arrayed against Mr. Williams – *and* Mr. Roberson – seem, well, overwhelming. Yet in both instances, advocacy groups came to insist that these men weren't simply deserving of life: they were truly *innocent*. That certitude, and what's followed, has placed a lot more than the *defendants'* reputations at stake. And if (as we believe) the [Innocence Project](#) again got it wrong, they *also* have victims. Here is an extract from [a recent letter](#) sent by Nikki's maternal side of the family to the Texas House committee that held the hearing:

...in a last-ditch effort, some Members of your committee are proclaiming his innocence, and you have held hearings in an attempt to halt Roberson's execution. Lost in this parade of people who are overeager to proclaim the innocence of a man found guilty by a jury of his peers, are the facts about Nikki Curtis' murder and the voice of those who knew him best and who witnessed the repeated abuse by Mr. Roberson – Nikki's family.

Enough said.

Posted 4/8/12

A RAILROAD JOB?

Dueling experts and manipulative interrogation cast a shadow over a conviction

By Julius (Jay) Wachtel. In November 2009, following a two-week trial, [a New York judge sentenced](#) Adrian Thomas, 27, a father of seven, to the maximum term of 25 years to life for second-degree murder in the death of his 4-month old son thirteen months earlier. Thomas was largely convicted on the basis of his admission, after nearly nine hours of interrogation, that he flung the infant onto a mattress to stop him from crying on three successive days, including the day of the boy's death. Thomas said he was frustrated over being jobless and hounded by his wife and in-laws.

At trial, prosecution [medical experts testified](#) that the acts described by Thomas caused the child to suffer severe brain trauma, leading to death. Defense experts disagreed. They said that the boy's death resulted from septic shock caused by a serious bacterial infection. While there was no disagreement that a serious infection was indeed present – the coroner listed it as a secondary cause of death – [the prosecutor criticized the defense experts](#) as being bought and paid for. (Click [here](#) for an appeals decision that discusses the case in depth.)

Dueling experts are nothing new, and we'll have more to say about controversies surrounding the diagnosis of traumatic brain injuries in children later. What makes this case stand out were the circumstances of Thomas' interrogation, which was videotaped in its entirety. (To watch two extracts that precede the one linked above click [here](#) and [here](#).)

Police isolated Thomas in an interview room. Once he waived Miranda officers interviewed him twice; shortly after his son was hospitalized, for two hours, then on the following day for seven hours. Thomas was relentlessly manipulated using techniques that seem to have come straight out of the “Reid” playbook. Commercially marketed to police agencies, the system instructs detectives to counter all attempts to deny guilt while encouraging suspects to shift blame for their actions and to “bond” with interrogators. Here are some examples from the [above clip](#):

Detective: I thought we had something going on here, I thought we had a little trust-relationship going on...The chief wanted me to arrest you and I convinced the chief that I wasn't going to arrest you...I said “hold on, I dealt with this guy

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[accused] last night and I think he's telling the truth." I put my ass on the line for you...

(Thomas insists he's telling the truth. Detective gets angry, stands up, talks about the baby's severe head swelling, accuses Thomas of lying.)

Detective: It's a lot worse than you make it out to be, a lot worse...You're lying to me, I know it...Adrian, maybe you didn't throw the baby against the wall, maybe you took the baby and went like that (demonstrates with notebook) and threw him in the crib. Maybe you did that...Maybe it wasn't five or six inches, maybe it was five or six feet....Maybe when that baby was crying the other night, maybe you picked that baby up and you slammed it on the bed like that (demonstrates with notebook)...

(Thomas denies it.)

Detective: Remember I told you about post-partum depression...men can go through that too...you've got seven kids and two four-month old babies...you're feeling severe depression right now, you went to the hospital night and said about killing yourself...

(Detective suggests that depression and pressure from family members to get a job might be responsible for what happened. Detective again demonstrates dropping the baby on the bed.)

Thomas: But that's intentional...

Detective: That's not intentional. Maybe you did what you did intentionally, but it's not intentionally to cause the injury that you caused...Adrian, you already admitted that you caused an injury...you threw the baby on the bed Saturday night...

Thomas: It was an accident...

(Detective keeps interrupting Thomas' protests, doesn't let him finish a sentence)

Detective: Look, Adrian, we're trying to make a relationship here...you're lying to me, you're lying to me!

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(Detective hands Thomas the notebook and tells him to demonstrate how he threw baby on the bed. Thomas does so. Detective says he did it harder and has him do it again. Thomas does so.)

Thomas: I didn't do it on purpose, man...

Detective: I didn't say you did it on purpose...

Thomas: What I told you was the truth...

Detective: But there was more to the story...You was afraid to tell me about it because you were afraid I was going to judge you...you were afraid I was going to come after you for that – I'm not. I'm here because you lied to me, Adrian...From day one I said it was an accident...are you suffering from depression?

(Thomas says a bit.)

Detective: We're trying to keep Matthew alive because of what you did...I put my neck on the line to keep you out of jail, all right? I think you owe that to me...

(Thomas says all he did was throw the baby on the bed once.)

Detective: I'm sure that did, but there's more to the story...there's more stuff that I need to know about that caused the severe injury to your son's brain...extreme acceleration, consistent with a 60-mile per hour vehicle crash...you know damned well that [what Thomas admitted to] didn't cause his injury, man...you know that there's more severe acts that you committed against this kid that put him in the hospital...

(Thomas keeps denying but is continuously interrupted.)

Detective: There's going to come a time when someone's going to say "is this man criminally responsible for what happened to that child," are you criminally responsible for it or was it an accident? Did you mean to try to kill this boy?...you know what, I'm your only hope now...you ain't got that many people left on your side, man...I'm the guy that's gonna stick up for you, I'm the guy that's gonna say, "You know what, you've got some psychological problems, all right, and he hurt his kid real bad, but he feels remorseful and he feels sorry" ...I'm the one that's going to talk to the District Attorney for you, all right, you ain't got anyone left going to talk to the District Attorney for you...

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(Thomas becomes more agreeable.)

Detective: You've got a lot of things to worry about. You've got to worry about keeping your son alive...and give me the proper information to relay to the hospital...you think that you're getting a divorce but you know what, if you're a man and you step up and tell me what really happened, your wife may forgive you...and number three, you've got to worry about someone being on your side...if the D.A. wants to press criminal charges against you you're going to need a police officer to say, "this guy's all right..."

(Thomas says that after arguing with his wife he threw down the baby on the bed twice, once on each of two days, Wednesday and Thursday. But the detective insists that something had to have happened on Saturday, the day when the baby was brought to the hospital.)

Detective: Something had to happen on Saturday to make him to start wheezing like that...and make him start getting short of breath and have breathing difficulties...you did it on Saturday too? You was in the bedroom with him crying...

Thomas: Wednesday, Thursday...not Friday...Saturday, I did it too.

Detective: You slammed him on the bed?

(Thomas nods weakly. The detective asks why, and Thomas mumbles a long reply, that things were piling up on him.)

Detective: ...you got frustrated, and for some reason you took it out on...I don't doubt that you love your children...sometimes you hurt the person that you love the most, you know?

(Thomas repeatedly denies throwing the baby on the floor or against the wall.)

Detective: How hard did you throw him on the bed? (Detective hands Thomas his notebook.) Don't try to downplay this and make it like it's not as severe as it is, for we both know you are now finally starting to be honest...start thinking about the negative things that your wife said to you...start thinking about them kids crying all day and all night in your ear, your mother-in-law nagging you and your wife calling you a loser, all right, and let that aggression build up, and show me how you threw Matthew on your bed...don't try to sugar-coat it and make like it wasn't that bad...show me how hard you threw him on that bed...

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(Thomas raises the notebook over his head and throws it on the bed.)

Detective: All three times you did it just like that...

Thomas: Yes...honest to God, that's it...

(The detective approves.)

Detective: ...What you just showed me with how hard you threw him on the bed, that's probably what caused his injuries...on Saturday you picked him up and threw him back down, kind of like taking out your frustration...

There's no doubt that this detective played a scared, exhausted and confused man like a banjo. Of course, that doesn't prove that Thomas lied. Maybe he really did forcefully fling his son on three days, including Saturday. Or maybe after hours of relentless interrogation by a cop who insisted that he was his only remaining advocate, Thomas was ready to say anything.

At an evidentiary hearing a defense psychologist said that Thomas' admissions had been coerced. However, [he was not allowed to testify at the trial](#), as the judge agreed with prosecutors that his conclusions weren't sufficiently scientific. Thomas did testify. He said that he lied to the detective and did nothing that could have caused his son's death.

A New York State appeals court [recently affirmed](#) Thomas' conviction. It ruled that excluding the psychologist was not error, as jurors could decide from the videotapes whether Thomas was coerced. As for the interrogation tactics, the court decided that they were "not of the character as to induce a false confession and were not so deceptive that they were fundamentally unfair and deprived him of due process." [In a different, more recent case, [People v. Bedessie](#), New York's highest court ruled that psychological testimony about false confessions *can* be admitted if relevant. But like *Thomas* it upheld its exclusion, finding that given the facts it was not. See 3/30/12 update, below.]

The justices seemed far more troubled by the dueling medical testimony. In the end they didn't find sufficient grounds to disturb the jury's decision:

All of the experts offered compelling testimony, and the jury's task was difficult. However, the defense experts were not, as a factual matter, more qualified, persuasive or credible, and we cannot say that the jury erred in not finding their testimony more believable or persuasive.

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That's exactly how the U.S. Supreme Court recently settled [Cavazos v. Smith](#). A child died, according to police because her grandmother shook the 7-week old infant to death. Defense medical experts insisted that the infant actually died from an accidental blow, but jurors were unconvinced and convicted Smith of murder. Ultimately, the American Academy of Pediatrics rewrote the syndrome to reflect that blows and disease can mimic the effects of rapid deceleration trauma (click [here](#) for our prior posting.)

On appeal, the Ninth Circuit decided that medical evidence was insufficient to support a finding of guilt to the necessary certainty and reversed. But the Supreme Court reinstated the conviction, ruling that unless juries act irrationally or unreasonably, it's up to them to resolve conflicts between medical testimony.

It's impossible to conclude with any certainty that Thomas and Smith are innocent. Their situations highlight the folly of asking jurors to decide between competing scientific judgments that are to all appearances equally balanced. That was undoubtedly on California Governor Jerry Brown's mind [when he commuted Smith's sentence](#) earlier this week. We'll see whether New York Governor Mario Cuomo is sufficiently troubled by Thomas' conviction to do likewise.

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A VERY *RIGHTFUL* CONVICTION

Crying wolf over a well-deserved conviction

By Julius Wachtel, (c) 2010

During the early morning hours of December 9, 1981, Philadelphia police officer Danny Faulkner, who was white, got into a tussle with a black man named William Cook during a traffic stop. Cook's brother, a taxi driver who had taken on the name Mumia Abu-Jamal, happened to be parked across the street. Shots rang out. Moments later Officer Faulkner lay on the street dying, struck five times, including a fatal shot between the eyes. Abu-Jamal was wounded once, in the chest. Nearby lay a .38 caliber five-shot Charter Arms revolver registered in his name. It held five empty cartridges. William Cook came through it all unscathed.

Abu-Jamal was tried seven months later. Neither he nor his brother testified. The jury, which included two blacks, took three hours to convict him of first-degree murder and two more to impose the death penalty.

Fast-forward twenty years. After losing his State appeals, up to and including the Pennsylvania Supreme Court, Abu-Jamal got a hearing in US District Court. It upheld his conviction but found flaws in how jurors were charged at the sentencing phase. Its decision was upheld by a panel of the [Third Circuit Court of Appeals](#), which ordered Pennsylvania to conduct another sentencing hearing. (It's presently pending.)

The case of Mumia Abu-Jamal may go down as the most bitterly disputed conviction of a black man for killing a white police officer in American history. After more than twenty-five years the tragic episode continues to generate media attention. It's spawned at least three books. In [The Framing of Mumia Abu-Jamal](#), the convict is described as "an articulate, compassionate righter of wrongs." [Killing Time: An Investigation into the Death Row Case of Mumia Abu-Jamal](#), written by a respected investigative journalist, admits that Abu-Jamal might have done it, but even if he did, it probably wasn't first-degree murder. In contrast, the recently released [Murdered by Mumia](#), penned by the officer's widow and a professional writer, declares Abu-Jamal guilty, guilty, guilty.

Of course, there's also a DVD. "[Mumia Abu-Jamal: A Case for Reasonable Doubt?](#)" is an advocacy piece produced for HBO that tries its best to disguise its pro-defendant bias through droll narration and a faux-documentary style.

Just who is Mumia Abu-Jamal? Born in 1954 to a hardscrabble Philadelphia family, Abu-Jamal grew up during a time when many blacks, disenchanted with the slow pace of progress, were spurning mainstream civil-rights organizations such as the NAACP in favor of more radically-minded groups. In his teens Abu-Jamal became active in the Black Panther Party. He later worked as an on-air radio commentator, gaining attention for giving voice to MOVE, an oddball collection of anarchists who kept getting into shoot-outs with police. At the time of his arrest Abu-Jamal was married, working in radio part-time and driving a taxi. He had no criminal record.

Abu-Jamal's arrest, imprisonment and death sentence for this most heinous of crimes came during a period of extreme tension between blacks and authorities. Political activists of all shades seized upon his case as an example of the injustices that beset black America. Civil rights organizations in the U.S. and around the world rushed to take up his cause; attorneys lined up to represent him for appeals. It can be said without irony that for Abu-Jamal prison was in a sense a liberating experience. Freed from the need to make a buck, the gifted intellectual became a prolific writer, authoring numerous essays and several books about race relations and the criminal justice system, including [*Live From Death Row*](#) (1995) and [*We Want Freedom: A Life in the Black Panther Party*](#) (2004). At present Abu-Jamal also does regular podcasts for [Prison Radio](#).

He's a talented person, all right. But did he murder Officer Faulkner? In the eyes of [his supporters](#) he's not a killer but the victim of lying cops, a biased prosecutor, a racist trial judge and indifferent appeals courts.

In the eyes of Officer Faulkner's [former colleagues](#) Abu-Jamal is a cop-killer who needs to die.

Again, what's the evidence? This much is uncontested:

- Abu-Jamal was found leaning against the car that his brother was driving when stopped by Officer Faulkner
- A gun registered to Abu-Jamal was found near him, on the ground. It had five spent rounds. Officer Faulkner had been shot five times
- Officer Faulkner's gun was fired once; Abu-Jamal was hit once

Some might say that all this, together with the fact that neither Abu-Jamal nor his brother chose to testify, leaves painfully little to the imagination. Not according to the defense. It would take volumes to wade through the arguments and counter-arguments,

but the essence of Abu-Jamal's original defense was not that he was innocent (remember, an accused need not prove anything) but that police so botched the investigation that it was impossible to say what actually took place. Hence the DVD's title: reasonable doubt.

For example, at trial the defense argued that a bullet removed from Officer Faulkner was .44 caliber, while Abu-Jamal's revolver was a .38. It turns out that the .44 caliber claim was based on a note made by the medical examiner, who admitted it was a guess and that he didn't really know how to measure caliber. A prosecution [ballistics expert](#) not only confirmed that the bullet was a .38 but that the markings it bore had the same number of lands/grooves and twist as Abu-Jamal's gun. (The bullet was too deformed for further analysis. George Fassnacht, a ballistics expert later brought in by the defense, reportedly refused to examine it.)

Abu-Jamal's appellate team more recently claimed that their client was framed by a cabal of [corrupt cops](#) that conspired to murder Officer Faulkner because they were afraid he would tattle about police misconduct. Abu-Jamal has also offered his [first account](#) of what happened, which omits any mention of his gun. How very convenient.

Yes, LiberalPig's certain that Abu-Jamal is guilty. But why bother posting it? The ground's been covered by others, and far more exhaustively. His concern is that if interest and advocacy groups keep recklessly burnishing the reputation of Abu-Jamal, a *rightfully* convicted man if there ever was one, it will work against the cause of correcting the careless policing and incompetent prosecution that have led to so many *real* miscarriages of justice.

Incidentally, as this is written Dallas County, Texas announced its [latest exoneration](#). Its D.A. has now helped clear *eighteen* wrongfully convicted men since 2001. Look for more on this in the near future.

Posted 12/23/17

ACCIDENTALLY ON PURPOSE

A remarkable registry challenges conventional wisdom about the causes of wrongful conviction

By Julius (Jay) Wachtel. “[Your Lying Eyes](#),” one of this blog’s very first posts, related the stories of three victims of crime. Each was done in not by a crook but by the State. Lousy policing and indifferent prosecution in North Carolina, Rhode Island and California had led to the mistaken arrest and wrongful conviction of [Ronald Cotton](#), an innocent man who wound up doing eleven years for rapes he did not commit, and [Scott Hornoff](#) and [David Allen Jones](#), who were exonerated after serving six and nine years respectively for murder.

One could argue that their endings were more-or-less happy. After all, both Hornoff (a police detective) and Jones had been on track to do life. It’s harder to rejoice about the outcome for many other exonerees. For example, consider [Craig Coley](#), whose [November 2017 pardon](#) by California Governor Jerry Brown took *thirty-nine years* to come to pass. And it’s well-nigh impossible to celebrate the ultimate redemption of Cameron Todd Willingham, whom Texas executed in 2004 for setting a house fire [that experts now agree was accidental](#).

Miscarriages of justice are definitely not going away. According to [the National Registry of Exonerations](#), which tracks such things back to 1989, there have been 681 exonerations during the past five years, including eight-eight in 2013, 135 in 2014, 165 in 2015, 169 in 2016 and 124 so far in 2017. Exonerations are coded as to one or more of six causes: mistaken witness ID, false confession, perjury or false accusation (someone other than the defendant lied), false or misleading forensic evidence, official misconduct (govt. officer significantly abused their authority), and inadequate legal defense.

Except for Willingham, whose official rehabilitation seems unlikely (can you expect Texas to apologize for a wrongful *execution*?) each of the others mentioned above appears in the Registry’s pages. They attribute the conviction of [Cotton](#) to mistaken witness ID; of [Jones](#) to a false confession; and of [Coley](#) to misleading biological evidence. But ex-cop [Hornoff](#)’s case is one of three in 2003, when eighty-one exonerations were recorded, for which no cause is reported. (There have been sixty-nine such cases since 2013, about ten percent of the total.)

Apparently there are causal factors that the registry doesn’t measure. To help fill the gap we offer our favorite: confirmation bias. In “[Guilty Until Proven Innocent](#)” we

defined it as the tendency to “interpret events in a way that affirms one’s predilections and beliefs.” When making decisions fallible humans are always shoving aside niggling inconsistencies and seizing on solutions that reflect their biases, predilections and beliefs. Naturally, in policing the consequences of taking shortcuts can be disastrous. [Here’s an extract from our earlier account](#) about Hornoff:

On August 12, 1989, Warwick, Rhode Island police discovered the body of Vicki Cushman, a single 29-year old woman in her ransacked apartment. She had been choked and her skull was crushed. On a table detectives found an unmailed letter she wrote begging her lover to come back. It was addressed to Scott Hornoff, a married Warwick cop. Hornoff was interviewed. He at first denied the affair, then an hour later admitted it. Detectives believed him and for three years looked elsewhere. Then the Attorney General, worried that Warwick PD was shielding its own, ordered State investigators to take over. They immediately pounced on Hornoff. Their springboard? Nothing was taken; the killing was clearly a case of rage. Only one person in Warwick had a known motive: Hornoff, who didn’t want his wife to find out about the affair. And he had initially lied. Case closed!

Although several witnesses placed Hornoff elsewhere at the time of the killing, his lie apparently doomed him with jurors. He’d still be locked up except that the killer had a conscience. Incredible as it may seem, the real perpetrator eventually turned himself in and confessed.

Wait a minute. Didn’t forensics promise a future free of wrongful conviction? As it turns out, physical evidence is often lacking, and even when it’s present it may not be collected or properly handled. Cotton, Jones and Coley would have never been convicted had officials realized that the materials they gathered actually carried the perpetrators’ DNA. On the other hand, inept application of forensic techniques can make things worse – *much* worse as the Willingham imbroglio illustrates. Indeed, according to the Registry, thirty-six of the 124 wrongful convictions recorded in 2007 (a full twenty-nine percent) are partly or wholly attributable to forensic goofs. It’s not just subjective techniques such as handwriting examination and dog-scent evidence that can cause problems. Sophisticated methods including ballistics, serology and even DNA have also been blamed for “identifying” the wrong person. We recently discussed [a move by the Department of Justice](#) to prevent such blunders by regularizing the work of Federal forensic scientists (click [here](#) and [here](#)). Unfortunately, it seems that politics may have doomed this effort. (For an authoritative assessment of the state of the forensic art check out the National Research Council’s landmark 2009 report, “[Strengthening Forensic Science in the United States: A Path Forward](#).”).

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What can be done to combat miscarriages of justice? We must recognize that some cops, lab employees and prosecutors are careless, take dangerous shortcuts and habitually seize on convenient solutions. And that agencies have fostered such tendencies by emphasizing and rewarding numerical productivity. “What counts” must not simply be “what’s counted.” As our blog [has repeatedly warned](#), one cannot champion crude measures such as number of arrests and expect that employees will exercise good judgment in the field – or the lab.

Still, we’ve always assumed that mistakes which underlie wrongful convictions are usually errors in judgment. But according to the Registry, more than half the blunders this year cross the line into something more. So far in 2017, official misconduct – meaning, *on purpose* – figures as a cause or contributor for seventy-nine of 124 wrongful convictions. That’s a full sixty-four percent. (Perjury/false accusation trailed just behind with seventy-seven exonerations. Inadequate legal defense was a factor in forty-nine, false or misleading forensic evidence in thirty-six, mistaken witness identification in thirty-two and false confessions in twenty-six.)

For a stunning example of how far policing can fall look up this year’s alphabetically first victim of official misconduct: [Roberto Almodovar](#), whose wrongful conviction is attributed to witness coercion by Chicago detective Reynaldo Guevara. According to the Registry, and to [a recent, eye-popping article](#) in the *Chicago Sun-Times*, this was only the latest in a long string of episodes of alleged “bullying” by Guevara. So far his handiwork has resulted in *seven* exonerations and, in 2009, a stunning \$20 *million* civil award to one of the victims. (By the way, Guevara recently took the Fifth, and by that we don’t mean booze.)

Sad to say, this isn’t the first time that a Chicago detective has come under fire for such things. In 2010 [the Feds convicted](#) one-time Chicago police commander Jon Burge “for falsely denying in an earlier civil suit that in the 1980s he and his officers extracted confessions through beatings, electric shocks and suffocation.”

And it’s not just the cops. Check out [“People do Forensics”](#) and [“Better Late Than Never”](#):

The Justice Department and FBI have formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000....The cases include those of 32 defendants sentenced to death. Of those, 14 have been executed or died in prison, the groups said under an agreement with the government to release results after the review of the first 200 convictions.

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Well, there's no need to bully readers: our point's been made. Many miscarriages of justice aren't "accidents": they're the product of willful misconduct. Yet regardless of the justification for using shortcuts – whether it's to assure that offenders are punished, or something more self-serving such as pleasing superiors and gaining recognition – taking the low road is simply wrong. As a quick glance through the Registry reveals, in criminal justice it's also apparently quite common. And until *that* is openly acknowledged, innocents will suffer while the guilty remain free to continue their predations.

Posted 3/1/10

BABY STEPS AREN'T ENOUGH

*Protections against miscarriages of justice
must be embedded within the system*

By Julius Wachtel, (c) 2010

Must someone be factually innocent to be convicted of a crime? If you're a criminal justice major or law student, you know the answer: of course not! All that's necessary is to convince jurors that guilt is evident beyond a reasonable doubt. Once the State meets that threshold, the rules change. In the interests of "finality" – not having to endlessly re-litigate judgments – those convicted by plea or at trial can't simply reargue the facts. To get a second bite of the apple they must demonstrate that their Constitutional rights were severely trampled or find new facts – so-called "newly discovered evidence" – that conclusively demonstrate their innocence.

That's tough to do from a prison cell. Most inmates don't have the resources to rub two nickels together, so hiring lawyers and private investigators is out of reach. But for the "lucky" few there is a way. Since 1989, the [Innocence Project](#) has helped exonerate two-hundred fifty-one persons who were convicted of a crime, often rape, where sufficient perpetrator DNA was left behind to prove their innocence.

As the number of documented wrongful convictions continues to climb, most States (but [not the Supreme Court](#)) have grudgingly conceded prisoners the right to send potentially exculpatory biological evidence to a lab – at their own expense, of course. But what if there's nothing to test? As we pointed out in an [earlier post](#), absent a miracle ([ex-cop Jeffrey Hornoff](#) was in the sixth year of a life term when the real, conscience-stricken killer turned himself in) few are cleared without DNA. State innocence projects are swamped and short-staffed, and given the time-consuming complexities of attacking circumstantial and testimonial evidence they must carefully choose which non-DNA cases to pursue. Even when there is substantial evidence of innocence progress is agonizingly slow. (For example, check out the never-ending saga of the [West Memphis Three](#), now in its sixteenth year.)

It's not only the wrongfully convicted who benefit when mistaken convictions are made right; after all, for each innocent person rotting away in prison a guilty man or woman remains free. Yet criminal justice agencies have resisted the notion that safeguarding the integrity of the process is as important as gaining convictions. Happily, there have been a few exceptions:

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- In August 2009 a Federal magistrate reviewed the evidence against [Bruce Lisker](#), a Los Angeles man who had been in prison for twenty-six years for allegedly killing his mother. After more than a decade of startling revelations, meticulously chronicled in 2005 by the [Los Angeles Times](#), it seemed obvious to everyone but prosecutors that the case should have never been brought in the first place.

Unfortunately, the person most likely to be the murderer had committed suicide years earlier. Recognizing Lisker's dilemma, the judge called the State's bluff and set aside the conviction. Prosecutors grumbled, but in the end decided against a new trial. Lisker was finally free. Of course, he's now suing.

- When [D.A. Craig Watkins](#) came into office in 2007 he discovered that Dallas County led the nation in exonerations. Regrettably, prior administrators were apparently more concerned with running up conviction stat's than with doing justice. Instead of sticking his head in the sand or going into denial the newly-elected prosecutor formed America's first (and apparently still the only) "[conviction integrity unit](#)." Working hand-in-hand with innocence projects, he set out to correct his predecessors' errors.

In October 2009 Dallas celebrated its [twenty-first and twenty-second exonerations](#), of two men who were wrongfully convicted of a 1997 murder. Notably, these also happened to be the first two Dallas exonerations where DNA didn't play a role.

- On February 17, 2010 a panel of North Carolina judges reviewed the 1993 murder conviction of [Greg Taylor](#). Now 47, Taylor had been locked up for twenty-seven years for murder. Had Taylor been a citizen of any other State he'd be out of luck, as he had exhausted his appeals and there was no DNA. But in 2006 North Carolina established the nation's first (so far, only) statewide [Innocence Commission](#), empowering it to act as "an independent and balanced truth-seeking forum for credible claims of innocence." A recourse of last resort, the Commission employs a full-time staff of attorneys and investigators who investigate claims of actual innocence. Those deemed meritorious are referred to a three-judge panel, which makes the final decision.

Since 2007 the Commission has reviewed more than 500 applications and investigated five. Taylor's case was only the second to be sent on to the judges. In their first-ever exoneration, the jurists ruled that Taylor had been convicted on the basis of incorrect physical evidence and witness testimony, including

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“misinterpreted” behavior by a canine and a police officer’s false assertion that blood was found in Taylor’s vehicle. Taylor was freed.

For lack of a suitable example we left out the police, where nearly all miscarriages of justice have their root. After all, there would be no wrongful convictions without a mistaken arrest. However, we know of no law enforcement agency that has made a special effort to monitor and review prosecutorial referrals so that innocent persons aren’t needlessly placed at risk.

When pressed to account for its mistakes, the criminal justice system typically responds by pointing out that [very few exonerations](#) take place. What’s ignored is that there would likely be many more but for the fact that innocence must be proven to a certainty that far surpasses what’s required to convict. In most cases there’s no DNA. What’s more, few inmates have the resources to take on the State, and even if they could, discovering compelling new evidence long after the fact may be impossible.

Compassionate judges, enlightened D.A.’s and statewide commissions are welcome, but they’re only baby steps. What’s needed is a formal approach, perhaps patterned after Dallas’ “conviction integrity” model, that embeds active protections against miscarriages of justice within every agency, from police to the courts. Surely, getting at the truth benefits everyone. It’s the smart way to fight crime.

Posted 3/2/2008

BELIEVE IT...OR NOT!

***Despite prosecutors' best efforts,
a wrongfully imprisoned woman gets a break***

By Julius Wachtel, (c) 2010

No one's surprised anymore when some poor soul is let out from prison after serving a decade or more for a crime they didn't commit. When news broke last November of the release of [Lynn DeJac](#), 44, what seemed most noteworthy wasn't that she spent nearly fourteen years behind bars wrongfully convicted of murdering her daughter, but that she was the first woman to be freed by DNA evidence. Actually, her release had been bitterly opposed by the D.A., who until earlier this month held on to the fiction that DeJac was guilty even though the evidence pointing elsewhere was overwhelming. But we're getting ahead of the story.

["Her mother liked good times and bad men."](#) That reputation, detectives now say, was what turned jurors against DeJac. Even in her hardscrabble Buffalo neighborhood it was considered bad form to stay out all night partying and leave 13-year old Crystallynn and 8-year old Ed to fend for themselves (their father was in prison for molesting the girl). So when Crystallynn was found strangled to death early one morning in February 1993 suspicion quickly fell on her mother. It didn't help that a male neighbor who once lived with DeJac said that she didn't deny killing the child. Still, evidence seemed wanting until a local hoodlum awaiting trial for forgery came forward to say that DeJac confessed to him in a bar.

There was also a spurned lover, Dennis Donohue. DeJac had taunted him the night of the murder by kissing another man, prompting Donohue to chase them around town and at one point even hold a knife to his rival's throat. Prosecutors deemed Donohue's account of DeJac's comings and goings sufficiently important to grant him immunity, an odd decision that would come back to haunt them years later.

In September 1993, while DeJac was still free, a 42-year old Buffalo woman, Joan Giambra, was strangled to death. That she had been dating Dennis Donohue raised a few eyebrows, but as there was no evidence tying him to her murder the case stalled. Then DeJac went to trial. Despite a lack of physical evidence she was convicted and got 25 to life. With Crystallynn's killing "solved" and the Giambra case gone cold the police turned to other things.

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Twelve years later Buffalo PD reinstituted its cold case squad. [DNA](#) recovered from Giambra's fingernails was analyzed using new, more sensitive techniques; as detectives hoped, it matched Dennis Donohue. He was arrested for murder and jailed. DeJac's lawyers, assisted by the [Innocence Project](#), demanded that Donohue's DNA be compared against DNA found at the scene of Crystallynn's killing. Again, there was a match.

DeJac was granted a hearing. The judge -- the same who presided at her trial -- excoriated prosecutors, openly challenging their kid-gloves approach to the man whom everyone assumed killed both young Crystallynn and Giambra. But the D.A. insisted that nothing uncovered so far proved that DeJac was innocent. Incredulous, the judge ordered DeJac released and the charges dismissed. The D.A. insisted he would refile. [Local media](#) went crazy. Even detectives got into it, publicly calling DeJac innocent, the witnesses against her liars and Donohue everything short of guilty.

That wasn't the end of it. Prosecutors were now faced with a case they couldn't possibly win. That's when Dr. Michael Baden, the forensic pathologist who testified that Phil Spector's girlfriend shot herself, rode to the rescue. Asked by the D.A. to review Crystallynn's autopsy, the man mocked by the *Buffalo News* for twisting facts to suit his clients' needs determined that she hadn't been strangled after all! Instead, her death was supposedly due to an [overdose of cocaine](#). His improbable findings were parroted by the current medical examiner, who blamed a combination of cocaine and head trauma. Then another in Spector's stable of experts, Dr. Werner Spitz, threw a curve, saying that he didn't think there had been enough cocaine in Crystallynn's system to kill her. But after receiving "additional" evidence he supposedly changed his mind.

On February 28, 2008 the ticking time bomb was defused. Citing their experts' conclusions, prosecutors [dismissed the case](#) against DeJac, not for insufficient evidence, but because no crime had been committed! Ergo, there was no longer any need to concern oneself with Donohue, a good thing since he had been immunized. That didn't sit well with cold case squad detective Dennis Delano, who promptly gave the press a [police crime scene video](#) demonstrating that Crystallynn's room had been upturned in what any reasonable person would conclude was a struggle. Delano was promptly relieved of duty, an instance of what local reporters called a cop being punished for daring to tell the truth. And not just any cop, but a celebrated veteran who in 2007 helped free [Anthony Capozzi](#), a man who spent 20 years in prison for two rapes he didn't commit.

Donohue's trial for killing Joan Giambra is pending. Oh, did we say that he's also suspected in a [1975 strangling](#)? But that's a story for another day.

Posted 11/23/08

CAN WE OUTLAW WRONGFUL CONVICTIONS?

Are sequential, double-blind lineups really the answer?

By Julius Wachtel, (c) 2010

“I think because of the outrageous number of wrongful convictions in Texas, it's time to begin the dialog.” That’s how [State Senator Rodney Ellis](#) explained the purpose of a package of bills that would establish a Texas “[Innocence Commission](#)” and require that police follow strict procedures when investigating felony crimes to avoid making tragic mistakes.

What rules does he propose? For confessions to be admissible, custodial interrogations would have to be [recorded](#) in their entirety. [Photographic and in-person lineups](#) could only be done in certain ways. Photos would have to be displayed to eyewitnesses sequentially rather than in a group, and only by someone unaware of the real suspect’s identity. Although there’s no specific mention of this in his bills, Senator Ellis also proposed to [ban showups](#) -- one-on-one identifications done soon after a crime occurs.

No one can deny that the Senator has a righteous cause. According to the [Justice Project](#) Texas leads the nation in the number of wrongful convictions. Surprisingly, one of the leaders in correcting the problem is a Texas official, Dallas County District Attorney [Craig Watkins](#), whose office has helped exonerate nineteen wrongfully convicted Texas men since 2001. Most fell prey through [misidentification](#).

Traditionally, photo lineups have been administered “simultaneously.” A photo of the suspect and (normally) five “fillers,” look-alikes not suspected of the crime, are randomly arranged on a cardboard backer and shown to the witness all at once. Police call these “sixpacks” or “photospreads.” When advances in DNA analysis brought to light the sobering fact that wrongful convictions were not rare, and that most were due to misidentification, reformers started pressing for changes. Police were urged to display photos sequentially, meaning one at a time, as viewing them together allowed witnesses to compare images and choose the one that looked “most” like the suspect. Critics also demanded that the process be “double-blind,” meaning that those administering lineups not know who the suspect is or even which photo they are setting out, thus keeping them from subtly suggesting whom to pick and whom to avoid. Police generally resisted modifying their procedures, leading frustrated advocates to lobby legislators. Thus far a

few States (e.g., [North Carolina](#)) have incorporated the sequential, double-blind procedure into law.

In 2006 a monkey wrench got lobbed into the mix. In the first major study of photo lineup procedures used by real officers in real cases, conducted in Illinois, [researchers concluded](#) that the *simultaneous* technique was superior, proving *more* likely to identify perpetrators and *less* likely to produce mistaken ID's (the dreaded "false positives") than the sequential, double-blind approach.

Whether photographic or in-person, lineups can go astray in two ways. In a "Type 1" error witnesses simply fail to identify anyone, including the culprit, thus letting a bad guy go free. That's not nearly as nasty as a "Type 2" error, in which an innocent person is mistakenly identified. When the above report came out reformers denounced its conclusions because officers who administered photos *simultaneously*, in the old-fashioned way, weren't kept ignorant of who the real suspects were. Maybe they got better results because they subtly steered witnesses away from fillers!

That debate still rages (for the Illinois research team's response to the nay-sayers, click [here](#).) Meanwhile a noted authority on witness identification has reported [little difference](#) between lineup techniques even when giving great weight to preventing Type 2 errors. More interestingly, he also concluded that as the probability that the real evildoer is in the lineup increases the simultaneous technique actually takes the lead in accuracy.

But wait a minute: why wouldn't the bad guy (or gal) *be* in the lineup in the first place? Consider these possibilities:

- Detectives have substantial information pointing them to a specific suspect, above and beyond a witness description. They build a photo lineup around this person.
- Detectives don't have a specific someone in mind. Assembling a physical and behavioral profile of the perpetrator from witness descriptions, they troll through the "usual suspects" looking for a fit. Finding a likely candidate, they assemble a photo lineup around that person.

Which scenario yields greater confidence that the identification is correct? That's a no-brainer. When a witness picks out someone who's a suspect for reasons other than their physical description the probability of error seems remote. Difficulties mostly arise in "whodunits," where cops have nothing concrete to go on other than a description. Consider this all-too typical example:

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On December 11, 1980 a holdup man killed the manager of a fast-food restaurant in Orange, California. Suspecting it was a gang member, police got numerous photos from LAPD of gang members with previous armed robbery arrests. One, of [DeWayne McKinney](#), was placed in a photo lineup and shown to restaurant workers. Although McKinney was considerably shorter than the witness description, he was identified by four employees. McKinney was convicted and got life (the prosecutor asked for a death sentence.) He was freed nearly nineteen years later when two inmates admitted they committed the robbery and identified another prisoner as the shooter. Two of the four witnesses who sent McKinney up the river then looked at this man's photograph and said that, indeed, he was the killer – not McKinney. McKinney's lawsuit against police was settled for \$1.7 million. He married and became a wealthy entrepreneur in Hawaii. (He died in October 2008 in a scooter accident.)

What's the moral to the story? Precisely how a lineup is administered isn't the most crucial thing to consider. Sure, police shouldn't be suggestive. But if the goal is to catch criminals while minimizing the possibility of snaring the innocent, cops shouldn't even think of staging a live lineup or showing photos unless there is substantial information linking someone to the crime. What's sufficiently "substantial" is a matter of judgment that comes with education, training and experience. It's not something that can be easily articulated in a legislative bill.

So what about show-ups? Recording interrogations? Stay tuned!

Posted 12/7/08

CAN WE OUTLAW WRONGFUL CONVICTIONS? (PART II)

Legislator proposes banning showups and recording all interrogations

By Julius Wachtel, (c) 2010

Do you enjoy getting scared out of your wits? Then you'd love the Lone Star State. According to the [Justice Project](#), the place that gave us the groundbreaking horror film [The Texas Chainsaw Massacre](#) has been at the forefront of another spine-tingling exercise: [locking up the innocent](#). For an example that will stand your hair on end look no further than [Billy Miller](#).

No one claims that Billy was a nice guy. In 1983, on parole for armed robbery, he was staying with friends when early one morning police came knocking. They were looking for a suspected rapist, although with a different first name. At 3 a.m. cops had Miller step outside for a "showup," a one-on-one procedure commonly used soon after a crime occurs. The victim, who was sitting in a patrol car, instantly identified him. He was convicted and spent twenty-two years in prison before DNA tests proved his innocence. The woman who pointed him out has since gained a lengthy record for prostitution and other minor crimes.

At least [three of the 18](#) wrongful convictions uncovered in Dallas County during the past years were caused by flawed showups. Critics of the procedure argue that presenting only one person for a look-see is unduly suggestive. As Miller's case demonstrates, bringing the witness to the suspect (instead of the other way around), as the [National Institute of Justice](#) recommends, may not be enough. Texas State Senator Rodney Ellis, who recently introduced a package of bills to reform his State's justice system, has gone so far as to suggest that [showups be banned](#) altogether.

What's wrong with that? Consider the environment of policing. Officers frequently encounter persons matching suspect descriptions in the vicinity of a crime. Sometimes they're in a vehicle, sometimes on foot. Under the rules of [stop-and-frisk](#) police can temporarily detain persons if there is reasonable suspicion that they committed a crime. Doesn't it make sense to bring a victim or witness by for a look, right then and there? Sure, officers can take a picture, let the suspect go and show the victim or witness a photo lineup later. But by then the witness's memory will have faded and the

perpetrator -- if indeed he or she is the guilty party -- will be long gone, along with any evidence that prompt action might have turned up.

Instead of recommending that showups be done away with altogether the National Institute of Justice has offered [guidelines](#) to reduce their suggestibility. It's advised, for example, that suspects not be viewed while seated in the back of patrol cars, and that if there are multiple witnesses only one participate in the showup while the rest view photo lineups. And of course police should admonish the witness that this might not be the right person, take careful notes of what's said and even record the event.

Recording showups? Well, why not? As cases move through the system subtle pressures from police and prosecutors can make witnesses overconfident, turning a tentative "maybe" into a definite "that's the one!" Taping their initial reaction preserves an unimpeachable record of the original degree of certainty should it inflate over time.

Taping police-citizen encounters has become routine. Many officers carry miniature recorders and drive patrol cars with video cameras. Interview rooms equipped with recording devices are commonplace. Concerns that improper questioning techniques can precipitate false confessions have led a few States to enact laws that strongly encourage recording interrogations. [Maryland](#) police must "whenever possible" make "reasonable efforts" to record in-custody interrogations of persons charged with murder and rape. [Nebraska](#) has a similar law that applies only to "places of detention." Police in [Washington D.C.](#) must record custodial interrogations of persons charged with crimes of violence, but only when a suspect is interviewed in a room that has the appropriate equipment.

[Senator Ellis has introduced a bill](#) that would ramp things up a significant notch, at least in Texas. Police would be required to record all "custodial interrogations" for felony crimes, period. On pain of inadmissibility, entire interviews would have to be recorded, not just the actual confessions. But imagine that a patrol officer detains someone in the field. Although "custodial" has a broader meaning than arrest, the legislation leaves both "custodial" and "interrogation" undefined and makes no exception for place or circumstance. Accordingly, questioning anyone who may have been involved in wrongdoing without whipping out a tape recorder would invite litigation. It's just such ambiguities that cause experienced officers to shake their heads.

There is another pressing issue. Interrogations can continue for hours and, occasionally, days. But busy prosecutors and public defenders don't have the time to watch videos and listen to tapes. If the Senator's bill passes as written detectives couldn't file the simplest felony case without sending along verbatim transcripts, and in complex cases or those with multiple suspects, reams of transcripts. Departments

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would require legions of secretaries to commit interrogations to paper. Who would pay? If “custodial interrogation” means what it seems to mean one thing is certain: should the bill become law police will probably do a lot less of it.

Neither is recording a panacea. It seems that something always “happened” before the cameras started rolling. And even if everything is captured on tape, whether questioning was unduly coercive or suggestive isn’t always clear. In 1993 [three Arkansas teens](#) were convicted of the brutal murder of three boys in what police described as a “Satanic ritual.” Two of the accused got life and one was sentenced to death (they are still in prison awaiting the outcome of appeals.) There were no witnesses or physical evidence. Instead, the convictions were due to a taped [confession](#) by one of the accused, a developmentally disabled youth who was interviewed outside the presence of his parents or a lawyer. His account, which he has since recanted, was preceded by hours of interrogation that weren’t recorded and, if one believes the detectives, in which no notes were kept. What’s more, as a defense expert pointed out, a transcript of what *was* taped has police repeatedly -- and successfully -- prodding the teen to change his responses so they are consistent with their theory of the case. It’s impossible to watch the court video (included in a [commercial DVD](#) of the case) without taking pity on the pathetically vulnerable youngster as he struggles to please the cops. In the end his “confession” was admitted as evidence, with catastrophic consequences for himself and his friends.

Technology can help. But at the end of the day the best “cure” lies in the knowledge, skills and abilities of police and prosecutors. Given the perils of witness identification and confessions, it’s appalling that few if any agencies have incorporated what’s known about these pressing issues into pre-service and in-service training. Remember that for each innocent person convicted a guilty person goes free. Considering the imperatives of public safety, the practicalities of law enforcement, the limits of law and technology, and the difficulty (some would say, futility) of promoting change in the insular worlds of policing and prosecution from the outside, it seems more important than ever to spur reform from within.

Is anyone listening?

Posted 9/8/21

DAMN THE EVIDENCE – FULL SPEED AHEAD!*

*Lousy policing and thoughtless prosecution
cost three innocent men decades in prison*



For Police Issues by Julius (Jay) Wachtel. Virginia offers [three kinds of pardons](#): simple, conditional, and absolute. That last type can only be issued “when the Governor is convinced that the petitioner is innocent of the charge for which he or she was convicted.”

Needless to say, absolute pardons are rare. Yet within a recent thirty-day period [Governor Ralph Northam granted three](#). Two of the beneficiaries had been convicted of murder: Emerson Stevens, for abducting and killing a rural Virginia woman in 1985, and [Joseph Carter](#), for bursting into a Norfolk motel room in 1989 with an accomplice and robbing and killing an occupant. The third, [Bobby Morman, Jr.](#), was convicted of being the triggerman in a 1993 Norfolk drive-by shooting that fortunately injured no one. Here are some of the pertinent details:

Emerson Stevens

(click [here](#) for the *Washingtonian*’s comprehensive two-part account.)



Mary Harding, a rural Virginia bookkeeper, disappeared on a day in 1985 when her husband, a fisherman, was reportedly at sea. Four days later her decomposing body was found in a marsh. It had been weighted down with a cinder block. Her back bore deep slashes, and a rope and chain bound her neck and right leg.

There were no obvious leads. But Mary’s husband said that a local fisherman, Emerson Stevens, a “loner and a drinker,” had been at Mary’s funeral and seemed “shaken.” A neighbor mentioned that she

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once caught Stevens looking through her bedroom window. And that was pretty much it.

When questioned, Mr. Stevens told the detective that he was home all of that fateful day, and repeated his assertion when polygraphed. But when informed that he failed, Mr. Stevens changed his story. He said that he actually drove to his sister's that day and briefly parked near the victim's home to urinate. Analysts found a single strand of hair in Mr. Stevens' pickup. Using microscopy they matched it to the victim.

Stevens was tried for murder. One expert confirmed that damning match. Another testified that a specialized hunting knife Stevens was known to carry could have inflicted the slashes. And another suggested that the victim's body could have floated from Mr. Steven's dock to where it was recovered, ten miles away. Mr. Stevens testified. He admitted lying to the detective, but only to get him "off his back." As for the knife, he said he had lost it. Several defense witnesses swore that they had dinner with Stevens that evening, and wife confirmed that he was home that night.

Jurors hung. But on retrial one of Stevens' cousins testified that he saw the defendant's truck at the victim's home on the day of her disappearance. Worse still, Mr. Stevens was again caught lying, this time on the stand. It turns out that he didn't "lose" the knife: his father testified he threw it out because his son "was hassled so bad."

Mr. Stevens was convicted of murder. In 2009, nearly a quarter century after his imprisonment, the Virginia Innocence Project took on his defense. And in time they thoroughly debunked the State's case. Only two years after Mr. Stevens' conviction, the cousin who supposedly saw his truck at the victim's home pled guilty to obstructing justice for testifying that he never asked about a \$20,000 reward offered in the case (in fact, he repeatedly did.) And the State withheld material evidence that contradicted their case. An FBI report estimated that the body floated no more than 600 yards. The medical examiner was now certain that the slashes weren't produced by a knife, but were inflicted by a boat propeller after Mary's death. Over the years, microscopic hair comparisons had led to many wrongful convictions [and were thoroughly discredited](#).

Thanks to the project's work [Mr. Stevens gained parole in May 2017](#). Three years later a Federal appeals court [affirmed his right to pursue a claim](#) that Virginia violated his right to a fair trial (956 F.3d 229, 2020.) Here's what one of the Judges wrote:

There is now no reliable physical evidence, the prosecution's theory that Stevens's knife caused the back wounds is no longer viable, the jury could seriously question at least one prosecution witness's credibility based on his false testimony, and the FBI report at least makes the prosecution's theory that the body traveled ten miles much more difficult to believe...At a minimum, Stevens

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has made a prima facie showing that, based on the evidence as a whole, no reasonable jury would have convicted him of this crime.

Joseph Carter

(click [here](#) for the National Registry account and [here](#) for the UVA summary)

What's known for certain is that on November 19, 1989 two men burst into a Norfolk motel room and robbed its occupants, stabbing one dead and clubbing the other. When first questioned, neither the survivor (he said both his assailants were masked) nor a female resident of the motel who got a glimpse of the duo (she said neither was masked) said they knew either of the robbers. Crime scene investigators found fingerprints in the room. They belonged to a known local man, Mark Pavona.



Pavona was interviewed by detective Glenn Ford. He denied being involved. However, Pavona said that two acquaintances, Joseph Carter and Brian Whitehead had told him that they planned to commit the robbery. Detective Ford displayed their photos to the survivor and the witness. Both identified Joseph Carter as one of the assailants.

Physical evidence was otherwise lacking. At trial neither the survivor nor the witness could identify Whitehead. So he was acquitted. But both positively identified Carter. They conceded knowing the defendant, who had once lived at the motel. In fact, the witness said that she spoke with Carter's wife about the crime on the day after. As for the survivor, he admitted not recognizing Carter when he was supposedly masked. But in court, his "body shape" and "the way he spoke" cinched it. It was Carter, allright.

Carter and his wife testified that they were home with their kids when the murder occurred. But that wasn't enough to carry the day, and jurors convicted Carter of murder.

In 2011, as Carter began his second decade of imprisonment, the investigating detective, Glenn Ford, then retired, [was sentenced to twelve and one-half years in Federal prison](#) for extorting money from drug dealers while he served as a cop. By then his reputation had been shattered by the notorious "[Norfolk Four](#)" case, in which he gained the convictions of four Navy vets for a 1997 rape/murder by hounding them into falsely confessing. (They were conditionally pardoned in 2009 and fully exonerated in 2017.

Ford's downfall reignited things, and the Virginia Innocence Project took on Carter's defense. Pointing out some glaring flaws in the ex-detective's work – for example, he didn't investigate Pavona, whose fingerprints were found in the room – they secured Carter's parole in 2016. Two years later the female witness admitted that she had succumbed to pressure to identify Carter. "The truth is that I have no idea who committed this crime, because I did not get a good look at either man."

Bobbie Morman, Jr.

(click [here](#) for the National Registry account and [here](#) for the UVA summary)



On August 4, 1993 gunfire erupted from a car occupied by several young men as it passed by a Norfolk residence. Three persons were standing outside; fortunately, none were struck. Each told police that the gunman was Bobbie Morman, Jr.

Mr. Morman went to trial. His accusers' accounts varied. One, who initially told authorities that she didn't see Bobbie Morman's face, testified that she was certain that he pulled the trigger. A second witness testified that he "figured" it was Bobbie Morman. When cross-examined, he conceded that he "was not exactly" sure. But the third witness was certain that the shooter was Morman.

Surprisingly, all of the vehicle's occupants testified. Each denied that the defendant had been in the car. One, Glen Payne, swore that *he* did the shooting and his companions confirmed it. Another defense witness said that he and the accused were playing video games at the time of the shooting. All this affected the jurors, who posed many questions to the judge during deliberations. But they nonetheless convicted.

In 2014, as Bobbie Morman began his second decade in prison, Mr. Payne, the confessed triggerman, [told a television host](#) that, as he had said "time and time" again, *he* was the shooter. He had only intended to scare, not to harm: "I shot in the air, just to scare them...No one was hurt... Bullets in the air...Pow...That`s all it was."

That got the Virginia Innocence Project involved. Mr. Payne informed them that Bobbie Morman's lawyer had passed on instructions to not contact the police before the trial. As for the witness who "figured" the shooter was Bobbie Morman, he was now "even less less confident that I was right." All that had an effect, and Morman was paroled in 2016.

In Virginia qualifying for an “absolute pardon” requires that applicants have pled not guilty (that is, were convicted at trial) and always asserted their innocence. That describes the Norfolk Three. Yet it took decades for justice to prevail. Mr. Stevens was released thirty-one years into a 164-year term. Mr. Carter served twenty-six years of a sentence of two life terms plus 30 years. Mr. Morman, who wasn’t accused of hurting anyone, served twenty-three years, nearly half of his stiff, 48-year term.

How did three innocent men get locked up? After all, their culpability seemed questionable from the start:

- Of the three, only Mr. Stevens was connected to the crime scene by physical evidence. Still, that microscopic hair match proved by itself insufficient. Two decades after his conviction, innocence project lawyers learned the rest of the story. [“A box of potentially exculpatory case evidence”](#) replete with materials that Stevens’ lawyer never saw contradicted prosecution assertions about the wounds on the victim’s body and, as well, put the lie to its ten-mile voyage.

And there was more. According to [an in-depth piece in the *Washingtonian*](#) there were at least three very “viable” suspects other than Stevens, most prominently the victim’s husband. A potential witness had also complained that the investigating detective pressured him to lie about Stevens’ whereabouts during a critical timeframe (he was offended and refused.) Indeed, coercion seemed part of that cop’s toolbox. Years later a judge would excoriated the same detective for mercilessly bullying a 65-year old woman into falsely confessing to murder.

- Witness intimidation also helped doom Joseph Carter. According to the Virginia Innocence Project, “coaxing, pressuring, and even threatening witnesses to obtain the evidence and testimony necessary to secure convictions” [was how Norfolk P.D.’s Robert Ford went about his business](#):

“There was no physical or forensic evidence tying Mr. Carter to the murder; the Commonwealth instead relied solely on tainted witness testimony obtained by disgraced former Norfolk Detective Robert Glenn Ford and his partner. Instead of taking time to sufficiently investigate the murder, or critically evaluate witness testimony, the Commonwealth permitted Detective Ford to elicit false witness testimony that wrongfully implicated Mr. Carter in a crime he did not commit.”

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In his pardon message, Governor Northam noted that the detective “used his official capacity to extort witnesses in order to yield high solvability percentages.” After gaining Mr. Carter’s conviction he went on to persecute (and prosecute) the “Norfolk Four,” a notorious case that in time sealed his reputation.

- Mr. Morman faced far less serious charges. But as we suggested in [“The Usual Suspects”](#), having a prior felony conviction puts defendants in a fix. Among other things, it can be used to impeach their testimony should they take the stand. And Mr. Morman’s alleged wrongdoing seemed virtually identical to the conduct that brought on that earlier conviction. (It was for “attempted malicious wounding.”)

That made for a heavy lift. It undoubtedly blunted the force of the testimony by the car’s occupants. Mr. Morman was also poorly served by the legal system. Mr. Morman’s lawyer reportedly advised that Glen Payne, the self-professed shooter, should wait until the trial to tell his story. Had Mr. Payne promptly alerted police, as he later said he intended, prosecutors would have had time to look into things. But that surprise testimony likely affected the judge, whose comments to Mr. Morman at sentencing (e.g., “Who do you think you’re talking to? I’ve taken time to listen to your parents and all the other witnesses...You asked for a jury trial, and you got a jury trial...”) reflected a great deal of skepticism. We’re not suggesting that Mr. Morman was a “nice” guy, but forty-eight years for a shooting that hurt no one seems exceptionally stiff.

Good old-fashioned police work would have spared our three victims. But posts in our [“Quantity and Quality”](#) special section sound a deep note of warning. For example, [“Why do Cops Lie?”](#) focused on two eye-popping examples from the Big Apple: detective Louis Scarcella, whose “propensity to embellish or fabricate statements” led to the reversal of eight convictions, and detective Kevin Desormeau. “Once regarded as among the city’s most effective street cops,” [Desormeau was ultimately convicted of lying to a grand jury](#) for falsely testifying that he witnessed a sale of drugs.

Why do detectives go astray? Let’s self-plagiarize. When serious crimes aren’t promptly resolved, pressures mount from within and outside the ranks, to say nothing about forces within oneself. That’s when “confirmation bias,” the natural tendency to “interpret events in a way that affirms one’s predilections and beliefs” rears its ugly head. Should detectives fall prey, they may accept “evidence” that might otherwise seem sketchy or implausible ([“House of Cards”](#) and [“Guilty Until Proven Innocent”](#)). And as our self-professed guardians rush along, pressuring witnesses and turning “maybe’s”

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into “yes’s”, what’s inconsistent must be disputed or ignored (“[Can We Outlaw Wrongful Convictions II](#)”). That’s how a “house of cards” gets built (“[The Ten Deadly Sins](#)”).

We left out a tricky part of the puzzle: officer differences. In the writer’s twenty-plus years of investigating crime, nearly every cop and Fed with whom he worked was honest and trustworthy. Yes, there were a (very) few exceptions, whom he studiously avoided. In our experience, the NYPD detectives mentioned above are far from the norm. Yet as we recently set out in “[Third, Fourth and Fifth Chances](#)”, some agencies seem unwilling to reign in cops who repeatedly misbehave. Getting an agency to question the practices of highly “successful” detectives who repeatedly solve serious crimes may be tough. You see, that same “confirmation bias” – and self-interest – affects superiors, indeed, [the whole chain of command](#).

We’ve also ignored another difficult issue. Abundant evidence can point the wrong way. It took three trials before jurors convicted [Horace Roberts](#). Set up by his lover’s husband and another man, [who allegedly fabricated enough evidence to distract police from their own culpability](#), Mr. Roberts spent more than twenty years wrongfully locked up for murder. Yet according to the California Innocence Project, [it wasn’t the cops’ fault](#):

Mr. Harris [the victim’s husband] actually set our client up. It was evidence that was fabricated by, we believe, the actual killer. On top of that...he actually had the audacity to come in and testify at our client’s parole hearings, that he be kept in prison longer...it’s certainly something can’t be put on the police department or the district attorney’s office in terms of evidence; it was evidence that was actually fabricated.

However, we continue to be skeptical that cops and prosecutors did such a great job to start with. It seemed to us that the case against Mr. Roberts, which relied exclusively on circumstantial evidence, was thin to start with. That, after all, is why two juries couldn’t agree. This concern – that appearances *can* and often *do* mislead – [underlies the present struggle between cops and prosecutors in Chicago](#) over an August 15, 2021 shooting that killed a 7-year old girl and wounded her 6-year old sister. Police claim that their case against the alleged murderer, a parolee, is “solid”: prosecutors disagree. So the cops are threatening to go to court *without* the lawyers. That’s a really, *really* rare step. And if there eventually is a conviction, we hope that there will never be a need to examine how yet another miscarriage of justice came about.

Really, when one considers public and agency pressures to solve serious crimes, and the personal idiosyncrasies of cops and prosecutors alike, it may seem a miracle that wrongful convictions aren’t an everyday occurrence. That they’re not supports your

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writer's belief that a sense of craftsmanship still prevails in policing. Insuring that this continues, and that careless practitioners and possible lapses are promptly brought to light, is every cop's Job #1.

* With apologies to Admiral Farragut for filching his classic line: "Damn the *torpedoes*, full speed ahead!"

Posted 12/7/10

DEAD MAN WALKING

***Kevin Cooper has had his appeals.
Guilty or not, he will soon meet his maker.***

By Julius (Jay) Wachtel. During the late evening hours of June 4, 1983 one or more persons slipped into a suburban Southern California home and brutally hacked to death a man, his wife, their ten-year old daughter and an eleven-year old neighbor boy who was spending the night. The couple's eight-year old son was grievously injured but survived.

A hatchet used in the brutal killings was located nearby. One week later the victims' station wagon was found abandoned in another city.

It took police only hours to identify the suspect. Two days earlier Kevin Cooper, an inmate doing time for burglary, had walked away from a nearby prison. Cooper had previously spent time in a mental institution and had also kidnapped and raped a teenager. Seven weeks later police in a coastal community ran across Cooper while investigating another rape. He had traveled to Mexico and was working on a sailboat.

Cooper denied killing anyone. But the evidence against him was compelling. A blanket with his semen was found in a vacant home only yards from the victims' house. He had used a telephone there to ask friends for money. Officers at the murder scene found a drop of blood on a wall. They also seized a blanket that was later found to bear a bloody shoe print. DNA was not yet in use, but a criminalist testified that in both instances the blood residue was consistent with Cooper's blood type.

Not everything pointed to Cooper. Four days after the crime a local woman turned over a pair of bloody coveralls that she said her ex-boyfriend, convicted killer Lee Furrow, left behind at her home on the evening of the murders. Police considered her a "scorned woman" and destroyed the coveralls without having them tested. Furrow was interviewed and denied everything.

The survivor's initial comments suggested that there were three assailants. A cop who accompanied him to the hospital said the boy indicated through hand-squeezes that three white men were responsible (Cooper is black.) The child later told a psychiatrist it was actually "three Mexicans." Another officer reported that the boy said it wasn't Cooper when his face was displayed on TV. A vehicle resembling the station wagon was seen leaving the area of the crime. It had three or four passengers. And so on.

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Prosecutors vigorously challenged all explanations inconsistent with guilt. After all, Cooper was a violent man and a prison escapee; he was also in the area during the period when the killings occurred. It took five days and many ballots, but jurors ultimately convicted. The California Supreme Court turned Cooper away in 1991. Federal appeals were to little avail, and the U.S. Supreme Court declined to hear his case late last year.

Cooper is a dead man walking.

Actually, he would have been executed six years ago but for a [last-minute reprieve by the Ninth Circuit](#), which ruled that prosecutors had violated *Brady* by failing to turn over a potentially exculpatory statement. (This was Cooper's second go-round with the Ninth Circuit. His first appeal was rejected out of hand.)

Justices ordered a District Court review. By then DNA tests had been run on the blood drop on the wall, on a bloody t-shirt found near the scene, and on the blanket. Each positively identified Cooper as the donor.

Predictably, in 2005 a District Court judge gave Cooper a big thumbs-down. Back at the Ninth, a three-judge panel concurred. Disturbed by the many defects in the investigation, a justice asked that the Circuit hear the case *en banc*. They put it to a vote and a majority said no. So the justice wrote an exhaustive, bitter dissent in which three colleagues joined. Its opening sentence, "The State of California may be about to execute an innocent man," set the tone. Here are some of his points:

- At the trial a criminalist conceded that he changed his initial conclusion about the wall blood when he discovered that it excluded Cooper as a donor. (He explained it as an innocent mistake.)
- Internal lab records indicate that the wall blood was exhausted through other procedures well before DNA testing in 2002 linked it to Cooper. Curiously, the vial was checked out in 1998 for one day. Was it purposely replenished with a sample of Cooper's blood?
- Lee Furrow's bloody coveralls weren't destroyed as a matter of routine but on orders of a police supervisor who knew that they were potential evidence in a notorious murder case.
- Analysis of bloodstains on the t-shirt and blanket indicated contamination by EDTA, a preservative that's added to blood evidence prior to storage. Were these

stains planted by police?

- A detective admitted that he disregarded the multiple suspects/“three Mexicans” theory because he was convinced of Cooper’s guilt from the very start. Police reports distorted the eight-year old’s initial statements to make it seem that only one attacker was involved. That carried into the trial, where prosecutors implied that the youth had been confused.
- At the end of the 2005 District Court hearing, the survivor, then 30, gave a long statement blaming Cooper alone. Defense lawyers were precluded from asking why he changed his mind.

Naturally, the prevailing justices didn’t take the scolding lying down:

The dissent improperly marshals the facts in the light most favorable to Kevin Cooper, yet the evidence was resolved against Cooper at trial – after he took the stand and testified – and at each step of post-conviction proceedings. The dissent also approaches the issues as if they were new, yet the same issues have been on the table since day one (except for DNA testing which didn’t exist at the time and which has turned out to be inculpatory).

Dissenters were also criticized for ignoring the constraints imposed by the [AEDPA](#). Among other things, it requires that Federal judges accept factual determinations made by state courts unless there is clear and convincing evidence to the contrary. In other words, if the state didn’t think evidence was planted, who are the Feds to disagree? The nay-saying justices were also challenged to name the “real” killer, if not Cooper:

In asserting that “[t]he State of California may be about to execute an innocent man,” the dissent neglects to acknowledge the evidence tying Cooper to the murders, or the fact that, after all the testing that has been done post-conviction, no forensic evidence suggests that anyone else was at the scene of the crime or was the killer.

That’s logical. Furrow’s coveralls were destroyed. Since they can’t be examined, he can’t be the killer. Catch-22!

Furrow casts a long shadow over the case. Six years ago five concerned members of Cooper’s jury sent California Governor Schwarzenegger a letter bringing up some of the same issues raised in the Ninth Circuit. Here’s what one wrote: “I am bothered to know that a convicted murderer who years before had dismembered his female victim was

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near the scene at the time, that his hatchet was missing and that his girlfriend called police and turned in his bloody coveralls.”

Had she and the others read the dissenting opinion before casting their votes things might have turned out differently. Unfortunately, the dissent wouldn't come for twenty years, and as we know time travel is impossible.

Alas, so is taking back an execution.

DOJ: TEXAS EXECUTED AN INNOCENT MAN

*Before a national audience, experts confirm
what was long suspected*

By Julius Wachtel, (c) 2010

“It was a crock.” That’s how renowned fire expert [John Lentini](#) characterized the official investigation of a [1991 Corsicana house fire](#) that killed three girls and led to their father’s execution thirteen years later.

In “Rising from the Ashes – What We Have Learned from the Cameron Todd Willingham Case,” the opening plenary panel of the [2010 conference](#) of the National Institute of Justice, the author of *Scientific Protocols for Fire Investigation* ripped claims by Texas authorities that the fire had been deliberately set. According to Lentini burn patterns on the floor and crazed windows weren’t the products of a super-hot fire fed by accelerants, as a fire marshal testified, but occurred naturally, the first when the premises became fully engulfed in a natural phenomenon known as “flashover,” and the latter as firefighters sprayed water on hot glass.

Lentini wasn’t the only expert to suggest the fire was accidental. Well before Willingham’s execution, [Dr. Gerald Hurst](#), a Cambridge-trained chemist known for debunking arson myths, said so in a report that Texas Governor Rick Perry regrettably chose to ignore. Several months after Willingham was put to death the [Chicago Tribune](#) asked Hurst, Lentini and other experts to review Dr. Hurst’s findings. They did, and concurred. And that wasn’t the end of it. Two years later a [comprehensive report](#) by a distinguished panel of experts (including Lentini) confirmed it all over again. It wasn’t arson. Just like Cameron Willingham had insisted, he was an innocent man.

Willingham isn’t the only victim of Texas forensic “science.” Eight months after the lethal cocktail coursed through his veins another death-row inmate, [Ernest Ray Willis](#) was exonerated when a prosecutor concluded that experts who testified that he deliberately set the fire that killed two women relied on faulty science – the same faulty science that was responsible for Willingham’s execution.

Fears that Texas forensic “experts” were out of control led legislators to pass a [bill](#) in May 2005. Signed by Governor Rick Perry, it created a new entity, the [Texas Forensic Science Commission](#), and charged it with regulating the practice of forensic science in

the Lone Star state. In 2008, after three years of organizing, [the commission announced](#) it would conduct public hearings into the Willis and Willingham cases. But in fall 2009, just as the inquiry was getting under way, Governor Perry abruptly [removed three commissioners](#), stalling the inquiry for the foreseeable future. Some accused Perry of trying to avoid embarrassment. But his decision nonetheless stands.

Arson prosecutions require physical evidence that fires are of incendiary (i.e., purposeful) origin. There must also be proof that someone set the blaze. In Willingham the “who” came from a seedy jailhouse informer who testified that Willingham admitted his guilt. David Grann, whose September 2009 piece in *The New Yorker*, “[Trial by Fire](#),” exhaustively debunked the charges against Willingham, spoke at the conference. Among other things Grann said that when he interviewed the stoolie the man asked whether he could still be prosecuted for perjury.

Other speakers in “Rising From the Ashes” included Itiel Dror, a cognitive neuroscientist who criticized the failure to keep detectives, witnesses and experts from influencing each other, and Dallas County assistant D.A. Mike Ware, who accused Governor Perry of “[jerking] the rug out from under the forensic science commission.” (Dallas County, which formed a [Conviction Integrity Unit](#) to rectify and prevent miscarriages of justice, was never involved in the Willingham case.) But it was the moderator’s comments that proved the most telling. Introducing the panel, Deputy Assistant Attorney General Mary Lou Leary described its purpose as an attempt “to help us learn from our mistakes.”

Mistake? Willingham’s conviction was an abomination. Think that’s too harsh? Consider what one of the fire marshals who worked on the case [said years later](#):

“At the time of the Corsicana fire, we were still testifying to things that aren't accurate today. They were true then, but they aren't now...Hurst [Dr. Gerald Hurst] was pretty much right on...We know now not to make those same assumptions.” (p. 42)

Of course, given the circumstances it’s impossible to be as confident in Willingham’s innocence as in a DNA exoneration, where the genetic profile of the real perpetrator is there for everyone to see. Yet if absolute certainty isn’t required to convict (it’s not) it’s hardly fair to demand irrefutable proof of innocence. If Texas prosecutors knew then what they know now Willingham would never have been charged, let alone taken to trial. A posthumous pardon, such as Governor Perry granted to [Timothy Cole](#), a wrongfully convicted man who died in prison, seems well in order.

During the next weeks we'll post more reactions to the 2010 NIJ conference. Meanwhile let's make a couple of observations. [Once again](#) the pressing issue of officer misconduct was virtually ignored. About as close as we got were remarks by University of Maryland professor Charles Wellford, co-chair of IACP's Research Advisory Committee, who bemoaned that police leadership and management issues draw little research attention. As to that we can only add, Amen!

Police body armor also continues to get short shrift. We came away with the impression that [protecting patrol officers from rifle rounds](#) isn't a priority; indeed, our suggestion for a "Marshall Plan" to develop wearable vests that resist high-velocity projectiles drew puzzled looks. If there's a light at the end of this tunnel, we can't see it. (Check below for related postings).

More on these and other issues after we recover from jet lag. See you next week!

Posted 8/12/11

FALSE CONFESSIONS DON'T JUST "HAPPEN"

When expediency is the more important value, tragedy follows

By Julius (Jay) Wachtel. Forget C.S.I. Confession is the grease that keeps the wheels of American justice turning. Really, it's hard to imagine how our bursting-at-the-seams criminal justice system could function without it. What it *can* do without are false confessions. Yet these have been more commonplace than one might think. Where does the blame lie? Read on.

In a recent [journal article](#) University of Virginia law professor Brandon L. Garrett examined the cases of [thirty-nine innocent persons](#) who falsely confessed. Each was convicted and subsequently exonerated by DNA. [Douglas Warney](#) was a typical example. A sometime psychiatric inpatient with an IQ of 68, he confessed to a 1997 murder and got twenty-five years to life. Nine years later DNA from the scene was matched to the real killer. He confessed, truthfully. Warney was turned down for compensation because he wasn't physically threatened or abused during interrogation and had contributed to his own problems by confessing.

Warney appealed. New York's high court recently ruled in his favor. Police subjected Warney to "calculated manipulation," which considering his mental disability was unduly coercive. He was also fed intimate details about the crime. During oral arguments a justice pointedly asked the state's attorney how Warney could have known that the killer used a twelve-inch serrated knife and stabbed the victim fifteen times. "He may have been asked a leading question," the lawyer conceded.

Professor Garrett discovered that in all but two cases the confessions were full of insider information, making the accused look guilty as sin. That didn't happen by accident.

It's human nature to trust confessions. Why would someone falsely admit to a crime? Indeed, the law considers confessions and other "statements against interest" so credible that they are exceptions to the hearsay rule. Few know this better than [Jeffrey Deskovic](#). Ten years into a life term for a rape/murder to which he falsely confessed, he finally got a lawyer to petition for a habeas hearing in Federal court. [Alas, the attorney let a key deadline pass.](#) A two-judge panel – one member was future Supreme Court justice Sonia Sotomayor – ruled that the error (the document was filed six days late) was insufficiently "extraordinary" and turned Deskovic away. It would take another six years before DNA would identify the real killer.

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Deskovic was sixteen when police picked him up. He confessed after hours of intensive interrogation because officers had promised to let him go home if he did.

“Extraordinary” aptly describes what happened to [Earl Washington](#). Questioned in 1982 about the rape/murder of a Virginia woman, he eagerly confessed to the crime and several others. He also implicated another innocent man. Washington’s good work earned him the death penalty. Three years later he was within a few days of being executed when a team of pro-bono lawyers got him a last-minute stay. It thankfully turned permanent. But Washington would serve another fourteen years before DNA finally identified the guilty party.

Oh, yes. Washington’s IQ was only 69. Why did he confess? He was trying to help the police.

More than a few defendants have falsely confessed because they feared rolling the dice by going to trial. In 2005 two victims of a carjacking identified California man [James Ochoa](#) as the culprit. A bloodhound supposedly followed the scent from a baseball cap left in the vehicle to Ochoa’s residence. Police found DNA on the cap and in the car’s interior, but it wasn’t his. Five family members also swore that Ochoa was nowhere near the crime scene. But he had a drug record, and when a judge threatened him with twenty-five years should a jury find him guilty he pled guilty and got two. Ten months later another man was arrested for another carjacking. Yes – the DNA on the cap and in the car was his. He confessed and Ochoa was released.

Here are some recent news clips about false confessions:

- July 2011: [A hearing will be conducted](#) to determine whether DNA evidence exonerates three Arkansas men, known as the West Memphis Three, who have been imprisoned since 1993 for murdering three boys. A judge will also consider whether the confession of one, a low-IQ youth who was tried separately (he recanted, to no avail) was improperly used in finding the others guilty.
- May 2011: Seven Chicago men who were imprisoned as teens in the 1990s for two unrelated rape/murders [have been tentatively cleared by DNA tests](#) that connect others to the crimes. One match has a record for sexual assault and armed robbery; the other, who is deceased, was reportedly involved in a string of assaults and murders. Prosecutors, though, are objecting to the release of the seven, as all confessed.
- September 2010: [A Mississippi judge released and exonerated](#) Phillip Bivens, 59, and Billy Ray Dixon, 53. They had served *thirty years* for murder. Bivens, Dixon

(he describes himself as a “slow learner”) and a third defendant, who died in prison nine years ago, confessed and implicated each other, supposedly after threats by police. As for the real killer, who was recently identified through DNA, he’s already doing life for another rape.

- August 2010: An extensive investigation by the Raleigh News-Observor accuses [North Carolina Bureau of Investigation agents](#) of extracting false confessions from innocent persons. “SBI agents have cut corners, bullied the vulnerable and twisted reports and court testimony when the truth threatened to undermine their cases.” The state crime lab also caught blame for biasing its findings in favor of prosecutors.
- May 2010: Up to 12,000 persons arrested by Chicago police during 1999-2008 [will share in a \\$16.5 million settlement](#). Their claim alleged that police arrested persons without adequate cause, then used “soft torture” techniques such as withholding food and water and denying bathroom breaks to get suspects to confess.
- April 2010: New York resident [Frank Sterling](#) was freed after DNA proved that the murder to which he confessed in 1982 was in fact committed by the original suspect, Mark Christie. Sterling’s confession was extracted through a relentless twelve-hour interrogation session that included the use of hypnosis. Christie was easy to find, as he is in prison for another murder that he committed two years after Sterling’s arrest.

Cops, prosecutors and judges have manipulated and bullied vulnerable persons to get them to confess. But confirmed modern-day instances of beating confessions out of people seemed rare. That is, until last year. That’s when the Feds convicted former Chicago police commander [Jon Burge](#), 62, of perjury for falsely denying in an earlier civil suit that in the 1980s he and his officers extracted confessions through beatings, electric shocks and suffocation.

Michael Tillman was one of Burge’s victims. Freed in January 2010 after spending 23 years in prison for a murder he didn’t commit, [he collected his certificate of innocence](#) and promptly sued. Only a few days ago fifteen current Illinois inmates [petitioned the state supreme court](#) for evidentiary hearings. Their claim, which is backed by affidavits from current and former prosecutors, is that Burge and his brutal cops beat false confessions out of them, too.

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Officers learn in the academy that when interviewing victims and witnesses they should avoid being suggestive or offering details that only the perpetrator would know. Yet when it comes to suspects the gloves come off, at least figuratively. How to get people to confess is an accepted component of advanced police training. One of the best known methods, [the “Reid” technique](#), urges officers to come up with “themes or reasons that allow the suspect to salvage self-respect while confessing.” There are tips for overcoming denials, getting suspects to “bond” with police, “stimulating” confessions, and crafting questions that essentially trap persons into confessing.

Reid asserts that his approach is equally useful in exonerating the innocent. But academic experts disagree. After studying 125 cases of false confession, professors Richard Leo and Steven Drizin concluded that methods such as Reid’s [are psychologically coercive and can induce false confessions](#), especially in juveniles and the mentally challenged.

To make arrests as expeditiously and economically as possible police have adopted interrogation techniques that, while perhaps legal, risk inducing innocent persons to confess. That may reflect a lack of technical knowledge (meaning that cops need to be retrained), a moral lapse (meaning that they ought to be reeducated), or perhaps a bit of both.

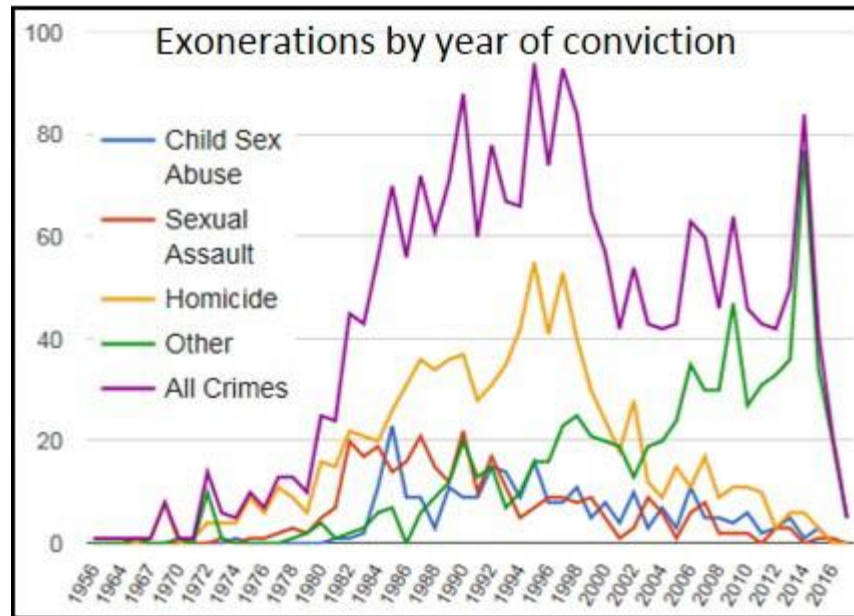
As for training, professors Leo and Drizin urge that police receive instruction on the causes of false confession, abandon pseudoscientific approaches that try to intuit deception from nonverbal cues, learn how to properly assess the reliability of confessions, and become adept at interviewing juveniles and the mentally ill.

On the other hand, if one believes that false confessions are the end result of a misguided moral crusade (e.g., the West Memphis Three; Chicago PD Commander Burge and his disciples) then something of a higher order may be called for. One could begin with your blogger’s favorite all-purpose solution: a [quality-oriented approach to the craft of policing](#).

Posted 6/9/18

FEWER CAN BE BETTER

Murder clearances have declined. Should we worry?



www.law.umich.edu

By Julius (Jay) Wachtel. Murder has always been the most frequently cleared serious crime. In the mid-1970s [police were reportedly solving](#) an impressive eight out of ten homicides. But a downtrend apparently took hold. Clearances fell to 72 percent in [1980](#), 67 percent in [1991](#), and 63.1 percent in [2000](#).

In 2008, with clearances stuck in the mid-sixties, the Feds stepped in. Four years later BJA released “[Homicide Process Mapping: Best Practices for Increasing Homicide Clearances](#).” Produced by the [IACP](#) and the [Institute for Intergovernmental Research](#), the 54-page report set out promising approaches to homicide investigation in seven jurisdictions of varying size: Baltimore County PD, Denver PD, Houston PD, Jacksonville S.O., Richmond PD, Sacramento County S.O. and San Diego PD. Why were these agencies chosen? In 2011, when the overall murder clearance rate was [64.8 percent](#), each enjoyed a rate exceeding 80 percent.

A sense of urgency permeates the report. Here’s the BJS director’s opening message:

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One homicide victim is one too many. Yet we also understand the challenging and quite complex nature of homicide investigations. Homicide, homicide investigations, clearance rates, and productive communication with the public are all critical concerns for law enforcement and communities nationwide. And despite recent across-the-board improvements in homicide clearance rates, we know that we can do better.

And here's the first paragraph of the executive summary:

Since 1990, the number of homicides committed in the United States has dropped over 30 percent. While this is a positive trend, it is somewhat counterbalanced by another trend: in the mid-1970s, the average homicide clearance rate in the United States was around 80 percent. Today, that number has dropped to 65 percent—hence, more offenders are literally getting away with murder.

We won't belabor the findings. As one might expect, resources get prominent attention. There's an emphasis on technology and information. Agencies are strongly encouraged to include forensic specialists and crime analysts in homicide teams. Data is said to have reshaped the detective's task: "the investigator must be an information manager who can coordinate and integrate information from a wide range of sources to drive the investigation forward."

Then what happened? Clearances kept going down, falling to [59.4 in 2016](#). Of course, many homicides are "cleared" over time. Still, considering that the murder rate is presently about half that of the crack-addled nineties ([1991](#)=24,703 murders, rate 9.8; [1996](#)=17,250 murders, rate 5.3) the persistent decline in solution rates seems puzzling.

During the early morning hours of April 17, 1994 [a woman was stabbed to death](#) in her Jacksonville County apartment. At the time the only other occupant was her brother-in-law, Chad Heins. He said he found her body when he awakened that morning. No physical or other evidence implicated Heins. However, he was convicted based on the testimony of two jailhouse informants who said he confessed. Heins drew a life term. In time the [Innocence Project](#) got involved. Between 2003-2006 a sequence of DNA tests confirmed that semen and skin residue from fingernail scrapings belonged to the same, unidentified third party. More damningly, it turned out that officers and prosecutors apparently kept quiet about a bloody fingerprint found at the scene that did not match Heins. He was exonerated in 2007 after serving thirteen years.

A happy ending? Not exactly. Eight years later [Heins was convicted](#) in a tax fraud scheme hatched by a former cellmate. Citing the time Heins did for a murder he didn't commit, the judge went easy and sentenced him to a year and a day.

Heins' investigation was conducted by the Jacksonville sheriff's office, one of the seven contributors to the BJA report. A glance through the [National Registry of Exonerations](#) turned up wrongful convictions for murder and other crimes of violence (alas, without a known ironic aftermath) involving each of the other six police agencies. For example, [the 1991 conviction of Jeffrey Cox](#), a Richmond resident who got life plus fifty for murder. Although police had two suspects in mind, they added Cox to a photo lineup after one of the suspects brought up his name. And that's whom two neighbors identified. What police and prosecutors didn't let on was that one of the witnesses was a multi-convicted felon, while the other had charges that would be dropped in exchange for his testimony. And that a composite sketch of the killer didn't resemble Cox. And that a recovered hair didn't match. What finally set things right was when [a witness came forward](#) and said he was told by one of the two original suspects that they committed the killing and that Cox wasn't involved. That took eleven years, but hey, who's counting?

Your blogger, a retired ATF agent, spent a career pursuing gun traffickers. When he and his colleagues caught them in the act, the quantity and quality of evidence was terrific. And when investigations didn't work out, they turned their attention elsewhere. After all, there were always plenty of good leads to chase.

That pattern applies to all "victimless" crime, including narcotics offenses. Unproductive inquiries can be easily dropped. And when everything lines up and suspects get caught, say, illegally transferring a load of guns or drugs, the evidence is indisputable. Evil doers literally convict themselves.

That's something that homicide detectives can only dream about. Like most cops, they work reactively, collecting what evidence they can after the fact. While they enjoy high status and comparatively ample resources, their mission is inherently stressful. We mentioned that in 2016 the homicide clearance rate was a seemingly robust 59.4 percent. Of course, if six in ten murders are promptly solved, that means four in ten languish. Pursuing these "whodunits" can consume prodigious amounts of shoe leather and laboratory time, and all with no guarantee of success. Yet one can't simply give up. Most detectives wouldn't want to. And even if they did, their managers would likely balk. After all, what would the public think? The victim's family?

Killers are seldom “in the act”. Yet the level of certainty required for conviction – beyond a reasonable doubt – is the same for all crimes. In reactive policing such as homicide investigation, where reaching this threshold depends on the availability of witnesses and physical evidence, pressures to produce results may drive officers to use illegitimate means, and particularly when the heat’s on. Here are some relevant extracts from prior posts:

- External and self-induced pressures to solve heinous crimes can lead even the best intentioned investigators to set aside doubts and interpret information in a light most favorable to a prompt resolution. (“[Guilty Until Proven Innocent](#)”)
- “Probable cause” can be an elastic concept, and all the more so when police are under pressure to solve a high-profile crime. (“[Rush to Judgment, Part II](#)”)
- Pressures to solve serious crimes can cause the theory of a crime to form prematurely, leading authorities to uncritically gather evidence that is consistent with that notion regardless of its merit or plausibility. (“[House of Cards](#)”)
- As cases move through the system subtle pressures from police and prosecutors can make witnesses overconfident, turning a tentative “maybe” into a definite “that’s the one!” (“[Can We Outlaw Wrongful Convictions? Part II](#)”)
- ...pressures to solve violent crimes can lead agencies and investigators to prematurely narrow their focus. Concentrating investigative resources on a single target inevitably produces a lot of information. As facts and circumstances accumulate, some can be used to construct a theory of the case that excludes other suspects, while what’s inconsistent is discarded or ignored. That’s how a “house of cards” gets built. (“[The Ten Deadly Sins](#)”)

We could go on, but the reader undoubtedly gets the picture. One would think that the mighty Feds are well aware of these issues. Yet clearance rates are the only measure of success that 54-page report mentions. Nothing is said about dreadful mistakes like convicting the innocent. Same for a “[Morning Edition](#)” piece that gave prominent play to the shallow musings of a self-anointed “expert”:

Homicide detectives say the public doesn't realize that clearing murders has become harder in recent decades. Vernon Geberth, a retired, self-described NYPD "murder cop" who wrote the definitive manual on solving homicides, says

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standards for charging someone are higher now — too high, in his opinion. He thinks prosecutors nowadays demand that police deliver "open-and-shut cases" that will lead to quick plea bargains.

So what about that decline in clearance rates? Considering all the attention that's been given to the scourge of wrongful conviction, from Dallas County D.A.'s pioneering [conviction integrity unit](#), since replicated in many other jurisdictions, to the [Innocence Project](#) and its numerous clones, to the near daily stream of headlines and breathless exposés about exonerations, the need for caution has apparently sunk in.

Our expectations (and apparently, NPR's) for solving murders were set too high. Being more careful likely lowered the numbers. No matter. Sometimes fewer really *is* better.

GOVERNOR TO CCFAJ: DROP DEAD

*Bowing to cops and victim groups,
the Guvernator nixes justice reforms*

By Julius Wachtel, (c) 2010

Bowing to heavy pressure from prosecutors, police and victims' rights organizations, Governor Arnold Schwarzenegger vetoed the entire work product of the obscure California Commission on the Fair Administration of Justice, an organization created by the State Senate in 2004 to address concerns about wrongful convictions.

In 2007 the CCFAJ sponsored three bills: SB 756, asking that Cal DOJ and POST develop guidelines for the administration of photo and live lineups; SB 511, requiring that police record in-station interrogations of those suspected of violent crimes; and SB 609, requiring corroboration of jailhouse informants. Similar measures have been recommended and enacted in about a dozen States. For example, North Carolina requires, among other things, that officers showing photo lineups take special precautions to avoid influencing witnesses and that photographs be displayed sequentially rather than as a group. (These provisions go far beyond SB 756, which only calls for a study.)

Echoing the shrill views of nay-sayers, the Governor called CCFAJ's proposals unnecessary, unduly restrictive and burdensome. Perhaps the most rabid opposition was to the lineup bill. Opponents led by L.A. County District Attorney Steve Cooley claimed that California's system of justice is so accurate -- 99.9999%, the proportion of all convictions not proven wrongful -- that we don't need a bunch of do-gooders and know-nothings poking their head into the serious business of crime-fighting.

California law requires that accomplices be corroborated, so asking the same for snitches behind bars seems perfectly reasonable. Even so, the California State District Attorney's Association came down hard against the measure. Maybe they missed a report by the American Bar Association that called for exactly what the CCFAJ recommended. Or maybe they forgot that the most notorious jailhouse liar in American history (informant is much too nice a word for this guy) was -- yes! -- a California guy, Leslie Vernon White, a career criminal who repeatedly made up bogus confessions to use against cellmates by calling around from a jail phone pretending to be a cop.

Still not convinced? In March 2007 the U.S. Ninth Circuit Court of Appeals ordered that a Federal civil rights lawsuit against Long Beach PD detectives and the L.A. County

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District Attorney proceed to trial. The plaintiff, Thomas Goldstein, had been released in 2002 after serving twenty-four years for a murder he did not commit. His conviction was based on a mistaken eyewitness ID and false testimony from infamous jailhouse informant Edward Fink (yes, that's his real last name.) Although the eyewitness later said he was pressured by police, and Fink was conclusively proven a liar, prosecutors refused to free Goldstein: as far as they were concerned he was convicted, his conviction was upheld on appeal, and that was that! It took a lengthy investigation by a Federal magistrate and concurrence by a District judge and a three-judge Federal panel to finally force the innocent man's release.

And here we come to the heart of the matter. Personal interests aside, some judges and prosecutors are so in thrall to process that they resist any challenges to the "finality" of judgments -- even those clearly based on lies. How high does the misplaced confidence go? During his confirmation hearings Supreme Court Justice (then nominee) Samuel Alito repeatedly refused to agree that wrongfully executing someone was unconstitutional. The best he could do was to say "it is unconstitutional to execute someone who has not been proven guilty beyond a reasonable doubt." In other words, once convicted, forever damned. His response, or rather, non-response, caught Senator Pat Leahy, himself a former prosecutor, completely off guard. Such attitudes help explain why, in a 5-4 ruling, the U.S. Supreme Court overruled a last-minute appeals court decision halting the planned execution of Thomas Thompson. (He was gassed on schedule.) Thompson's alleged crime? An Orange County rape/murder. The key evidence? Testimony of two jailhouse informants, both declared liars by the appeals court.

Oh, yes. One of the informants was Edward Fink.

Post-adjudication claims of innocence must meet exceedingly high standards. It's not enough to show that key trial evidence was false or mistaken, or that the remaining evidence clearly doesn't meet the "beyond a reasonable doubt" standard required to convict in the first place. To be heard a petitioner must present newly-discovered, reliable evidence that demonstrates it is more likely than not that they are factually innocent. Proving a negative -- that one is not guilty -- is tough. Most who succeed do so with DNA; for example, by showing that semen or public hairs are not theirs. But DNA is only recovered in twenty percent of violent crimes, usually rapes. Even where key trial evidence has been completely discredited (e.g., West Memphis Three; Los Angeles' Bruce Lisker), the absence of extraordinary proof of innocence such as DNA means that convicted persons are out of luck.

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Rabid opposition from law enforcement and victim rights organizations has overwhelmed all efforts at reform. What can be done? Most convicted persons are poor. Those with plausible claims of innocence should be given funds for lawyers, investigators and forensic experts. Petitioners must not be forced to prove a negative; to be freed it should suffice that, considering all the evidence in the light of what is presently known, one would not be convicted anew. Grand juries can take on some of the burden of providing post-conviction relief. That was the approach in the 2004 murder of Amy Yates, where jurors impaneled long after the trial exonerated one falsely convicted youth and indicted another. And since wrongful convictions are often traced back to mistakes by police and prosecutors, they must accept responsibility as well, developing practices and instituting training programs that greatly improve the accuracy of their work.

Confidence in American justice is starting to fray. While we can't expect absolute perfection, the many miscarriages of justice brought to light by innocence projects around the country suggest that preventive and remedial measures are urgently in order. The next victim of flawed justice could be you.

Innocence Projects: New York (founding, DNA-only) Southern California Northern California

Posted 3/19/17

GUILTY UNTIL PROVEN INNOCENT

Pressures to solve notorious crimes can lead to tragic miscarriages of justice

By Julius (Jay) Wachtel. [“Confirmation bias”](#) denotes the tendency to seek out information and interpret events in a way that affirms one’s predilections and beliefs. A notorious example of how such biases can affect the criminal justice process is [the case of David Camm](#). In September 2000, four months after Camm retired as an Indiana trooper, his wife and two children were shot to death. Camm alerted 911 after allegedly finding their bodies when he returned home from an evening out. He was arrested and convicted for the killings and served thirteen years, going through three trials before being ultimately acquitted. At his last trial, in 2013, a defense witness, [Dr. Kim Rossmo](#), an expert on cognitive bias in criminal investigations, [blamed factors including confirmation bias and “groupthink”](#) for leading detectives and prosecutors to overlook contradictory evidence, ignore DNA and rely on a deeply flawed interpretation of bloodstain evidence in their rush to judgment.

An appeals court reversed the first verdict, ruling that introducing evidence of Camm’s extramarital affairs was unduly prejudicial. Before the second trial DNA that authorities said they had sent in (but did not) was finally tested. It was found to match [Charles Boney](#), an ex-con who had done time for armed robbery. Boney had also left his palmprint at the crime scene. He wound up testifying against Camm, to the effect that he provided the murder weapon but waited outside the home while Camm executed his family. A forensic “expert” testified that victim bloodstains on Camm’s shirt had been produced by spatter, and three prisoners insisted that Camm confessed to the killings.

Camm was again convicted (Boney would be separately tried and convicted. He drew life without parole.) But this conviction was also reversed, as Boney had been allowed to testify, without corroboration, that Camm admitted molesting his daughter.

Camm’s third trial, held in 2013, brought in a wholly new perspective. A defense expert testified that Boney’s DNA was found on the clothes and under the fingernails of Camm’s wife, thus putting the lie to his claim that he “waited outside.” Dr. Rossmo and another expert, who testified at length, criticized the investigation as haphazard and hopelessly biased from the start. Most importantly, the self-styled “serologist” who testified about blood spatter on Camm’s clothes was thoroughly discredited. Real experts, hired by the defense, testified about the [profound ambiguities and uncertainties](#)

[of blood spatter analysis](#) and said that the traces of victim blood found on Camm's clothes were likely produced by accidental transfer when he found the bodies.

Camm was acquitted. His lawsuit against the county [was settled in 2016](#) for \$450,000. Camm's litigation against D.A.'s and State police investigators continues.

David Camm's saga drew extensive coverage in the broadcast media, including [48 Hours](#) and [WDRB TV](#), and has several extensive writeups online (click [here](#) for the Wikipedia page and [here](#) for Murderpedia.) His travails are also cited in a [forensic science text](#) and were the subject of two nonfiction works (click [here](#) and [here](#)). And if that's not enough, a [novel](#) that closely tracks the case is supposedly in the works.

When actionable leads are lacking detectives may have little choice but to assemble a list of possible evildoers. As we suggested in "[The Usual Suspects](#)", getting arrested increases one's risk of being accused of offending in the future. And when the new crimes are particularly grave – say, a string of unsolved rapes – pressures to bring a culprit to justice can rope in anyone who seems to fit the bill.

That's the situation that Luis Lorenzo Vargas faced in 1999 when Los Angeles Police proudly announced the arrest of "[The Teardrop Rapist](#)." Suspect of at least thirty-nine sexual assaults between 1995 and 2013, the rapist (he reportedly had a pair of teardrop tattoos under his left eye) stalked central city streets during the early morning hours and threatened victims with a gun or knife before dragging them away.

Vargas lived in the area where the rapes occurred and [physically resembled the perpetrator](#) down to a teardrop tattoo under the left eye (Vargas, though, only had one.) His past was also highly damning, as he had served three years in prison for the 1992 rape of a girlfriend. Detectives investigating three sexual assaults between February and July 1998 attributed to the Teardrop Rapist [showed the victims a photospread that included Vargas](#). Each victim would ultimately identify him as her assailant, although with qualifications and what now seems considerable uncertainty.

Police arrested Vargas in July 1998. He was tried eleven months later. Each accuser positively identified him in court, and Vargas was convicted. What the prosecution didn't disclose was that despite his arrest the rapes continued.

Vargas steadfastly denied his guilt and drew 55 years. He thereafter continued to maintain his innocence, placing parole out of reach. Finally, in 2012, thirteen years into his term, the California Innocence Project secured a court order to have the rape kit

from one of the three victims submitted for DNA analysis (physical evidence was not available for the others.)

DNA testing excluded Vargas. But they matched several other assaults attributed to the Teardrop Rapist. Prosecutors recommended that Vargas be exonerated and a judge concurred. Vargas was released on November 23, 2015 after serving more than sixteen years. Meanwhile the “real” Teardrop Rapist remains unidentified.

External and self-induced pressures to solve heinous crimes can lead even the best intentioned investigators to set aside doubts and interpret information in a light most favorable to a prompt resolution. Camm and Vargas were likely suspects who bobbed up in a sea of complexities that might have taken a very long time to untangle. But the criminal justice system doesn't have centuries.

Of course, no good cop would knowingly arrest and no good prosecutor would knowingly seek to convict the wrong person. Yet workplace pressures can play havoc with evidentiary practices. Camm was done in by misleading forensic testimony procured by police and prosecutors from a pretend expert. Vargas fell to the perils of eyewitness identification. When showing photospreads, investigators can slip and suggest, through word and gesture, just who the “real” suspect is. After undoubtedly many “thank you’s” and words of support, three victims who were once not so certain positively identified an innocent man in court.

DNA helped rescue Camm and was key to Vargas's redemption. Now consider all the miscarriages of justice where there was no DNA. For more on that, click [here](#).

Posted 9/6/09

HOUSE OF CARDS

Evidence isn't better just because there's lots of it: it must also be true

By Julius Wachtel, (c) 2010

"I am an innocent man, convicted of a crime I did not commit. I have been persecuted for 12 years for something I did not do."

That's what [Cameron Todd Willingham](#) reportedly said as the poison dripped into his veins. On February 17, 2004 he was executed by lethal injection for deliberately setting fire to his Corsicana (Tex.) home, resulting in the deaths of his three infant girls, Karmon, Kameron and Amber. As it turns out, though, the fire was of accidental origin.

Yes, that's right. Texas executed an innocent man.

Willingham refused to plead guilty in exchange for a life term. At his trial Corsicana's fire chief and a deputy State fire marshal testified that an accelerant caused a "superhot" fire that quickly consumed the home and crazed its windows. But several months before the execution a renowned fire expert retained by the [Chicago Tribune](#) called the officials' testimony bunk and said that the blaze was accidental.

Two years later the [Innocence Project](#) announced that a distinguished scientific panel concluded that the Willingham fire was indeed accidental. A common phenomenon known as "flashover" was blamed for setting the floor on fire, thus lending the appearance that accelerants were used, while the crazing was caused by firefighters pouring cold water on hot glass. After reviewing the report a Texas state fire marshal who helped on the Willingham case admitted that he and his colleagues got their science wrong:

"At the time of the Corsicana fire, we were still testifying to things that aren't accurate today. *They were true then, but they aren't now...*Hurst [the *Tribune's* expert] was pretty much right on...We know now not to make those same assumptions."

Too late! The consequences of their error couldn't be taken back. Still, the forensic testimony had only "proved" that a crime had been committed, not by whom. For that the authorities turned to [jailhouse stoolie](#) Johnnie Webb. A drug user with a serious criminal history, he testified that Willingham told him he set the fire to cover up injuries

that one of the girls sustained in a beating by her mother. Webb later tried to recant his words, but to no avail.

To convince jurors that Willingham was capable of killing his own children prosecutors got a psychologist and a psychiatrist to testify that he was a sociopath. Known in local circles as “Doctor Death” for his ability to secure convictions, the psychiatrist was later expelled from the American Psychiatric Association for ethical misdeeds. By then, of course, the trial was ancient history.

In 1993 three Arkansas teens -- the [West Memphis Three](#) -- were convicted of the brutal murder of three boys in what police and the media quickly termed a “Satanic ritual.” The victims had been stabbed to death and dumped in a wooded area. Their bodies were covered with wounds and one of the boys’ genitals was removed.

There were no obvious suspects. However, the cult-like appearance of the crime drew suspicion on a local teen, Damien Echols, 18, and his two disciples, Jason Baldwin, 16, and Jessie Misskelley, a mentally retarded 17-year old. Echols dressed in black, listened to heavy metal music and affected a Goth-like demeanor. He also bragged about practicing the Wiccan religion.

Witchcraft!

Police zeroed in on the weakest link, Misskelley. After hours of isolation Misskelley broke, giving a fantastic, rambling confession in which he admitted helping Echols and Baldwin kidnap, sexually abuse and stab the boys. He also accused Baldwin of cutting off a victim’s penis with a knife (the transcript of the confession, which was the only part of the interview that police recorded, is [here](#) and [here](#)). Misskelley’s account was replete with inaccuracies, forcing officers to repeatedly step in and offer suggestions (at one point he said that the killings happened at noon, while the victims were in school.) Misskelley later recanted but it was too late. Tried and convicted, he got life plus forty years.

Echols and Baldwin were tried next. Misskelley refused to testify, so there was little hard evidence against the pair (their legal briefs, which include detailed accounts of the trial, are [here](#).) A medical examiner testified that some of the wounds were caused by a serrated blade; a knife with a serrated blade was pulled from a lake behind Baldwin’s home. Echols was also said to have such a knife, which is hardly a unique item. Much was also made of his manner of dress and preoccupation with the occult. Dale Griffis,

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supposedly an expert in such matters (his degrees are by mail order) testified that the prosecution's evidence was consistent with the profile of a ritual killing. And so on.

Given the weakness of the case against Echols and Baldwin witnesses were badly needed to directly connect them to the crime. Prosecutors found three. Two girls, one twelve, the other fifteen said that they heard Echols brag about the killings at a baseball game. A jailhouse informer, Michael Carson, testified that Baldwin admitted he cut off a victim's penis and sucked on its contents.

Jurors convicted both. Baldwin got life without parole; Echols, death.

At this writing the West Memphis Three have been imprisoned fifteen years. Their current lawyers have sought hearings and retrials based on inadequate representation, admission of improper evidence, and misconduct by prosecutors and jurors (the foreperson at the Echols/Baldwin trial supposedly brought up Misskelley's confession during deliberation.) Their [briefs](#) contain highly detailed point-by-point rebuttals of the prosecution's evidence. For example, what the girls heard Echols say wasn't intended to be taken literally but was directed at youths who were taunting him as being the killer. Well-known forensic experts have debunked the ritual-killer theory, offering convincing proof that the wounds and castration were caused by animals. And the jailhouse informer that fingered Baldwin was denounced as a liar by his counselor and members of the jail's custody staff.

After fifteen years on death row, Echols will soon learn whether he'll get a new trial. Meanwhile Baldwin and Misskelley are waiting for a court to decide about habeas hearings. Considering how slowly the wheels of justice are turning, by the time the three get to the Federal courts they'll be old men.

That unholy alliance of junk science, character assassination and jailhouse informers that figured prominently in the Willingham and West Memphis Three was also responsible for the conviction of [Bruce Lisker](#) (see "[Never Say Die](#)," below). Lisker was recently ordered freed by a Federal judge after serving twenty-six years for a crime that by all appearances he didn't commit.

These cases share another characteristic. From the bloody footprint in Lisker, to the "arson" testimony in Willingham, to the ritual castration in the West Memphis Three, virtually every piece of prosecution evidence that was used in court has been proven false or highly misleading. There was a bloody footprint, but it wasn't Lisker's. There was no arson (hence no crime) in Willingham. The child victim allegedly castrated by

Baldwin wasn't, thus refuting both Misskelley's confession and the testimony of the jailhouse snitch.

How could things go so wrong? Pressures to solve serious crimes can cause the theory of a crime to form prematurely, leading authorities to uncritically gather evidence that is consistent with that notion regardless of its merit or plausibility. As statements, objects and observations accumulate they reinforce and lend weight to each other, deluding cops and prosecutors -- and ultimately, jurors -- into believing that they accurately depict what they purport to depict. By trial's end, the cumulative weight of all that evidence makes other explanations seem highly unlikely.

In fact, all that's been built is a [house of cards](#). Put another way, it's like trying to come up with the number one by adding up a string of zeroes. In the highly consequential world of criminal justice, that can easily lead to tragedy.

Posted 1/8/2008

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

Why do prosecutors resist post-conviction DNA analysis?

By Julius Wachtel, (c) 2010

...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's power 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.

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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.

Posted 4/16/16

IS A CASE *EVER* TOO “COLD”?

Citing factual errors, an Illinois prosecutor successfully moves to free a convicted killer

By Julius (Jay) Wachtel. Two weeks ago, in an Illinois courtroom, DeKalb County State’s Attorney Richard Schmack implored Judge William Brady to do the right thing.

Surprisingly, he wasn’t asking that someone be locked up. Precisely the contrary. Characterizing a conviction gained by the former D.A. as “a fraud on both the trial court and appellate court,” the area’s chief prosecutor [moved for the unconditional release](#) of Jack D. McCullough, 76, who was serving a life term for the December 1957 abduction and murder of seven-year old Maria Ridulph.

No, this isn’t a story about a possibly innocent someone who (oops!) served decades in prison. McCullough could be considered “lucky,” as more than five decades passed before his arrest. Celebrated by officials and the media as a record for “cold cases,” his conviction, in 2012, became the subject of a [mini-documentary on CNN](#).

McCullough (his birth name was John Tessier) was a suspect at the start. He not only lived in the same neighborhood as Maria but resembled her playmate’s description of “Johnnie,” the personable young man who frolicked with the child shortly before her disappearance. McCullough was also something of an oddball. When interviewed by the FBI shortly after the crime, [he admitted keeping a “black book”](#) on local girls and conceded a past sexual encounter with a child. On the other hand, he steadfastly denied any involvement with Maria, offered what seemed an ironclad account of his whereabouts (supported by his mother) and passed a polygraph. So cops and agents crossed him off their list.

McCullough went on to lead what can most charitably be called a checkered life. On the one hand, he served in the Army, left as a captain, and became a police officer. On the other, he had problems with money and booze and seemed obsessed with young females. In 1982, while employed as a cop, [he was arrested](#) for the statutory rape of a 15-year old girl. McCullough pled to a misdemeanor and was fired from the force.

Another quarter-century passed. In 2008 McCullough’s half-sister, who had long tried to put cops on his trail, [offered some startling news](#). Many years earlier, as their mother lay on her deathbed, she supposedly accused her son, for whom she had provided an alibi, of killing the child. McCullough’s sibling soon [dropped another](#)

[bombshell](#) – when she was fourteen McCullough raped her, then had three friends join in.

McCullough was arrested in July 2011. Prosecutors successfully argued that his absences from the state extended the statute of limitations, so in addition to Maria's murder he would also face charges for raping his half-sister. That trial took place first, in April 2012. McCullough's decision to waive a jury proved an excellent strategy, as the judge found the victim's testimony unconvincing and, since that's all there was, [promptly returned an acquittal](#).

McCullough went to trial for Maria's murder in September 2012. Emboldened by the earlier result, he again opted for a bench trial. Again, there was no physical evidence. But what came in was damning. Two years earlier the victim's childhood playmate had identified McCullough as "Johnny" from a photospread. She did it again in court, fifty-five years after the fact. McCullough's half-sister then took the stand. Improbably, she was allowed to repeat their mother's accusation – that McCullough was the killer. (Her statement was allowed because it supposedly went against the late woman's self-interest.) Three inmates who were in McCullough's cellblock also testified – although not without stumbling – that McCullough admitted killing the child.

McCullough didn't take the stand. This time he was convicted, and got life without parole.

But the man may have more lives than a cat. In a startling motion filed earlier this year, [the new D.A. blasted police and his predecessor](#) for dragooning an innocent man. His harshest criticism was reserved for what he considered a purposeful distortion of the timeline of events, making it seem as though McCullough was in the area although cops and FBI agents originally concluded that a telephone call placed him elsewhere. ([Their reports were ruled inadmissible hearsay by the judge](#). An appeals court later ruled the exclusion in error but found it insufficient to disturb the verdict.)

There were also issues with the photospread. Assembled decades after the crime, its photo of the young Tessier differed substantially from the others. What's more, the witness had, as a child, [incorrectly identified someone else](#) as "Johnny." Indeed, stymied cops [had long blamed Maria's murder](#) on a serial molester who supposedly killed an eight-year old in another state. Alas, that man was long dead.

Throughout it all, McCullough has steadfastly denied guilt. He represented himself until recently, when a pair of Chicago lawyers heard about the case and came in *pro bono*. Their motion for post-conviction relief was vigorously seconded by the current state's attorney, who filed his own brief. On the other side is the victim's brother, who

vigorously disputes McCullough's version of events and appeared at the hearing to oppose his release.

To keep from convicting the innocent criminal cases must be proven "beyond a reasonable doubt." Here is a jury instruction [approved by the Supreme Court](#):

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (Sandoval v. California, no. 92-9049, 1994)

Criminal justice's "moral certainty" threshold has a parallel in social science, where your blogger occasionally dabbles. There, the obstacle to overcome is called "point oh-five," meaning that findings cannot be considered true unless the probability that they were reached in error (i.e., a "false positive") is less than five in one-hundred.

Of course, important decisions are always supposed to rest on evidence. Still, in both policing and research critical information often goes unrecognized, uncollected or ignored, and errors, negligence and – yes – self-interest can distort whatever kernels of truth remain. Precise numerical goals might seem more reliable, but in actual practice it's all about fallible humans. To that extent, "point oh-five" and "moral certainty" seem equally useful – and equally flimsy.

Two days ago [the judge tossed out](#) McCullough's conviction. An embittered 75-year old walked out of court a free man, leaving behind a trail of unanswered, perhaps unanswerable questions. Although the judge held out the possibility of a retrial, that seems most unlikely, as the D.A. lobbied for McCullough's release. Fifty-nine years after a child's vicious murder, a manhunt may begin anew. Whether it *should* is another question.

Posted 8/17/08

MISCARRIAGES OF JUSTICE: A ROADMAP FOR CHANGE

To prevent wrongful convictions, education is key

By Julius Wachtel, (c) 2010

The system worked exactly like it's supposed to....The Government doesn't owe an apology to anyone about that....This is just one of those horrible, horrible things.

Those unforgettable remarks were made by Caddo Parish (LA) Assistant District Attorney Hugo Holland during an on-camera interview about his office's conviction of Calvin Willis, who was cleared in 2003 by DNA after serving twenty-two years in prison for a rape that he didn't commit. Willis was one of eight wrongfully convicted persons featured in the groundbreaking documentary [After Innocence](#), winner of the Special Jury Prize at the 2005 Sundance Film Festival.

Holland's point of view is all too common. Although some cops and prosecutors are deeply remorseful for locking up the innocent, many others seem unfazed, often asserting that despite incontrovertible forensic evidence to the contrary the exonerated may still be guilty. Here's what Asst. D.A. Holland [told the Baton Rouge Advocate](#) shortly following Willis's release: "I'm still not convinced Calvin Willis didn't do it. Calvin Willis is not innocent, he's just not guilty. I just don't know who did it."

What's missing in this picture? Nothing in D.A. Holland's comments suggested that he saw in his role any greater purpose than convicting whomever the police deposit at his door. "Beating" the defense seems to be many prosecutors' main goal. Here's the [last paragraph](#) from the National District Attorney's Association website profile of Clatsop County (OR) District Attorney Joshua Marquis:

Josh Marquis beat famed defense attorney Gerry Spence in a 1985 juvenile proceeding, winning the equivalent of a manslaughter conviction of a 16-year-old accused of shooting a neighbor to death in a property dispute. Although the Oregon Court of Appeals reversed the conviction four years later, Marquis has a book that Spence sent him, with the inscription: "To my friend Josh Marquis, who beat me fair and square."

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That inscription seems quite undeserved. The book that Marquis refers to, “Smoking Gun,” Gerry Spence’s impassioned account of the boy’s defense, reports that the Oregon appellate court threw out the conviction because the D.A. failed to prove the boy’s guilt to the required standard: beyond a reasonable doubt. (Marquis seems to take pleasure in advocating against the wrongfully convicted. For example, see his [opinion piece](#), criticized in an [earlier post](#).)

Prosecutors and police seem to view what they do as a zero-sum game that only one side can win. But Calvin Willis’s exoneration was a victory for everyone, as it not only freed a wrongly convicted man but alerted the authorities that a dangerous criminal was still loose. Unfortunately, Asst. D.A. Holland didn’t agree. “There ain’t no place to go with this case,” he said. “It’s impossible to try a second person when one person has been convicted.” That of course is simply untrue, yet the mindset it demonstrates is chilling.

[Calvin Willis’s conviction](#) was based on three things: he lived in the neighborhood and had been inside the home in the past; his blood type (O, the most common) matched semen found on the victim’s clothes; and the victim identified his photograph.

Yet there was plenty of exculpatory evidence. Willis’s wife testified that he was home. A pair of boxer shorts with a waistband ten inches too large was recovered at the scene. The victim, a young girl, described her assailant as having a beard, while Willis had always been clean shaven. She also couldn’t identify him in court. And on and on. All this notwithstanding, Willis would still be locked up if it wasn’t for the fact that the [Innocence Project](#) took up his case and proved that the matching DNA on the fingernail scrapings and the boxer shorts wasn’t his.

[Last week](#) we made these recommendations:

- Prosecutors and police must perceive their roles more broadly, in terms of securing justice rather than only making arrests and gaining convictions.
- They must change how they actually do their work.
- Finally, they need to acknowledge that serious errors will happen. Knowing that, they must implement strategies to identify and correct mistaken arrests and wrongful convictions after the fact.

Had these precepts been followed Willis would have never been arrested, let alone charged and convicted. In their rush to judgment the police applied poor investigative practices, and when their problem-riddled case landed on the D.A.’s lap a prosecutor

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capitalized on the State's vastly superior resources to make it stick. Once the innocent man was finally released, instead of apologizing the D.A.'s office demonstrated anew the lack of reflection and capacity for self-criticism that helped the miscarriage of justice happen in the first place.

What's to be done?

- A vigorous re-education campaign at all venues, from police departments to law schools emphasizing that police and prosecutors are first and foremost guarantors of justice. Poor policing doesn't just devastate the wrongly accused: it's dangerous for everyone, as for each mistaken arrest and wrongful conviction a perpetrator goes free. That's why care and precision in law enforcement are much more than good ideas -- they're moral imperatives.
- Coursework and instruction in the causes and prevention of miscarriages of justice should be incorporated into academy, college and university curricula and peace officer and lawyer licensing requirements. It's important to go beyond alerting students and practitioners to poor investigative and forensic practices. As "[The Ten Deadly Sins](#)" suggests, failing to understand and properly deal with workplace routines and pressures can lead even the best-trained and equipped officers and prosecutors to take dangerous shortcuts.
- Finally, police and prosecutors must support vigorous quality control. Knowing that mistakes *will* happen, arrests and convictions must be monitored by independent teams of investigators and prosecutors who are beholden to no one. (A [pioneering approach](#) is underway in Dallas County.)

No cop or prosecutor starts out their career intending to do the wrong thing. Indeed, the very thought of arresting or convicting the innocent is repulsive, an outright contradiction of the principles that law enforcement professionals so eagerly swear to uphold. How to recapture that spirit is the most urgent to-do for American criminal justice in the 21st. century.

Posted 8/3/08

NEAR MISSES

Six chilling examples of an imperfect criminal justice system

By Julius Wachtel, (c) 2010

Had the FBI not tried for six years to pin the 2001 anthrax attacks on an innocent man, recent revelations that maybe -- just maybe -- they've identified the real killer might have been better received.

Only two months after the Justice Department agreed to pay [Stephen Hatfill](#) \$5.8 million for recklessly invading his privacy (a judge commented that there was "not a scintilla of evidence" of his guilt) the Federal leak machine was already cranking out rumors that a fellow anthrax researcher, [Bruce Ivins](#), was about to be indicted for the attacks that killed five and left America afraid to open its mail. Unfortunately the whole story may never be known, as Ivins killed himself shortly after being released from a hospital where he was treated for a depression reportedly brought on by being in the Fed's bullseye.

Hatfill isn't the only innocent soul whom the FBI has wrongly soiled as a "person of interest". Remember [Richard Jewell](#)? He was the Atlanta security guard who discovered a bomb in a park during the 1996 Olympics and warned off bystanders before the device went off. FBI agents immediately targeted Jewell, grilling him, searching his home and generally making his life miserable. Two years later Eric Rudolph, a serial bomber, was spotted by citizens after an explosion at an abortion clinic. He wasn't caught until 2003. Rudolph later pled guilty to planting pipe bombs at the Olympics and three abortion clinics, including one where an off-duty police officer was killed. (Jewell went on to become a small-town cop and deputy sheriff. He passed away from heart disease last year.)

And who could forget [Brandon Mayfield](#), the Portland attorney who was arrested as a material witness to the 2004 Madrid train bombing because FBI examiners incorrectly matched his fingerprints to latent prints found by Spanish police on a bag of unexploded detonators. Confident in their work (Mayfield happened to be Muslim and represented a suspected terrorist in a civil action), the Feds pooh-poohed Spanish analysts who insisted that the prints didn't match. Eventually Spain positively identified the man who really handled the explosives -- an Algerian terrorist -- and the sheepish Feebs let Mayfield go. (He got \$2 million in taxpayer cash for his troubles.)

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It's not just the Feds who get it wrong. Here are three examples of goofs by local cops in LiberalPig's home turf:

- In January 1998 [Stephanie Crowe](#), a 12-year old girl, was stabbed to death in her Escondido (Calif.) home. Detectives quickly zeroed in on her 14-year old brother Michael. After being relentlessly interrogated he confessed and implicated two friends. Meanwhile patrol officers spotted a drifter who had been seen near the residence on the night of the murder. He was at a laundromat, so they took some of his clothes for processing. But detectives were so sure the boys did it that they never sent anything in. Months later during a pre-trial hearing the judge ordered that it be done. Sure enough, spots on the clothes turned out to be the victim's blood. Charges against the boys were dismissed (sorry!) and the man, a violent schizophrenic was convicted and imprisoned.
- "He grabbed my hair and then he started pulling me. And that's when I screamed. I tried to go away, and then my friends were trying to help me, and that's when he started choking me." In January 2004, as [Eric Nordmark](#) sat on trial in Santa Ana (Calif.) for molesting three girls whom he'd never met, he was convinced that the victims were in fact assaulted, although not by him. But on the second day one of the three finally admitted they made it all up to avoid being punished for coming home late. Nordmark, a homeless person, was picked out because he seemed like a good fall guy. (His accusers were convicted of juvenile offenses and placed on probation.)
- In January 2006, after spending seven months in San Bernardino County (Calif.) jail, Christopher Fitzsimmons was released when DNA tests proved that he didn't rape the 4-year old girl who accused him of assaulting her in a park. Defense investigators discovered that the girl's mother had reported other rapes of her daughter, including two after Fitzsimmons was jailed.

In the above examples innocent persons were forced to endure unimaginable stress, huge legal bills, loss of reputation and employment, even significant jail time. However, unlike wrongful convictions, which have spawned a large advocacy movement, these lesser miscarriages of justice are like Rodney Dangerfield: they don't get no respect. Yet the root causes are the same. And perhaps the most fundamental is shoddy investigation.

Is police work often so poor because because FBI agents and detectives don't get enough training? Or is the fault more likely to be found in the workplace? Even in the face of limited resources, detectives are expected to promptly solve serious crimes and keep clearance rates high. Do such pressures inhibit their ability to discover the truth?

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Whatever their cause, investigative shortcomings inevitably affect prosecutors. If police don't inform them about gaps in a case (maybe because they don't know they exist) they can become equally overconfident. Prosecutors and judges are also political animals, highly attuned to public opinion and reluctant to let defendants off the hook lest they seem soft on crime.

The truly innocent are in the worst position. Few can afford top-notch lawyers and investigators to develop leads that police or the Feds might have ignored. As the pitifully long and sad string of exonerations attests, poor police work that goes unchallenged has repeatedly led well-intentioned jurors to convict the innocent. Finders of fact can only work with what they're given, and if that's a slipshod investigation, that's what will have to do.

Posted 8/30/09

NEVER SAY DIE

When should prosecutors quit clinging to a case?

By Julius Wachtel, (c) 2010

On August 13, 2009, after a decades-long battle to prove his innocence, Bruce Lisker was a free man, at least for the time being. Imprisoned at seventeen, he had served twenty-six years for murdering his mother. His release was prompted by [the findings of a Federal magistrate](#) who concluded that Lisker had been irreparably harmed by an ineffective defense, due process violations and “cumulative prejudice.” A Federal district judge agreed and [ordered that his conviction be set aside](#).

But the L.A. County D.A. wasn't done with him. Nine days after leaving State prison Lisker was re-arraigned in Los Angeles County Superior Court. A retrial (actually, re-retrial, but who's counting?) is pending.

Rewind to March 10, 1983. Only hours after Lisker allegedly found his mother stabbed and bludgeoned to death, [police were already dismissing the 911 call](#) (“Help me, please! I need an ambulance right now...Hurry!... My mom -- she's been stabbed! She's been stabbed!”) as the transparent attempt of a murderous youth to cover up his heinous deed.

There was reason to be wary of Lisker. A drug user and general n'eer-do-well with a violent temper, the high school dropout was reportedly strung out on meth when cops arrived and had to be handcuffed and confined to a patrol car. An adoptee, Lisker had spent time in a home for troubled youths and was once arrested for throwing a screwdriver at a motorist in a road-rage dispute. But what most concerned LAPD Detective Andrew Monsue was that the boy and his mother frequently argued; indeed, at the time of her death Lisker lived alone, his apartment, car and living expenses paid for by his weary parents.

Only problem was, precious little tied him to the crime. Monsue, who had previous run-ins with the youth, considered him “a loudmouth -- an in-your-face little punk.” Examining the scene, he concluded that Lisker could not have seen his mother's body through a window as he claimed. Rather than simply forcing the back door open, as an innocent son might have done, Lisker dismantled a window so that he could climb through. There was also a bloody footprint that police thought matched Lisker's shoe.

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Lisker demanded a polygraph. He got one. While the results aren't admissible in court, the examiner concluded that his subject was being deceptive.

Monsue arrested Lisker for murder. Yet significant clues pointed elsewhere. Lisker had a dope-smoking, mentally disturbed friend named Mike Ryan. According to Lisker's father, Ryan, also 17, unexpectedly came to their home the day before the murder and asked to do chores for money. The victim turned him away. Ryan soon wound up in Mississippi, where he was arrested for housebreaking. His story, [first related to Harrison County \(Miss.\) deputies](#), then personally to Monsue, was nothing short of astounding. Not only did he confirm visiting the Lisker residence just like the father said, but he admitted stabbing someone on the very day of the murder! (He insisted it wasn't the victim -- it was another man with whom he got into a knife fight.)

Then something even more remarkable happened: Detective Monsue declared Ryan "[convincingly cleared](#)" of the killing (pg. 5). Exactly why remains hard to say. One possible reason is that Monsue missed finding Ryan's extensive criminal record, including a conviction for *robbery with a knife* less than a year earlier, because he entered an incorrect birthdate into the police computer.

Ryan was sure fond of knives! Unfortunately he committed suicide in 1996. His mother later said that she always suspected him of being the killer.

With the evidence against Lisker so shaky, a confession would sure come in handy. Coincidentally, prison inmate [Robert Hughes](#), an unbalanced character with a history of snitching happened to be in L.A. County Jail. Hungry for a deal on his own sentence, he befriended Lisker. Soon Hughes had great news: Lisker admitted the killing!

Lisker went to trial. Within days his lawyer convinced him to plead guilty as a juvenile, making him eligible for release at age 25. Lisker reluctantly provided a sketchy account of the crime. However, authorities soon determined that he wasn't suitable for placement at a youth facility, so he withdrew his plea and was retried.

Energized perhaps by Lisker's caving in, prosecutors aggressively went forward with their case. They hammered on the "fact" that Lisker's view of his mother's body was obstructed. They mentioned the squabbles. They introduced the bloody footprint. And they brought in jailhouse stoolie Robert Hughes.

Lisker didn't take the stand, so he never got to tell jurors that he didn't do it. What's more, the judge wouldn't let the defense point the finger at Ryan. [According to the Federal magistrate](#), the ruling could have gone in Lisker's favor had the judge been told certain things: that Ryan had a violent criminal past, that Detective Monsue caught him

lying about his comings and goings on the day of the murder, that he used a phony name to check into a Los Angeles-area motel shortly after the killing, and -- this one's a real shocker -- that about the time of the murder a brief (misdialed?) call had been placed from the victim's residence to a number "nearly identical" to that of Ryan's mother (pg. 28).

Lisker's lawyer failed to challenge the prosecution about key aspects of its case. Lisker really *could* have seen the body from outside the home. The bloody footprint *didn't* match his foot. And there was more. The victim's husband testified that he gave his wife a large amount of cash, but police reported none was found in her purse. That meshed perfectly with what the jailhouse informer told the jury -- that Lisker's theft of the money precipitated the lethal argument with his mother. In fact, *the cash was still in the purse*, buried deeply. Discovered belatedly, it remains in the LAPD evidence vault to the present day, a silent witness to what in retrospect seems a tragic miscarriage of justice.

That "missing" cash haunted Lisker even after his conviction. When he came up for a parole hearing in April 1998 Detective Monsue [informed the board](#) that the man and wife who bought the victim's home found money secreted in the attic, where Lisker assumedly hid it. The husband later denied saying any such thing (pg. 2 of the link). He also mentioned that, according to Monsue, there was "some question" as to whether Lisker or a friend committed the crime.

LAPD Chief Bratton subsequently disavowed Monsue's letter to the parole board. No matter. Lisker had already spent fifteen years in prison. He would do eleven more.

In 1992, nine years after his incarceration, knowing full well that he would never be paroled unless he accepted responsibility, Lisker told board members that, yes, he killed his mother. It didn't work. He refused to meet with the board again until 1999, at which time he proclaimed his innocence. That didn't work either.

Given the paucity of the evidence, Lisker's eventual exoneration seems a foregone conclusion. What's most instructive, however, is the exceeding vigor with which local and State prosecutors opposed his getting another bite of the apple, eventually taking more than two decades of a man's life before a Federal judge finally called a time-out.

Why be so bullheaded? Denial and fear of embarrassment must have played a part. D.A.'s are political animals, and a faux-pas this serious could be plenty threatening. Police had perhaps the most to lose. Unlike prosecutors, cops aren't absolutely immune from civil liability, and exonerations often breed sizeable lawsuits.

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Prosecutors like to deflect criticism by emphasizing the need to insure the “finality of the process”, meaning that once a judicial decision is made, it ought to stay made. In Lisker’s case they turned to AEDPA, the “[Antiterrorism and Effective Death Penalty Act of 1966](#),” a law that’s meant to bar abuse of the Federal habeas process by State inmates. Had Lisker lacked a superb legal team its intricacies would have probably been insurmountable.

Ironically, the one factor that most likely saved Lisker’s bacon was the involvement of another cop. [Sergeant Jim Gavin](#), an LAPD internal affairs detective, was assigned to investigate Lisker’s complaint that Monsue lied to the parole board about the money. His inquiry soon turned into a quest. And when Gavin’s superiors shut it down, possibly because they didn’t like what he was turning up, Gavin talked to Lisker’s attorneys and the *Los Angeles Times*. [The paper’s detailed, multipart account of the case](#) helped give Lisker the credibility and political legs to prevail.

What happened to Monsue over the letter? Nothing. Although Chief Bratton “withdrew” the document, declaring that it should not have been sent, LAPD cleared Monsue of wrongdoing. Not so for Sergeant Gavin, who was disciplined for leaking information. Later promoted to Lieutenant and awarded the Medal of Valor, Gavin [sued the LAPD](#) over harassment that he claimed was brought on by his work on the Lisker case. A jury rejected his suit, as Gavin knew that leaking was wrong but did it anyway.

Internal Affairs detectives can’t be expected to watch over officers on a daily basis. For that there are field supervisors. So where were Monsue’s? The Assistant D.A.’s? Given the consequences of making incorrect charging decisions, strong oversight is crucial, and all the more so in cases such as this, where there is scant corroboration and little forensic evidence. And the buck doesn’t stop there. Assuring that justice is served isn’t just a management function but the sworn responsibility of a community’s criminal justice leaders. LAPD Chief Bratton and L.A. County D.A. Cooley were well aware of the controversy. One word from them could have spared an apparently innocent man years in prison.

Where were *they*?

Posted 2/10/11

NO END IN SIGHT

DNA exonerations of the wrongfully convicted continue as non-DNA work heats up

By Julius (Jay) Wachtel. Three years ago Jack Blackburn, chief counsel of the [Innocence Project of Texas](#), said that cases of wrongful conviction where DNA was available [were drying up](#). His comments were echoed by the [California Innocence Project's](#) Justin Brooks, who said that "we're seeing very few DNA cases where testing is a possibility."

Barry Scheck felt differently. Co-founder of the famous [Innocence Project](#), the nation's first organization of its kind, he estimated that there were enough wrongful convictions with DNA available to support another ten years' work. Scheck, whose group shunts off non-DNA cases to state and local projects, suggested that the only reason why things might slow down is that advocates "are not looking hard enough."

Well, that's easy for him to say. Established in 1992, the Innocence Project was for many years the only place to whom the wrongfully convicted (and scores of not-so-wrongfully convicted) could turn for relief. Although other projects are now helping spread the burden, the original group's rock-star status assures it an unending supply of requests, reportedly to the tune of 3,000 a year. That keeps six full-time lawyers and a retinue of interns from [Cardozo School of Law](#), where the Innocence Project is housed, extremely busy.

Well, did DNA exonerations slow down? According to an informal review of [data published by the Innocence Project](#), the short answer is not yet. Since the exoneration of [Gary Dotson](#) in 1989, innocence projects have exonerated 266 persons through DNA, averaging 18 per year between 2007-10. (There has been one exoneration so far in 2011.) As one might expect, most of these cases involve crimes that occurred while DNA was in its infancy, with seventy percent of the convictions preceding 1990. Still, there is no indication that the end is in sight. Here are the three most recent DNA exonerations:

- In January 2011 Texas inmate [Cornelius Dupree](#) was released after serving 30 years for a rape/robbery. Dupree and a codefendant, whose release is pending, were mistakenly identified by the female victim from photo lineups. Her male companion couldn't identify either subject from photos but did so later, in court. According to the Innocence Project only two other exonerated persons have served more time: James Bain, a Florida inmate who served 35 years, and

POLICEISSUES.ORG

Lawrence McKinney, a Tennessee inmate who was locked up 31 years. This case was handled by the Innocence Project.

- In December 2010 Arizona inmate [John Watkins](#) was exonerated after serving six years for a 2004 rape. Misidentified by the victim from a suggestive photo lineup (Watkins was the only whose shirt was the right color) he accepted a plea deal to minimize the severity of his sentence. This case was handled by the [Arizona Justice Project](#).
- In May 2010 Ohio inmate [Raymond Towler](#) was exonerated of child rape after serving 28½ years. He was originally identified from photo lineups by the 11-year old victim, her 12-year old companion and two persons who said they had seen him in the area. A hair believed to be “Negro” was the only physical evidence. Towler and several alibi witnesses swore that he was home at the time but they were disbelieved. This case was handled by the [Ohio Innocence Project](#).

It’s inevitable that sooner or later the number of miscarriages of justice where DNA is both available and of probative value will drop off. Many local projects have already exhausted their supply of such cases. In any event, DNA is a tool, not a solution. Biological evidence that links a crime to its perpetrator is present in only a small proportion of cases; according to the Innocence Project, DNA can help in no more than ten percent. Yes, it’s conceptually simple to apply, and yes, the results can be compelling. But focusing just on DNA, as the Innocence Project does, leaves a tremendous gap.

Exoneration is a tough slog when DNA is available. As we pointed out in [“What if There’s No DNA?”](#) it’s doubly so in its absence. Reconstructing the past with witnesses and circumstantial evidence is difficult, and particularly after a conviction. Police lose interest – after all, they’ve done their job. Most accused also lack the resources to hire lawyers and investigators. The ability to gather enough facts to make a persuasive claim of innocence diminishes over time as memories fade and people disappear. And that’s to say nothing of the objections that prosecutors are sure to advance when a would-be exoneree seeks a habeas hearing. (For an account of a still-ongoing ordeal see [“Playing With Fire.”](#) For another, which is thankfully done, see [“Never Say Die.”](#))

Just a few days ago the ranks of projects that take on non-DNA cases were increased by one with the launching of Seton Hall Law School’s the [“Last Resort Exoneration Project.”](#) [Luis Rojas](#), a living example of a non-DNA exoneration, spoke at the kick-off event. A New York City resident, he had served eight years of a life sentence for murder. His conviction was based on the mistaken testimony of eyewitnesses who said

he furnished the gun that another teen used in a killing. Rojas, then 18, was a mild-mannered youth with absolutely no criminal record. It took countless hours of work by a dedicated team of volunteers to win him a new trial, where he was acquitted.

Rojas was doubly lucky. He would probably still be rotting away in prison except that his situation drew the attention of the new project's director, Lesley Risinger. She passed on the information to her mother, a lawyer, who got the ball rolling.

Debunking witnesses isn't the only route for non-DNA exonerations. Physical evidence has often been inappropriately used to convict. In ["One Size Doesn't Fit All"](#) we discussed the misuse of Shaken Baby Syndrome. Other forensic techniques that have come under attack include [blood spatter](#), [bite marks](#), [dog scent](#), and, as came to light through the wrongful execution of [Cameron Willingham](#), [arson evidence](#).

Innocence projects can help correct injustices, yet they must fight the good fight from the outside. Official initiatives that proactively seek to identify and address miscarriages of justice, such as the Dallas D.A.'s [Conviction Integrity Unit](#), are all too rare. Yet [every wrongful conviction begins with a mistaken arrest](#). It also hardly needs to be pointed out, as we did in ["It's Good to be Rich,"](#) that innocent persons who lack substantial resources are at a particular disadvantage. What's needed is a national initiative by criminal justice agencies to address the underlying causes of wrongful conviction and devise solutions. Really, until police and prosecutors are onboard, everything else is a band-aid.

Posted 11/22/09

PLAYING WITH FIRE

Journalism students double as advocates for the wrongfully convicted

By Julius Wachtel, (c) 2010

About the only thing not in dispute is that a life violently ended in a dark corner of a hardscrabble Illinois town some thirty-one years ago. On the evening of [September 15, 1978](#), in the Chicago suburb of Harvey, a man sitting in a car was killed by a shotgun blast to the head. Neither his wallet, the murder weapon or any other significant physical evidence were recovered. Within days officers arrested an 18-year old youth, Anthony McKinney. The sole person convicted, he remains in prison doing life without parole.

Fast-forward to 1999. As a youth, [Wayne Phillips](#) had testified that he saw McKinney shoot and rob the victim. Twenty-one years later, in a chance encounter with McKinney's younger brother, he tearfully confessed that he had lied. Phillips said that he and his friend Dennis Pettis, neither of whom saw the crime, were beaten by police into falsely identifying McKinney as the shooter (§34-38.)

McKinney's brother passed this on to the [Medill Innocence Project](#) at Northwestern University's Medill School of Journalism. (Northwestern's law school hosts a separate [Center on Wrongful Conviction](#).) Under direction of the project's founder, journalism professor David Protess, students collaborate with private investigators and lawyers to examine miscarriages of justice and "expose and remedy wrongdoing by the criminal justice system."

Medill's investigation began in 2003. It would be a tough slog. Aside from what Phillips said, students had to deal with the unpleasant fact that McKinney confessed to the murder. Although he recanted before trial – he said police beat him up – jurors didn't believe him. Considering the eyewitness testimony and his confession McKinney was lucky that the judge didn't sentence him to death, the penalty that prosecutors sought.

Yet there had been concerns about the evidence all along. In a pre-trial statement to a defense investigator, [Dennis Pettis](#) confirmed that he and Phillips were forced to lie. Unfortunately, Pettis made himself scarce and couldn't be found in time for the trial (§39-44). His sister said she overheard Pettis and Phillips complain about being coerced by police but wasn't allowed to testify (§45-46). Neither were two men who

heard a local hoodlum named Anthony Drakes say that he was present when the murder occurred and that McKinney wasn't involved (pg. 3).

McKinney's petition for post-conviction relief, filed last year, sets out compelling reasons for a new trial. Phillips and Pettis gave affidavits swearing that they didn't see the shooting (§34-44). There is also a stunning videotaped statement by Anthony Drakes. Drakes, *who has since done time for an unrelated shotgun murder*, admitted being present when a man named Roger McGruder robbed and shot the victim. Other witnesses said that Drakes, McGruder and a third man, Michael Lane, were members of a robbery crew and that Drakes and McGruder blamed the killing on each other (§60-72).

To win a retrial defendants must point to newly-discovered evidence that would have likely resulted in acquittal. After students videotaped Drakes the Cook County State's Attorney sent [two prosecutors and an investigator](#) to interview him. Surprise! Drakes recanted, claiming that he told the students nonsense because that's what they wanted to hear. His motive? Food and \$100, most of which he used to buy crack.

One of those students vehemently disagrees. [Evan Benn](#), now a reporter in St. Louis, said they gave a cabdriver \$40 to take Drakes home and had no idea that he intended to hop out after a few blocks and keep the change.

Students didn't interview McGruder. But they apparently spoke with [Michael Lane](#). According to a report filed by State's Attorney investigators, Lane said that the students were anxious to clear McKinney because they wanted a good grade. To that end they bought him an expensive meal, gave him \$50-100 and even had a girl flirt with him. In the end Lane told the students "I didn't have shit to do with the murder." He attributed rumors of his and McGruder's involvement to McKinney's brother, supposedly a member of a rival street gang.

Earlier this year prosecutors took the extraordinary step of issuing a [subpoena](#) demanding that Medill and its students turn over their entire work product, including notes, recordings, e-mails and even student grades. Citing Illinois reporter's privilege, [Medill refused](#). In a [response brief](#) the State's Attorney insisted that the materials were needed to help determine whether witnesses were biased by cash payments and the students' desire for good grades. Prosecutors also argued that the Medill Innocence Project wasn't a protected activity under Illinois law as it was "an investigative agency, as opposed to a news gathering agency intent on publishing the news."

[Medill's reply](#) was unusually blunt. Defining its students' work as investigative journalism, it accused prosecutors of displaying a "surprising lack of comprehension"

and “disturbing lack of sensitivity” to the First Amendment and Illinois law. Medill also chided the State’s Attorney for filling its brief “with off-point and distracting arguments.”

That caught the judge’s eye. [In a recent hearing](#) she severely chastised Medill’s lawyer for infusing his response with sarcasm. That things got this heated is understandable; after all, by issuing the subpoena the State was honing in on the project’s core weakness. Unlike most innocence projects, which are directed by attorneys and staffed by law students, Medill can’t avail itself of attorney-client privilege, a protection that’s far more powerful than a reporter’s shield. That naturally places it and its clients at a disadvantage.

Yet is Medill really doing journalism? Investigative journalism isn’t normally associated with taking sides, and certainly not with tailoring facts to support a particular position. Would students pursue leads even if they jeopardized their client’s case? Would they publish their findings? Looking through their comments on Medill’s website one thinks not: they might look like impartial fact-finders on the outside, but on the inside they’re rooting for their client. Although they’ve scored some impressive victories authorities are now pushing back, and if Medill persists in straddling legal aid and journalism it risks doing both poorly.

Meanwhile the mind-numbing legal process is on a brief furlough. Whether prosecutors get the access they seek won’t be known until January, when a ruling on the subpoena is expected. One day there will be an evidentiary hearing and possibly a new trial. But whatever happens, uncertainty about what took place on the mean streets of Harvey three decades ago will doubtlessly linger. Indeed, with all the legal fisticuffs, self-serving moves and high-minded rhetoric, the victim of the shooting, a security guard named Donald Lundahl, has been all but forgotten.

Posted 7/29/11

RUSH TO JUDGMENT (PART II)

By now, every cop knows that witness ID can be chancy. Right?

By Julius (Jay) Wachtel. Coming only three weeks after asserting that [LAPD](#)

[“absolutely” had the responsible party](#), Chief Charlie Beck’s explanation that [“we would have been derelict had we not made the arrest”](#) of what turned out to be an absolutely innocent man left more than a few heads shaking.



In [Rush to Judgment](#) we assumed that detectives had arrested Giovanni Ramirez (left photo) without a warrant because the D.A.’s office never filed charges.

According to Chief Beck, though, [a warrant had indeed been issued](#). That’s surprising as the evidence was frightfully thin. It was only through happenstance that Ramirez’s parole officer told cops that his client resembled the artist’s sketch that had been plastered on billboards. There was no evidence that Ramirez went to the game. (He turns out not to be a fan. Go figure.) Search warrants yielded zip: no evidence of Dodger regalia, of being at the stadium, of having a grudge against the victim.

LAPD wound up where they started, with virtually nothing but eyewitnesses. Then an LAPD insider confirmed what many already suspected, that the identification of Ramirez was “weak and tentative.” If the two now charged in the beating are truly guilty, that makes perfect sense. One of them is on the right. He’s [Louie Sanchez](#), 29 (the other is an Anglo.) Other than being Hispanic and having a neck tattoo, he looks little like Ramirez, whom he outweighs by a large margin.

Maybe the judge who signed off on Ramirez’s arrest warrant (and on search warrants for his two crash pads) knew something more. Or maybe he was oversold by detectives, [a possibility that Chief Beck speculated](#) might have skewed his own view of things.

After exonerating Martinez LAPD set out its new case, which seems far more compelling. Photographs reportedly depict Sanchez and his buddy Marvin Norwood, 30, a bulky white guy, sitting in the same section as the victim. Spectators described the pair as belligerent and assaultive. Police allege that they bragged about the beating to coworkers, and when confronted pointed fingers at each other. And that’s not all. Sanchez’s sister, who was also at the game, reportedly implicated both in the assault.

“Probable cause” can be an elastic concept, and all the more so when police are under pressure to solve a high-profile crime. Fortunately the D.A. came through and forced the department to reassess. And to its credit it did. Consider how things might have turned out had the eyewitnesses expressed certainty about Ramirez. “Yes, officer, that’s the guy. I swear it!” Can you spell w-r-o-n-g-f-u-l c-o-n-v-i-c-t-i-o-n?



For just such an example look no further than the sad case of [Thomas Haynesworth](#). During the first two months of 1984 five Richmond, Virginia women were abducted and sexually assaulted. Fortunately all survived. One of the victims later spotted Haynesworth on the street (left photo.) Convinced that he was the one, she called police. They displayed his picture to the others. Three more identified him.

Haynesworth, then 18 and with no criminal record, insisted that his accusers were mistaken. He went to trial. He was convicted in three sexual assaults and acquitted of one. His cumulative sentence: 74 years.

Fast-forward to 2005. Troubled by a series of wrongful convictions, Virginia’s governor ordered a review of past cases. It took four years, but DNA conclusively proved that one rape for which Haynesworth was convicted, and the one for which he was acquitted, had in fact been committed by Leon W. Davis (right photo.) Davis was already in prison, doing hard time for a string of sexual assaults that took place after Haynesworth’s arrest.

By this time the [Mid-Atlantic Innocence Project](#) had taken up Haynesworth’s defense, and after a protracted investigation even prosecutors agreed that he was innocent – of everything. Unfortunately, the two remaining cases lacked DNA, and one victim still insisted that Haynesworth was her assailant. So to date he has not been fully exonerated (a motion is pending.) A judge nonetheless granted Haynesworth parole in March, on his forty-sixth birthday.

He had been locked up twenty-eight years.

Haynesworth clearly resembles Davis. Interestingly, Ramirez (left) and Sanchez (right), who don’t look that much alike, both resemble the artist’s rendering of the perpetrator. It’s little wonder that eyewitness misidentification is



considered [the primary cause](#) of wrongful conviction, figuring in three out of four DNA exonerations.

Of course, detectives usually go well beyond photo lineups. But sometimes they don't dig deep enough, while at other times information is simply scant. That's when virtually any circumstance can be interpreted as an indicator of guilt, and the more the merrier. Consider Ramirez. Violent background? Check. Gangster appearance? Check. Neck tattoo? Check. Hispanic descent? Check. Present at the game? Well, can't say, but an ex-girlfriend supposedly was there. Hey, maybe she was the getaway driver! Check! Really, who needed the parole agent? Cruising the seedier parts of L.A. would have yielded any number of individuals who resembled the artist's sketch and matched or bettered Ramirez's profile. In the end what kept him from getting hammered for something he didn't do was concern over the ID's and a skeptical prosecutor.

Haynesworth wasn't as fortunate. Not only did he look a lot like the perpetrator, but a series of similar crimes had occurred. One misidentification led to more, lulling detectives into overconfidence. Certain that they had the right perp for *each* crime, they quit investigating. The upshot was that an innocent man spent the cream of his adulthood in prison while the real evildoer continued victimizing others.

What's the moral to these stories? It's really quite simple. Don't just go on appearances. Focus on corroboration. And be sure it's quality stuff. Remember that a pile of junk is still that.

Posted 8/30/24

SWITCHING SIDES

St. Louis' D.A. argues that a man condemned on his predecessor's watch is in fact innocent

Time left until execution:

25	09	52	26
Days	Hours	Minutes	Seconds

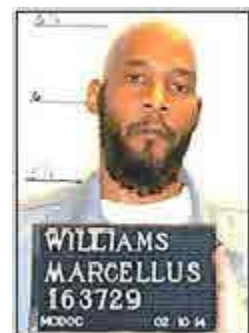
For Police Issues by Julius (Jay) Wachtel. As its “time left until execution” clock relentlessly counts down, [The Innocence Project](#) warns that the State of Missouri intends to murder an innocent man:

DNA evidence proves Marcellus Williams is innocent and the prosecuting attorney seeks to vacate his wrongful conviction, yet Missouri has scheduled his execution for Sept. 24.

It's not just about the death penalty. (We, too, [have come out against it.](#)) It's about what actually took place on that fateful Tuesday, twenty-six years ago. That's when Mr. Williams, a multi-convicted felon allegedly on the prowl for things to steal, reportedly broke into the residence of Felicia Gayle, a total stranger, stabbed her to death, and absconded with her laptop computer.

In June 2001 a St. Louis jury convicted Mr. Williams of murder and recommended he be sentenced to death. And that's the penalty the judge imposed. But as execution neared, things drastically changed. In [a January 2024 motion](#), St. Louis County D.A. Wesley Bell – the chief prosecutor, mind you – filed a detailed, 63-page motion arguing that a man convicted during his predecessor's watch was in fact innocent. Here's an outtake:

DNA evidence supporting a conclusion that Mr. Williams was not the individual who stabbed Ms. Gayle has never been considered by a court. This never-before-considered evidence, when paired with the relative paucity of other, credible evidence supporting guilt, as well as additional considerations of ineffective assistance of counsel and racial discrimination in jury selection, casts inexorable doubt on Mr. Williams's



conviction and sentence.

When an objection comes from *that* side of the tracks, one can't help but take notice. And as we pored through the competing accounts, the complexities were staggering. Here are (admittedly, incomplete) summaries of (1) the evidence at trial, (2) a disparaging assessment of the prosecution's case by Mr. Williams' advocates, including the current D.A., and (3) a retort by the Missouri Attorney General, who strongly opposes a re-do.

TRIAL EVIDENCE

During the evening hours of August 11, 1998, the husband of Felicia Gayle returned to their residence in University City, a St. Louis suburb. Dr. Daniel Picus [found his wife's body](#) at the bottom of the stairs, a kitchen knife embedded in her neck. She had been stabbed *forty-three times*.

Nine months later Marcellus Williams, a prolific felon who was serving a twenty-year term for robbery, told cellmate Henry Cole that [he was the one who had murdered Ms. Gayle](#). Upon his release in June, 1999, Mr. Cole – perhaps motivated by the \$10,000 reward offered by Dr. Picus – informed police. His account supposedly included details that hadn't been publicly released.

Police subsequently interviewed Mr. Williams' girlfriend, Laura Asaro, a reported sex worker. [After initially denying any knowledge of the killing](#), she changed her tune. Ms. Asaro said that her boyfriend showed up with a badly scratched, bloodied neck. There was a strange laptop in his car, and a purse with the victim's I.D. was in the trunk. Mr. Williams described the killing in grisly detail. He also warned her to tell no one.

Mr. Williams soon told his girlfriend that he sold the laptop to Glenn Roberts. When contacted by police, Mr. Roberts had the machine, and authorities confirmed that it belonged to the victim's husband. According to Mr. Roberts, Mr. Williams said that it had been his girlfriend's, [and that he was selling it on her behalf](#).

As one would expect, Mr. Williams appealed his conviction. Since it was a death penalty case, final say rested with the State Supreme Court. And on January 14, 2003, the Justices [affirmed the verdict and the penalty](#). Here's their concluding paragraph:

Finally, this Court concludes that the death sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases,

considering the crime, the strength of the evidence, and the defendant. Williams confessed to the murder. The crime involved a vicious attack during a burglary. Williams has a lengthy and violent criminal record. The sentence is not disproportionate...All concur.

REPUDIATION BY DEFENSE

Mr. Williams' defenders felt that physical evidence was abundant, and it all pointed away from Mr. Williams. Arguing that DNA effectively ruled out Mr. Williams as the perpetrator, his defenders embarked on a decades-long set of legal moves, including a pair of (unsuccessful) appeals to the U.S. Supreme Court (click [here](#) and scroll down to "Facts and Procedural History".)

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY STATE OF MISSOURI	
PROSECUTING ATTORNEY, 21 ST JUDICIAL CIRCUIT OF MISSOURI, Ex rel. MARCELLUS WILLIAMS' Relator/Movant))))) CAUSE NO. _____
<u>FIRST MOTION TO VACATE OR SET ASIDE JUDGMENT AND SUGGESTIONS IN SUPPORT</u>	

While all this maneuvering repeatedly managed to put off Mr. Williams' execution, claims that DNA excluded him as the killer were contradicted by the findings of a "Special Master" appointed by the State Supreme Court. Ultimately the St. Louis County D.A. – its office was

already on board – turned to an alternative method: [a "Motion to Vacate"](#). Here's an outtake:

Mr. Williams was excluded as the source of the footprints, Mr. Williams was excluded by microscopy as the source of the hairs found near Ms. Gayle's body (which did not match Ms. Gayle or her husband, the home's only residents, and thus were presumably the perpetrator's), and Mr. Williams was not found to be the source of the fingerprints. Now, three DNA experts have reviewed the DNA testing performed on the knife and each has independently concluded that Mr. Williams is excluded as the source of the male DNA on the handle of the murder weapon.

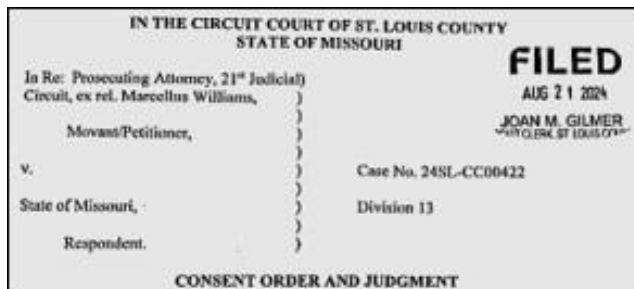
And it wasn't just physical evidence. Ms. Asaro was labeled as profoundly untrustworthy. She had outstanding warrants and was likely motivated by that \$10,000 reward. And, just like Mr. Williams told its buyer, the laptop came from her. Indeed, several witnesses now said that Ms. Asaro had tried to sell the machine. What's more, her account of what Mr. Williams supposedly said about the crime substantially changed over time (at trial, she attributed any inconsistencies to her drug use.)

Henry Cole, Mr. Roberts' cell-mate and himself a repeat offender, was characterized as a notorious liar who was trying to lessen his punishment and, as well, grab a chunk of the reward. While the pair shared a cell, Mr. Cole reportedly sent his son a message to the effect that "something big" (meaning, a crime) was "in the works." Was it Mr. Cole all along?

ATTORNEY GENERAL'S RETORT

To prepare for hearings on the motion to vacate, the State A.G. unleashed a flurry of re-investigation. Its findings are summarized in two press releases (click [here](#) and [here](#).)

Most importantly, the knife. From recovery through trial it was extensively handled by multiple persons. And no, they weren't wearing gloves. According to [a new lab report](#), knife DNA "is consistent with a mixture of at least two individuals." But the profile is incomplete, so "no conclusions can be made." Bottom line: no one can be excluded as a possessor. As for body hairs, Ms. Gayle "cannot be excluded" as a contributor. That, too, is the most that analysts could say. And as for the truthfulness of the State's witnesses, the A.G.'s detailed retort highlighted a host of corroboration.



Indeed, the A.G.'s blowback was so compelling that it apparently drove the D.A. (remember, he was on the defense team) to re-assess things. Instead of relying on a "Motion to Vacate", he had Mr. Williams [plead "no contest" to the murder charge](#) in exchange for a sentence of life without parole. On August 21st, a

Circuit Court judge issued a "Consent Order and Judgment" that endorsed the move.

Job done!

Not so fast, said the A.G. Turning to the State Supreme Court, [he quickly secured an order reinstating](#) Mr. Williams' first-degree murder conviction and death sentence pending a hearing on that "Motion to Vacate".

A (paid) search of Missouri's [MACHS online criminal record system](#) revealed that Mr.

Williams (his birth year was reported as 1968 or 1969) had been repeatedly arrested and convicted of felony crimes he committed in the St. Louis area. Here's a summary:

Arrest date	Charge	Disposition	Sentence
1/21/87	Burg 2nd deg.; stealing	6/5/87 Guilty on both	3 yrs. prob; revoked 3/5/88, 2 yrs. prison
10/6/87	Assault 1st deg.	4/13/88 Guilty	2 yrs. prison
12/18/87	Burg. 2nd. deg.	4/13/88 Guilty	2 yrs. prison
8/31/90	Burg. 2nd. deg.; stealing (2 counts @)	2/7/91 Guilty on all counts	7 yrs. prison
8/31/98	Robbery 1st. deg.; armed crim. act.; unlawful use of wpn.	11/17/99 Guilty on all counts	20 yrs. prison
1/31/00 (while in custody for prior conv.)	Murder 1st. deg.; robbery 1st. deg.; armed crim. act.; burglary 1st. deg.; etc	8/27/01 Guilty on all counts	Life imprisonment (on record); death (in fact)

Note that Mr. Williams' next-to-last set of convictions, for robbery and related offenses, stemmed from an arrest, on August 31, 1998, which followed his release from a seven-year prison term for burglary and stealing. That arrest took place only *twenty days* after the murder of Felicia Gayle.

In its 2003 ruling [affirming Mr. Williams' conviction](#), the Missouri Supreme Court pointed out that when it comes to imposing a death sentence, the defendant's "character" and criminal history are justifiably "central issues." Mr. Williams' criminal record indicates that he spent most of his adulthood committing (and being penalized for committing) serious crimes. That his behavior ultimately doomed him seems hardly surprising.

What *does* seem extraordinary, though, is that despite an accused's sordid past, and a seeming abundance of damning evidence, a prosecutorial office would "switch sides", and particularly in a grisly murder case. While we also oppose the death penalty, our (hopefully, objective) assessment of the evidence leads us to agree with the police, the original prosecutor, the jury, and the state Supreme Court. Mr. Williams *was* the killer.

Still, as your writer discovered during his career as a Fed, stoking the fires of innocence can affect *any* case where the proof depends, even in part, on the accounts of marginal, possibly self-interested players. But the strength of this case suggests that something beyond mere “facts” drove St. Louis County’s new D.A., Wesley Bell, to seek Mr. Williams’ exoneration. [Elected in 2015 to the Ferguson City Council](#), Mr. Bell promised to help reform a system that ostensibly set the stage for the 2014 [police killing of Michael Brown](#). Three years later, Mr. Bell’s avowed intention “to change a system that he argues sends too many minority suspects to prison and causes too many people to ‘lose jobs, home and custody of their children’” helped him oust Robert McCulloch, St. Louis’ long-serving D.A. (like Mr. Bell, he was also “Blue”, but perhaps insufficiently so.)

[Mr. Bell’s official website](#) touts him as “a vocal leader in criminal justice and court reform, including being the first prosecutor to advocate for the recall of thousands of non-violent municipal warrants.” Being D.A., though, isn’t Mr. Bell’s final move. [He’s now running for Congress](#). Could it be that the ambitious politician’s ideological inclinations – and their past success in stirring up votes – might have influenced his championing of Mr. Williams?

Two days ago, Circuit Court Judge Bruce Hilton held the [presumably last and final hearing](#) on that re-born “motion to vacate”. After sitting through a six-hour rehash of the arguments, pro- and con-, he has two weeks to decide whether the judgment of guilt should stand. What’s his yardstick? Here’s an extract from [Missouri law](#):

The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment...the court shall take into consideration the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings...and the information and evidence presented at the hearing on the motion.

And that’s where things presently sit. Ergo, the ticking clock.

Posted 8/11/08

THE TEN DEADLY SINS

Why do miscarriages of justice keep happening?

How do we address the problem of wrongful conviction? We could analyze cases where things went astray, draw up lists of poor law enforcement practices, then tackle them one by one. The problem with that approach is that it's like swatting flies: it makes a mess and you'll never kill them all. Why not see what's attracting them in the first place? To that end here are ten factors that can set the stage for a miscarriage of justice:

Overconfidence. When Supreme Court Justice-to-be [Samuel Alito](#) was asked during his confirmation hearing if executing an innocent person was Constitutional, all he could say was that the judicial process has many built-in safeguards. Knowing just how fallible humans are, the notion that witnesses, police, courts and juries don't make serious mistakes seems ridiculous, yet in practice we pretend that it's true.

Substituting measures for goals. If we could be certain that only the guilty are arrested and convicted, measuring success with numbers might make sense. Yet in the real, imperfect world, where skills vary and resources are limited, evaluating agencies and individuals based on [numbers of arrests](#) and convictions and on clearance rates encourages haste and sloppiness, with predictable consequences.

Illusion of an adversarial process. [O.J. Simpson](#), Michael Jackson, Robert Blake and Phil Spector could afford to hire teams of lawyers, investigators and expert witnesses, matching if not bettering the authorities blow by blow. Most defendants can't. When one has nothing beyond an appointed lawyer or harried public defender their chances of discovering exculpatory evidence that police overlooked are very small.

Rush to judgment. As the [FBI's anthrax](#), Atlanta Olympics and other fiascos demonstrate, pressures to solve violent crimes can lead agencies and investigators to prematurely narrow their focus. Concentrating investigative resources on a single target inevitably produces a lot of information. As facts and circumstances accumulate, some can be used to construct a theory of the case that excludes other suspects, while what's inconsistent is discarded or ignored. That's how a "house of cards" gets built.

Narrowly interpreting the State's obligations. Prosecutors aren't like defense attorneys, whose sole interest is the welfare of their client. D.A.'s are supposedly there [to do justice](#), not merely win one for the State. Yet in example after example they have

[relentlessly battled on](#) even when it was obvious that the police may have the wrong man or that someone was wrongfully convicted.

Ignoring mistaken arrests. Wrongful conviction gets plenty of attention. Meanwhile few concern themselves with the underlying problem of mistaken arrest. Not only are these events highly traumatic for those arrested, but they cause the police to stop looking, allowing the real perpetrator to continue making victims. Worse, after an arrest takes place it may be too late to fix things: system inertia, public pressures and a “let the jury decide” mentality have allowed many innocent persons to be taken to trial.

Absence of reflection and self-criticism. One would think that police and prosecutors are eager to address the issue of mistaken arrest and wrongful conviction. With a few notable exceptions, such as the new [Dallas County D.A.](#), one would be wrong. Despite a litany of goofs, up to and including wrongful executions, the law enforcement community keeps insisting that mistakes are much too rare to justify altering current practices. But how can we possibly know the [prevalence of error](#) when the deck is stacked against its discovery? What’s more, protecting one’s own is so ingrained that some police and prosecutors shield unprofessional colleagues who plant evidence and use force, threats and coercion to get suspects to confess.

Aura of invulnerability. Even the most skilled and well-intentioned detectives and prosecutors have inadvertently caused innocents to spend decades in prison. ([Faulty eyewitness identification](#) is a common culprit.) Unfortunately, eyewitness ID or circumstantial evidence may be all there is. Whether one should proceed without substantial corroboration is a critical decision that must be made in a dispassionate setting and given a lot of thought.

Picking on the usual suspects. Detectives faced with “whodunits” often [look for suspects](#) in the pool of past offenders. While potentially useful, the approach can set up an innocent person for a nasty fall, particularly if they resemble the real criminal, can’t account for their whereabouts or might know or live near the victim. It’s surprising just how readily juries will convict someone with a prior record no matter how sketchy the evidence.

Applying poor investigative practices and junk science. Suggestive interviews and flawed identifications have led to many wrongful convictions. [Polygraphy](#) and [investigative profiling](#) have been thoroughly debunked yet continue to be used to screen and identify suspects. There are also serious issues with fiber, arson, ballistics and blood-spatter evidence and, most recently, with [DNA probability assessments](#). Yet old habits die hard.

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Fine, you say, but now what do we do? Three things must change:

- Prosecutors and police must perceive their roles more broadly, in terms of securing justice rather than only making arrests and gaining convictions.
- They must change how they actually do their work.
- Finally, they need to acknowledge that serious errors *will* happen. Knowing that, they must implement strategies to identify and correct mistaken arrests and wrongful convictions after the fact.

More on this next week. Stay tuned!

Posted 5/6/13

THE TIP OF THE ICEBERG

Hooray for the exonerated! But what about everyone else?

By Julius (Jay) Wachtel. Randolph Arledge [left prison](#) in February 2013, finally a free man. He had been doing 99 years for allegedly stabbing a Texas woman to death. At the time of his conviction, in 1984, he and two criminal buds were in a Tennessee prison, doing time for armed robbery. They testified that Arledge admitted killing the woman. One, who later recanted, said that prosecutors promised them reduced sentences on the robbery for testifying.

Arledge was transferred to Texas in 1998 to start serving his time. Lawyers from the Innocence Project eventually stepped in. In 2011 advanced techniques [conclusively tied DNA from the murder](#) to a known violent criminal. Prosecutors endorsed Arledge's exoneration and police are currently seeking the new suspect.

It took twenty-nine years, but [George Allen is finally free](#). In December 2012 a Missouri appeals court exonerated him for a 1982 murder. A 56-year old schizophrenic, Allen first came to police attention through a mistake – officers brought him in for questioning thinking he was someone else – but once they got hold of him they wouldn't let go. Allen was coerced to confess, yet the evidence was so shaky that the first jury hung up. He was convicted on retrial, in part because of the confession, and in part because of shoddy blood work that mistakenly identified him as the donor. Jurors were never told that fingerprints found at the scene weren't his. Work by the Innocence Project [subsequently proved](#) that none of the abundant physical evidence was a match.

George Allen didn't get the death penalty because a juror had to be excused post-conviction, thus aborting the sentencing hearing. [Damon Thibodeaux](#) wasn't as lucky. In September 2012 the 38-year old inmate was released from Louisiana's death row after doing sixteen years for allegedly killing his teenage step-cousin.

Only thing is, he wasn't guilty. Yes, Thibodeaux confessed, but only after many hours of interrogation and a polygraph that he was falsely told he had flunked. His statement was riddled with inaccuracies and impossibilities, and his account of the killing had been supplied by investigators. Thibodeaux recanted, but to no avail. Jurors never

discovered that a prosecution expert who examined him concluded that he was innocent and only confessed because he feared being otherwise sentenced to death (it happened anyway.) Jurors didn't know that DNA from a suspect was recovered, [but that it didn't match Thibodeaux](#). In time evidence of innocence was so strong that the new D.A. joined in calling for Thibodeaux's exoneration.

Arledge, Allen and Thibodeaux are three of [306 post-conviction DNA exonerations](#) since 1989. They are in a sense exceptionally lucky. Most criminal cases other than homicide lack biological evidence, and even when it is found and processed the chances of identifying the perpetrator are low ([in one study, 12 percent](#).) It's for such reasons that DNA exonerees likely represent only the tip of the iceberg. That leads us to make a few suggestions.

First, pity the poor defendant who is innocent but was arrested for a crime, such as robbery, burglary or felony theft, where police are less likely to look for biological evidence and submit it for analysis. To minimize wrongful convictions and help correct those that occur, it is critical that police seek out such evidence in all felony cases, and that there be adequate funding to process what they do find.

Many prosecutors vigorously resist defense requests for DNA testing, and their positions are often endorsed by the courts. (For a current, inexplicable example click [here](#).) Some take it a step further. Consider for example Texas Judge (and former D.A.) Ken Anderson, who [is himself being prosecuted](#) for willfully failing to disclose exculpatory evidence in a case that needlessly cost exoneree [Michael Morton](#) twenty-five years of his life. Strict laws are necessary to remind recalcitrant servants of the state to do their real job, which as they should well know is to achieve justice, not simply gain a conviction.

Without doubt, inherently fallible techniques such as witness statements, eyewitness identification and admissions and confessions dominate the investigative process. Good police work is thus essential. Taking shortcuts may seem appealing but can so corrode a cop's sense of craft that he feels free to declare, as one did in court, that [questioning suspects "is not my style."](#) Concerns that this former detective's interrogation practices [may have led to more than one wrongful conviction](#) are a powerful reminder that quality policing is and will remain the first line of defense from miscarriages of justice for the foreseeable future.

Posted 4/20/08

THE USUAL SUSPECTS

Having a record makes it far more likely to be mistakenly arrested

By Julius (Jay) Wachtel. This isn't just another story about a wrongful conviction. No, it's much worse than that: it's about a D.A.'s office that doesn't care whether they have the right guy as long as they have *someone*. Who pays the tab for their fecklessness? Read on.

In March 1993 [an Anchorage prostitute](#) was picked up by two men, savagely attacked, dumped from a car, shot at and left for dead in a snowdrift. She miraculously survived. A week later two men were detained for the crime. In their car was a used condom of the kind carried by the prostitute, and a pistol that was matched to a cartridge casing left at the scene. The driver confessed. He said that the other assailant was not his then-passenger but a black man named William Osborne.

Osborne's photo was placed in a six-pack and shown to the victim. She said that her second attacker was either Osborne or one of the others, but most likely Osborne. Sperm from the condom was typed using a crude DNA procedure and found to be unique to one in every 6 or 7 African-American males. Hairs were also found: two were "consistent" with Osborne, while the origin of others was unknown. Osborne's lawyer decided not to pursue more advanced DNA tests, as she disbelieved his claim of innocence and feared that the results could only strengthen the prosecution's case.

Although the victim originally described a substantially older and much larger man, Osborne was convicted and imprisoned. For the next decade he repeatedly requested that DNA from the condom be analyzed using modern tests. Turned away by police, prosecutors and, finally, the Alaska Supreme Court, he finally admitted his guilt. Two years later, in June 2007, he was paroled.

Six months later Osborne was arrested for a home invasion. He and three codefendants are presently in jail awaiting trial. Obviously the concept of learning a lesson is not in this man's lexicon.

Meanwhile Osborne's appeals bore fruit. In 2006 a Federal District Court determined that Alaska's refusal to retest the DNA using modern procedures, on the defendant's dime, violated his Constitutional rights, senselessly depriving him of the opportunity to be cleared. Anchorage's never-say-die D.A. appealed. Earlier this month the Ninth Circuit affirmed the lower court, ruling that Alaska's standards for post-conviction DNA

testing were overly restrictive, essentially requiring that defendants prove their innocence in advance. The evidence finally went in and results are expected soon.

Admittedly, Osborne's not one to stir sympathy. After all, he did confess, even if it was only to qualify for parole. Maybe he's guilty, maybe not: why should we care whether he's cleared?

In 2005 Orange County (CA) resident [James Ochoa](#) was arrested for carjacking. Ochoa, who lived nearby, was identified by two of the victims from a photograph. A police bloodhound had also followed a scent from a baseball cap left in the vehicle to his home. However, DNA recovered from the baseball cap and from the car's interior was not his, and five members of his family swore he was with them when the crime occurred. Even so, a judge threatened Ochoa, who had a drug record, with a twenty-five year term if he was convicted at trial. Not willing to roll the dice, Ochoa pled guilty and got two years.

Ten months later a man was arrested for another carjacking. His DNA profile, which was routinely entered into the State database, matched the DNA profile from the Ochoa case. The suspect confessed, exonerating Ochoa.

In 1992 four prostitutes were murdered in South Los Angeles. Detectives interviewed [David Jones](#), a mentally disabled man with an IQ of 62 who was in jail for attempting to rape a prostitute. Through persistent, manipulative questioning they got him to say that he had smoked crack with the victims and choked them when they refused to have sex. But he denied killing anyone. Although DNA excluded Jones, prosecutors argued that it didn't rule him out, as prostitutes have multiple sex partners. He was convicted by a jury and got 36 years.

But the killings continued. In 2001 an LAPD detective used DNA to match ten rape/murders, including the four attributed to Jones, to a man in prison for rape. In 2004 Jones was exonerated and received a settlement of \$720,000. The real killer, Chester Turner, was convicted of the ten crimes in May 2007.

In [case after case](#) of wrongful conviction the guilty party continued victimizing citizens while a fall guy rotted in jail. That's not to say that the wrongfully convicted are always nice people -- many became suspects because they already had criminal records. They may not be worth pitying, but the public is. When cops quit looking because they incorrectly think they already have their man (or woman), perpetrators keep perpetrating and victims multiply.

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Not caring whether the right person is locked up places innocent citizens at grave risk. It's more than a singular injustice: it's a recipe for disaster.

Posted 4/24/11

TIME OR MONEY

If you haven't the bucks for a good lawyer, get ready to do the time

By Julius (Jay) Wachtel. During the evening hours of March 1, 2011 a Cleveland police sergeant was working off duty directing traffic in front of a downtown parking garage. An SUV exiting the garage made an illegal U-turn and stopped. When the officer approached and banged on the door the vehicle suddenly sped off, [knocking the cop to the ground](#). Fortunately he wasn't seriously injured.

A check of the SUV's license plate (more on this later) revealed that the vehicle was registered to W. Charles Geiger, a resident of Lakewood, an affluent suburb. Police went to his home. From his seat in a patrol car, the banged-up sergeant identified Mr. Geiger as the driver and his wife Patricia as the passenger of the vehicle that struck him hours earlier.

The stunned couple denied any involvement. Mr. Geiger said that he had spent the evening at a restaurant having dinner with his daughter. As for the SUV, he wasn't even driving it. It was taken by his wife, Patricia, who went on a girl's night out at a Cleveland theater with her friends. They parked in the garage and left without incident. Mr. and Mrs. Geiger suggested that officers check with their daughter, restaurant employees and Patricia Geiger's passengers. In fact, an officer apparently spoke with the daughter, who confirmed her father's story and displayed a receipt for the meal.

It was all to no avail. Convinced that the sergeant's identification was enough, officers arrested Charles Geiger for felony assault and other charges, and Patricia Geiger for obstructing justice by lying about what happened.

Unlike most of those with whom police come into contact, Mr. and Mrs. Geiger were prominent citizens and very well-heeled. They sat out the next twenty hours in the slammer, sharing intimate space with unsavory strangers, while their lawyers busily gathered a cornucopia of exculpatory evidence. By that afternoon the D.A. had the meal receipt as well as affidavits from the daughter, restaurant employees and Patricia Geiger's friends (they insisted they used a different exit than the suspect.) A time-stamped restaurant security video clearly shows Mr. Geiger and his daughter leaving when they said they did. A garage video would later prove that the SUV that struck the sergeant [was different from the Geigers' vehicle](#).

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Prosecutors realized that the case against the Geigers was, to say the least, very weak. They released the couple, Mrs. Geiger without charges, her husband on \$500 bond. His case was later dropped.

So how to account for the license plate? Hours earlier, the sergeant had chased a motorist driving a similar SUV from a reserved parking space. Unfortunately, that's where Mrs. Geiger then chose to park. The sergeant noticed her SUV while on his rounds and, thinking it was the same vehicle, wrote down the plate. Bottom line: there's a real cop-hater still on the loose, but he's yet to be identified.

"There was a warrant out for his arrest, and it just wasn't a good idea for him to walk around wanted for such a serious crime." So said [Pennsylvania State Senator Shirley Kitchen](#) (D – Philadelphia) about that fateful day when she told the siblings of a wanted but innocent man that he should turn himself in to police. "I thought it was going to be straightened out. I really did...I had no idea that this would have led to him being incarcerated for a year."

Eugene Robinson, 60, is the first to admit that he's made his mistakes. But he's no rapist. Yet there was no denying that old mugshot prominently displayed in the "Week's Most Wanted" section of the August 4, 2008 *Philadelphia Daily News*. An old booking photo – again, the man's no angel – identified Robinson as a predator who held a sword to his victim's throat. U.S. Marshals offered a reward, and with neighbors whispering it was only a matter of time before someone tried to cash in.

Robinson got his sister and brother to drive him to the senator's office. Maybe she would know what to do. He hid in the car while they went inside. And when they returned and passed on the senator's well-intended advice, he gulped and took it.

Only thing is, Eugene Robinson wasn't a wealthy, well-known businessman. He was a plumber, scratching out a living and trying to make restitution on a three-year old theft case. No way could he make bail or hire investigators to prove what he knew, that the cops had the wrong guy.

Since this is a post about mistaken arrests, not wrongful convictions, we know that Robinson wasn't convicted. He was eventually released, but not because authorities thought he was innocent. Luckily for him, the alleged victim failed to appear at two preliminary hearings so the case was dropped. (Had she shown up and for some reason mistakenly identified him, as has happened to others, we all know where Robinson would now be.)

It later turned out that there really was a rapist, but his only connection with Robinson was in their names. Authorities conceded the slip-up. “There was clearly a name and sort of identity issue between this Eugene Robinson and the other guy,” shrugged a prosecutor. In fact, nothing matched – not their appearance, social security number, birthdate or residence address. Robinson’s mugshot and particulars somehow wound up in the wrong file.

C’est la vie!

Robinson was nonetheless punished. All he had was a public defender who couldn’t spend a day running around gathering affidavits. (Indeed, exactly what he did seems unclear.) Unable to post bail, Robinson did five months awaiting trial. Then when he was finally released – remember, the authorities still presumed him guilty – the state revoked his parole on the theft case, reportedly because he wasn’t paying restitution. So he did another eight months.

Robinson finally got a lawyer and sued. Earlier this month the City of Brotherly Love sent some his way in the form of \$85,000. (If that seems puny, consider just how much leverage an unemployed ex-con really has.) One can be sure that Robinson would happily give it all back in exchange for the way things were on August 3, 2008, when he had a job and a fiancée. You see, she too had given up.

[America’s treatment of indigent defendants](#) is shameful. And that’s not just the ACLU’s opinion. Here’s what [Attorney General Eric Holder](#) had to say:

Putting politics aside, we must address the fact that, simply put, there is a crisis in indigent defense in this country. Resources for public defender programs lag far behind other justice system programs, constituting only about 3 percent of all criminal justice expenditures in our nation’s largest counties. In many cases, contract attorneys and assigned lawyers receive compensation that does not even cover their overhead. We know that defenders in many jurisdictions carry huge caseloads that make it difficult for them to fulfill their legal and ethical responsibilities to their clients. We hear of lawyers who cannot interview their clients properly, file appropriate motions, conduct fact investigations, or do many of the other things an attorney should be able to do as a matter of course.

It’s no secret that our adjudication system depends on guilty pleas. Imagine what would happen if there was no imbalance in resources between prosecutors and defense and every defendant had the same wherewithal as Charles and Patricia Geiger. Innocent

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persons who now plead to lesser charges to avoid stiff sentences would go to trial. So would many who are truly guilty. Perhaps there's some light at the end of the tunnel. Observers are closely watching the progress of [Duncan v. Granholm](#) (aka *Duncan v. Michigan*), a state case that challenges Michigan's grossly underfunded system of indigent defense. After three years of bouncing among state courts, the matter seems finally headed to trial.

While every wrongful conviction begins with a mistaken arrest, it's probably fair to say that most mistaken arrests don't end with a conviction. But even for those with the resources to fight back, the consequences can be dire. "You're supposed to feel protected by police," said Patricia Geiger, who spent a scary day in a cell with a dozen women, most of whom we assume weren't innocent. "And we don't feel that way anymore....We love Cleveland, and we want to see the city thrive. But I'm a different person because of this."

Now imagine the impact on those like Robinson, or perhaps people just like you and me, who may not have the means to mount a spirited defense. That, [said reporter Leila Attasi](#) of the *Cleveland Plain Dealer*, was very much on the Geigers' minds:

During a recent interview at their lakefront home, the Geigers said they won't hold their breath in anticipation of an apology for the mix-up. But they wondered aloud what happens to people wrongly accused of crimes – and unlike them don't have the support system or resources to clear their name.

What happens? Charles and Patricia Geiger, meet Eugene Robinson.

Posted 1/26/19

A VICTIM OF CIRCUMSTANCE

Building cases with circumstantial evidence calls for exquisite care



For Police Issues by Julius (Jay) Wachtel. What can be more suspicious than coming across a parked and unattended pickup truck, finding the body of a strangled woman nearby, [then discovering that the vehicle's owner](#) was the victim's lover?

That's the spot in which Horace Roberts found himself. Despite protesting that the woman borrowed his truck, and that he repeatedly called her from a phone booth when she didn't return, his insistence that they were not having the affair that everyone knew about helped doom him. As did finding the victim's purse at his home, and what was (incorrectly) thought to be Roberts' watch at the scene. As did testimony by the victim's estranged husband, who attended every court proceeding and would later argue against giving Roberts leniency at two parole hearings. Even so, not all the circumstances lined up in the same direction, and it took three trials before a jury returned an unanimous verdict. In 1999 the final set of jurors decided that Roberts was indeed guilty of murder, and a judge sentenced him to fifteen to life.

Roberts would still be locked up, too, had it not been for the [California Innocence Project](#). Its dogged pursuit of the case ultimately led authorities to re-examine the victim's fingernail scrapings, which didn't yield results the first time. Using new technology that required far less material for a full DNA profile, examiners positively identified the husband's nephew (right photo) as the source. Unfortunately, that didn't happen for nineteen years. Meanwhile Roberts sat in prison. [He was released and fully exonerated](#) last October. At present uncle (left photo) and nephew [await trial for killing the woman](#) and setting Roberts up to take the fall.

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In “[Fewer Can be Better](#)” we mentioned that gathering evidence in victim-type crimes such as murder can be challenging. Ditto here. No one observed the strangling, and all the evidence against Roberts was circumstantial and gathered after the fact. To be sure, there were lots of bits and pieces, and many seemed to fit. [That was enough](#) to convince detectives and former prosecutor Brian Sussman, who took the case through each trial, of Roberts’ guilt:

“I thought we were doing the right thing,” Sussman said of the circumstantial-evidence case he presented. “I am sorry from the bottom of my heart. It should have never happened. It’s been a nightmare for him, and I hope he can make something out of the rest of his life. I really do.”

According to the now-retired prosecutor, Roberts turned down a plea deal for voluntary manslaughter and an eleven-year sentence after the second hung jury. So he tried him for a third time. Innocence Project director Justin Brooks thought his persistence reasonable:

[The husband] actually set our client up. It was evidence that was fabricated by, we believe, the actual killer...it’s certainly something can’t be put on the police department or the district attorney’s office in terms of evidence; it was evidence that was actually fabricated.

In contrast with direct evidence, which itself suffices as proof, circumstantial evidence must be applied and interpreted. Here’s the [California jury instruction](#) on point:

Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining...For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. (Cal. 223)

Jurors are instructed that as long as one cannot draw another reasonable conclusion that points to innocence, circumstantial evidence alone is sufficient to convict:

Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts

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necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other.... (Cal. 223)

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty...However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable. (Cal 224)

But what of the motive? Why did Roberts murder his lover? [According to the D.A.](#), the reason was simple: “Roberts killed Cheek because she threatened to end their relationship – and he clumsily left his belongings at the crime scene.”

Whether the affair was really on the rocks we’ll never know. But Michael Semanchik, Roberts’ Innocence Project lawyer, [found the accused person’s “clumsiness” curious](#). Why would a killer abandon his vehicle at the crime scene? Why, [as reported](#), would he invite prompt discovery by leaving its lights flashing?

When jurors hung 6-6 at the second trial, prosecutors offered Roberts a reduced sentence in exchange for pleading to voluntary manslaughter. As an innocent man, he turned it down. Semanchik attributed his client’s subsequent conviction to repeated draws from the jury pool; essentially, to chance: “Sometimes it takes that right composition of jurors to sway them and get them across the goal line to convict. And I think that’s what happened in trial [number] three...” Yet the victim’s meandering was no secret; in fact, she and her husband were going through a divorce. Why didn’t the police look into him as well? According to Semanchik, Roberts must have seemed the better target:

There’s always pressure to solve a case from the police and prosecution side and in this case, at the time, back in 1998, although there was a contentious divorce between the husband and wife, there really wasn’t other evidence to support going after [the husband], and so it took this DNA evidence to really turn the tide...

Compelling direct evidence [is often absent in murders](#), so their investigation can require a lot of legwork and laboratory time. Detectives, though, can’t endlessly burn through resources. And pressures to clear homicides can be particularly brutal. Such things can make investigative and prosecutorial decisions in homicide cases [especially vulnerable to “confirmation bias”](#), the tendency to adopt explanations that affirm preconceptions or are particularly expedient. Circumstantial evidence can cut many

ways, and ignoring or tailoring things so that everything “fits” is a recipe for disaster. From all indications, that may be a big part of what happened here.

Still, the California Innocence Project [mostly blamed the outcome on lies by the husband and nephew](#). Its lawyers also criticized an antiquated evidentiary standard that supposedly kept a sympathetic judge (he, too, thought the evidence ambiguous) from granting post-conviction relief. Our favorite go-to source in such matters, the [National Registry of Exonerations](#), forged a similar path, selecting “perjury or false accusation” (meaning, by the husband and nephew) from its menu of six causes of wrongful conviction (the others include mistaken witness identification, false confession, false or misleading forensic evidence, official misconduct, and inadequate legal defense.)

To us, the perjury that did happen seems an inadequate container for the “why.” To that extent, the Roberts case is hardly unique. Searching the registry’s approx. 2,300 entries since 1956 [using the term “affair”](#) we identified thirteen individuals whose sexual affairs figured prominently in their wrongful conviction. As we perused the entries (see “data source” below) it became apparent that being an unfaithful sexual partner can affect how accused are perceived by witnesses, detectives and other decision-makers. Here, for example, is [an extract from a prior post](#) about one of our favorite examples, Scott Hornoff:

On August 12, 1989, Warwick, Rhode Island police discovered the body of Vicki Cushman, a single 29-year old woman in her ransacked apartment. She had been choked and her skull was crushed. On a table detectives found an unmailed letter she wrote begging her lover to come back. It was addressed to Scott Hornoff, a married Warwick cop. Hornoff was interviewed. He at first denied the affair, then an hour later admitted it. Detectives believed him and for three years looked elsewhere. Then the Attorney General, worried that Warwick PD was shielding its own, ordered State investigators to take over. They immediately pounced on Hornoff. Their springboard? Nothing was taken; the killing was clearly a case of rage. Only one person in Warwick had a known motive: Hornoff, who didn’t want his wife to find out about the affair. And he had initially lied. Case closed!

What’s more, unlike Horace Roberts, who is black, Hornoff is white. And he was a cop.

Of course, affairs are only a tiny slice of the universe of potentially stigmatizing circumstances. One that’s far more frequently present is a prior conviction, a known influencer of police and prosecutorial decisions. Moreover, *felony* convictions can be used at trial to attack the credibility of testimony by any witness, including a defendant (for the applicable California law click [here](#); for a discussion click [here](#).) Really,

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considering all the ways in which investigative lapses and workplace factors can lead to miscarriages of justice, we recommend that the National Registry create a category that takes such factors into account. And that readers who currently practice the policing arts use great care when relying on circumstances to nail their next transgressor.

Posted 11/1/09

WHAT IF THERE'S NO DNA?

***When biological evidence is lacking,
the wrongfully convicted may be stuck***

It's the rare prosecutor who will admit a grievous error. Rarer still are those who seek them out. [Dallas D.A. Craig Watkins](#) is such a man. Elected in 2007 after a string of exonerations shocked Texas, Watkins formed a "conviction integrity unit" to undo the damage. Using post-conviction DNA testing, which Texas authorized in 2001, Watkins quickly came up with more innocents rotting away in prison. A few months ago the total was twenty.

[Now it's twenty-two.](#)

Unlike most Dallas County exonerations, which are based on DNA, physical evidence was absent. Claude Simmons and Christopher Scott had been convicted of a 1997 murder based solely on the eyewitness testimony of the victim's wife, who was present when the killing occurred. The distraught woman had no reason to lie. Why did she err? One of the men (both suspects were petty drug dealers) was sitting handcuffed in a police interview room when she walked by, leading her to think that he was involved. That threw off police, and it went downhill from there.

Five years ago a former suspect in the case, who was serving thirty years for aggravated robbery, made a detailed confession and implicated a partner. University of Texas students worked with the D.A. and police to re-investigate the case. It turned out that the girlfriend of the convict's partner originally told defense lawyers that he admitted to the crime. But the trial judge wouldn't allow her statement in, nor those of two other witnesses with information to the same effect. It took six minutes for jurors to wrongfully convict, and twelve years for the truth to prevail.

"I could never admit to something I didn't do."

On October 28, 2009 [Dewey Bozella](#) was finally free. A sturdy-looking man of fifty, he had been in prison since 1983 for murdering an elderly woman in Poughkeepsie, New York. Posing with his spouse, a middle-school teacher he

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married in 1996 while incarcerated, Mr. Bozella smiled for the cameras, thanked everyone and walked away. He was looking forward to dinner; his wife was making his favorite, lasagna.

Sad to say, had he played ball with the system he would have been released long ago.

Mr. Bozella was convicted on the testimony of two criminals seeking deals on their own unrelated cases. His first conviction was set aside in 1990 because members of his race -- Mr. Bozella is black -- were improperly excluded from the jury panel. Before the second trial prosecutors offered a plea bargain and early release. That, however, would have required that Mr. Bozella confess. Like another innocent yet hard-headed man, [Darryl Hunt](#), Mr. Bozella took his chances and, like Hunt, was convicted again. Over the next few years he had several opportunities for parole, but these too would have required that he admit strangling a 92-year old woman with an electrical cord for the sake of her bingo money. So he just said “no.”

Mr. Bozella eventually asked for help from the [Innocence Project](#), a pioneering organization at Yeshiva University that exonerates the innocent using DNA. Unfortunately, as in a majority of violent crime, his case lacked DNA, so they handed off Mr. Bozella off to a private law firm that agreed to take on the case pro bono. Miraculously, the complete police file was preserved by a retired lieutenant who thought the case would come up again. It contained [reports](#) that Mr. Bozella’s original defense lawyers never saw. A neighbor said that the intruder entered via a broken window -- not, as the jailbirds testified, through the front door. A man spoke of a burglar who was planning to break into the victim’s home. Most remarkably, a [fingerprint found at the crime scene](#) was matched to a prisoner doing time for the “nearly identical” killing of another elderly female who lived nearby.

Finding evidence of Mr. Bozella’s innocence “overwhelming,” a judge ordered a new trial. Although they insisted that they still believed in their case prosecutors declined to refile. Mr. Bozella was let go.

What’s to be done? It’s difficult enough to exonerate with DNA. But when biological material is lacking -- estimates are that suspect DNA is available in no more than a quarter of violent crime -- freeing the innocent can prove daunting.

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“CSI” isn’t always useful. In the real world there is often nothing beyond an eyewitness or a confession. Consider, for example, drive-by shootings, where there may be no physical evidence other than bullets in a victim’s body. Balancing the need for witness ID against its pitfalls, some jurisdictions, including Dallas County, now require that photographic lineups be administered sequentially, one photo at a time, by an officer not involved in the case. Dallas PD goes so far as to prohibit [showups](#) (one-on-one field identifications soon after a crime occurs) unless a dangerous suspect might otherwise have to be released. [Texas State Senator Rodney Ellis](#) proposed tougher rules, banning showups altogether and requiring that all confessions be recorded in their entirety. Others have suggested that statements by self-interested parties such as jailhouse informants be inadmissible unless corroborated.

Whether to protect the finality of the process or, as seems more likely, to avoid political embarrassment [prosecutors often keep hammering away](#), opposing the most worthy appeals and requests for hearings with fanatical resolve. Whatever remedies are chosen, perhaps the most fundamental is the one most easily overlooked. As they relentlessly went after Mr. Simmons, Mr. Scott and Mr. Bozella there was something very basic that the authorities forgot. Doing justice means more than just securing a conviction. *A lot more.*

Posted 11/8/14

WHEN SEEING *SHOULDN'T* BE BELIEVING

A long-awaited report offers best practices in eyewitness identification

By Julius (Jay) Wachtel. On September 28, 1990, a 16-year old white girl was sexually attacked by a masked man in a Dallas motel room. She said that her assailant was Michael Phillips, a thirty-two year old black man who did maintenance work at the motel. He was arrested within days. Phillips protested his innocence. But his accuser later picked him out from a “six-pack,” a photographic lineup with six photos side by side. One was of Phillips.

Thirteen years earlier, when he was nineteen, Phillips served time for burglary. Although he had since kept out of trouble, a public defender suggested he plead guilty to avoid a possible life sentence. So that’s what he did. Phillips was released in 2002, a convicted sex offender.

Five years later the Dallas D.A. formed a unit to tackle the problem of wrongful convictions. They began having old rape kits tested, something that wasn’t done in Phillips’s case because he pled guilty. Lo and behold, DNA from the attacker’s semen DNA not only excluded Phillips, but turned out to be a perfect match for the DNA of another resident of the motel, a man who resembled Phillips. Alas, he cannot be prosecuted because the statute of limitations has lapsed.

On July 25, 2014, a judge exonerated Phillips. Under Texas law he will get \$80,000 for each of his twelve years of wrongful imprisonment, and the same amount yearly for life. Phillips, who suffers from sickle-cell anemia and is confined to a wheelchair, plans to leave the nursing home where he has been sharing a tiny room with another resident, and perhaps travel. “Hang on to your faith,” he told reporters. “The Father works in his own time, and like the good song says: He may not come when you want to, but He’s always on time.”

*

During the evening hours of August 7, 1977, a Metairie, Louisiana woman was attacked while walking to her apartment. She managed to fight off her assailant, but not before he bit her neck and ripped off her dress. He fled before police arrived. The victim described him as black, bare-chested, and wearing black shorts.

A security guard directed officers to an apartment in the same complex. Nathan Brown, the resident, was one of the complex’s few black residents and had tangled with the guard before. Brown answered the door. Officers had him take off his shirt and put

on black shorts. They then staged a “showup,” in essence parading Brown by the victim. She positively identified him as her assailant, and later testified to that effect at trial.

Brown denied everything. He insisted that he had been home playing with his 2-year old daughter. Five persons corroborated his account.

No matter – victim ID carried the day. Jurors found Brown guilty and a judge sentenced him to 25 years.

More than a decade later, through the intervention of the Innocence Project, tests were performed on the victim’s dress (miraculously, it was still in evidence.) DNA in saliva stains positively matched a different black man. He happens to be in a Mississippi prison, doing time for an unspecified crime.

On September 3, 2014, a judge exonerated Brown and set him free. He had served seventeen years for a crime he didn’t commit.

*

Eyewitness misidentification has long bedeviled America’s criminal justice system. According to the Innocence Project, mistaken identifications were involved in a stunning 72 percent of convictions that were later reversed due to DNA testing. In a new, comprehensive report, the National Academy of Sciences tries to bring order to the chaos.

NAS reviewed a number of witness ID techniques. Perhaps the two most common are photo arrays, a series of usually six photos, one normally of the suspect, and show-ups, one-on-one viewings that take place in the field and are normally staged by beat cops. Each procedure raises two important concerns: accuracy of recall and witness suggestibility.

Accuracy of recall

- Should photo arrays be shown simultaneously, all at once, or sequentially, one at a time?
- What is the maximum amount of time that should pass between an incident and a show-up?

Witness suggestibility

- Officers administering arrays are usually involved in the investigation. To minimize the possibility that they may purposely or inadvertently convey cues, two procedures can be used: single-blind and double-blind. In single-blind,

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photos are shuffled so the officer doesn't know which photo is being viewed. In double-blind, the officer is also unaware of the suspect's identity.

- During show-ups, witnesses might feel pressured to identify persons who are handcuffed or sitting in the back of a police car. Field situations can make it difficult to create neutral, non-suggestive settings or bring in uninvolved officers.

Certain factors are thought to always affect the accuracy of identifications. Witnesses may be distracted by the presence of a weapon. Stress and fear can negatively impact memory and vision. Cross-racial identifications can be tricky. Length of an observation is also important, as is the lag between the observation and its recall.

Using our own words (don't blame NAS!) here are some of its key recommendations:

- Inform officers about identification issues at the academy and through in-service training. Require in-depth coursework for investigators.
- Prevent officers from suggesting the "correct" choice by using double-blind procedures when showing photo arrays. If the cop doesn't know who the suspect is, that's as good as it can get.
- Develop and use standard witness instructions.
- Document, verbatim, the level of confidence that a witness has in his or her judgment. Resist the urge to give feedback. Videotape the process.
- Judges should conduct pre-trial inquiries to determine if witness identifications were done in accordance with best practices, and if not, whether lingering concerns should be addressed with expert testimony and a hearing.
- Inform jurors about every occasion when witnesses were asked to make an identification, and of their level of confidence each time.

There is a lot more in the report, including a detailed overview of Federal and State witness identification laws and court decisions, a summary of pertinent research on vision and memory, and a painfully technical discussion of issues in measuring eyewitness performance. As one might expect, the report ends by recommending a national research initiative on witness identification, and even sets out a comprehensive agenda.

Well, it's about time. Considering all the innocents who have been locked up, and all the guilty who should have been, but were left to roam around and victimize some more (for a few head-spinners, check our prior posts) the report comes in a bit late. But it's nonetheless highly welcome.

Posted 9/3/11

THE “WITCHES” OF WEST MEMPHIS

Outraged citizens called them killers. They were wrong.

By Julius (Jay) Wachtel. On August 19, eighteen years after their conviction for the gruesome murders of three eight-year old boys, three not quite middle-aged men [walked out of an Arkansas prison](#). Two, Jason Baldwin and Jessie Misskelley, had been doing life. The third, Damien Echols, the reputed leader of a local witches’ cabal, was on death row, awaiting the same end that befell his forerunners in Salem some three centuries earlier.

[The bodies were found on May 6, 1993](#), in and next to a creek in West Memphis. James Moore, Steven Branch and Christopher Byers had been missing for a day. Each bore the marks of a savage beating. They were lying naked, in fetal positions, their wrists bound with shoelaces, their bodies covered in wounds. One child’s genitals were missing.

The unspeakable crime carried all the hallmarks of a ritual killing. Really, it could be nothing else. Who in the deeply religious community of 27,000 could do such a thing?

In 2008 the actor Sean Penn produced “[Witch Hunt](#),” a feature-length documentary about one of the most remarkable miscarriages of justice in modern American history. During the early 1980’s authorities in Kern County, California became convinced that uneducated transplants from the Ozarks had been engaging in the most unsavory practices. During a frenzied, two-year period [prosecutors filed charges](#) accusing forty-six defendants with raping and molesting as many as sixty children.

In the first case, in 1983, ten defendants, including two couples, Alvin and Debbie McCuan and Brenda and Scott Kniffen were accused of sexually abusing and torturing the McCuan’s two girls, going so far as to rent them out to producers of kid porn movies. Based on the children’s testimony the Kniffens and McCuans were convicted. They got 240 years.

Cabals of child molesters were turning up everywhere. [John Stoll](#), the film’s central character, fell into the whirlpool when he failed to make child support payments. An inquisitive social worker asked his ex-wife if she thought that he could be one of those horrible abusers. Her reply, that it was possible, led authorities to interrogate six kids,

including Stoll's son. Stoll and three acquaintances were charged with a variety of unspeakable acts, including sodomy. Stoll was convicted. He drew 40 years. In a similar case Jeff Modahl and six others were convicted on the testimony of his two daughters, aged ten and twelve. One tried to recant after the trial but to no avail. She first attempted suicide two years into her father's 48-year sentence.

In short order authorities had uncovered eight rings of molesters and sent thirty adults to prison. And still they weren't done. In 1985 deputies opened an investigation into the alleged ritual murder of twelve children by an 80-strong Satanic cult. They searched everywhere but couldn't find the bodies. Finally the state attorney general stepped in and the madness abated.

For a while there was no helping Stoll and the others. But as the children started passing into young adulthood the prosecutors' house of cards began to crumble. Former "victims" offered devastating, heart-rending accounts of the pressures placed on them by investigators. "I was scared they were going to take my mom away," said one. "They kept pushing and pushing until they got the answers they wanted."

Appeals courts eventually ruled that the accounts of abuse had been implanted into the minds of scared and impressionable kids. Nearly every conviction was reversed, but not before some of the defendants had served long terms. The Kniffens and McCuans did twelve years; Modahl, fifteen. Stoll, the last one released, was in for nearly twenty. [Settlements and jury awards followed](#). Scott and Brenda Kniffen got \$275,000. Modahl and his codefendants shared \$4.75 million. Stoll got \$700,000 from the state, then in 2009, \$5 million from Kern County.

A decade later it was déjà vu all over again. During 1994-95 [forty-three persons were charged](#) with sexually abusing sixty children in Wenatchee, Washington. Among the accused were pastor Robert Roberson and his wife Connie; Honnah Sims, a Sunday-school teacher; and parishioners Harold and Idella Everett. Many including the Robersons and Sims held fast and were acquitted. [But seventeen were convicted](#). Most were poor, uneducated or, like the Everetts, mentally retarded, thus easy prey for police and prosecutors. Harold pled guilty and got 23 years; his wife, four.

Just like Bakersfield, the "facts" were produced by suggestive interviewing. Some of the children were patients in a psychiatric hospital. One, a 16-year old girl with suicidal tendencies would later ask, "Why did almost all my treatment...deal with me having to remember sexual abuse that never happened?" (Her parents, originally charged with 1,000 counts of rape, were each convicted of one. Each got ten years.) Another girl,

whose parents sent her to be treated for behavioral problems, complained that police and caseworkers pressed her to say that “my parents did things to me and to my sisters...and if I didn’t, I wouldn’t get out...They had their own ideas of what happened in my family. When I disagreed and said they were wrong, they said I was lying...I was a prisoner....”

Her father, a bipolar man, confessed and was sentenced to 47 years. His wife got forty-six.

Appellate courts soon stepped in, and within five years every conviction had been overturned. Threatened with retrial, a few of the more susceptible defendants pled guilty to minor, unrelated charges and walked away with nothing beyond a shattered life and a prison record. Others who fought back got sizable settlements. Among the largest was [\\$3 million to Sims](#) in 2001 and [\\$700,000 to Robert Robeson](#) in 2007.

Bakersfield and Wenatchee weren’t the only examples. At the time of the killings in West Memphis hysteria about child abuse [was sweeping the country](#). It was no surprise that suspicion fell on Echols, whose Wiccan tendencies and fondness for dressing in black had raised plenty of eyebrows.

Police interviewed Echols and his best friend Baldwin but both steadfastly denied any involvement. Authorities offered a reward. Soon two youths stepped forward. One said that he actually saw Echols, Baldwin and Misskelley kill the boys. But he couldn’t identify the suspects from photographs. Still hoping to cash in, his mother secretly taped a meeting with Echols. He said nothing of interest. Another youth told police that Echols confessed while drunk. But he later recanted.

Determined to make their case, [detectives turned to Misskelley](#), a developmentally disabled youth who was close to Echols. After twelve hours of relentless interrogation the cops had what they needed. Misskelley admitted belonging to a cult that mutilated animals and held orgies in the woods. He, Echols and Baldwin had enticed the victims to the creek, forced them to commit sex acts, then killed and mutilated them.

What happened next was widely reported. [There have been two documentary films](#), the widely-acclaimed “Paradise Lost: The Child Murders at Robin Hood Hills” and a follow-up, “Paradise Lost 2: Revelations.” A third is supposedly in the works. At least two websites specialize on the case. A nonprofit, [wm3.org](#), is funded by the defendants’ vast contingent of supporters. A second, [sponsored by TruTV](#) offers an exhaustive account of the investigation and trial.

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We'll use the latter to summarize. Misskelley was tried separately. [He had already recanted his confession](#), but it was nonetheless admitted as evidence. Two defense experts took the stand to convey what seemed obvious – that police manipulated a frightened, intellectually challenged youth into making implausible admissions that were riddled with inconsistencies. But the judge disallowed their most pertinent criticisms. Lacking that, Misskelley's conviction was virtually assured.

Echols and Baldwin were tried together. They had a rough go of it. [Three witnesses testified seeing them at the crime scene](#); three more swore that they confessed. Defense lawyers poked holes into each account. What they didn't learn until later was that one of the witnesses to whom Echols supposedly confessed had only learned of the case from his counselor at juvenile hall. (Horried at the boy's testimony, the man volunteered to testify. He was turned away.)

Indeed, prosecutors brought in a great deal of questionable evidence. [Common fibers present in a wide variety of clothing](#) were used to place the defendants at the scene. A medical examiner testified that the boys' wounds could have been caused by a serrated knife that was found in a lake near the home of Baldwin's parents. Echols, a witness said, had a similar knife. But perhaps the most damaging testimony came from [a self-styled cult "expert"](#) who concluded that the murders were part of a Satanic ritual that was consistent with Echols' pagan beliefs.

And that's not all. During deliberations [the foreman made sure](#) that jurors knew Misskelley had confessed. That wasn't known until recently, when an attorney who once represented the foreman let it out of the bag.

Thanks to the films and a devoted retinue of skeptics the convictions gained a lot of notoriety. Highly qualified lawyers came in pro-bono to take over the appeals. Forensic experts re-examined the physical evidence. They concluded that the killings didn't take place where the bodies were found and that the victims' wounds were caused by animals. Such views, of course, are fundamentally at odds with Misskelley's confession.

Advances in DNA also [made it possible to analyze two hairs from the scene](#), one stuck in the bindings that secured the wrists of victim James (Michael) Moore, and another found on the ground. Neither was consistent with the defendants' DNA. However, one hair was consistent with the DNA of Terry Hobbs, the stepfather of victim Steven Branch, and the other was consistent with the DNA of David Jacoby, a friend of Hobbs. A new witness has also come forward to say that despite Terry Hobbs' past denials, he had in fact met with the boys on the afternoon of their disappearance.

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Considering all the new evidence, the Arkansas Supreme Court [ordered that an extraordinary hearing](#) be conducted this December to determine whether to hold a new trial. As of two weeks ago those plans are off. Echols, Baldwin and Misskelley entered “[Alford](#)” [guilty pleas](#), in which accused maintain their innocence while agreeing that there is sufficient evidence to convict. They were resentenced to time served plus ten years of unsupervised parole. (Interestingly, Alford pleas had also been used in the Wenatchee cases, where the only crimes that took place were in the imagination.)

For prosecutors it was a win-win situation. A negotiated plea dodged the huge embarrassment that an acquittal would bring and protected the state from paying immense damages. The defendants also got something. Had they failed to win a retrial, much of their leverage would have disappeared, and along with it their prospects of release. If they went to trial there was always a chance that critical witnesses or key evidence might have become unavailable. And who can predict what jurors might do?

These are not risks to be taken lightly. Yet one nonetheless wishes that the West Memphis 3 would have rolled the dice. Indeed, that’s what Jason Baldwin said he would have done. But the deal was for all or none, and his friend Echols had already been in solitary confinement *for ten years*.

As for the D.A., he seems desperate to slam the doors shut on a case that is destined to occupy a prominent spot in the annals of miscarriages of justice, right alongside the Dreyfus affair. “[We don’t think there is anybody else,](#)” he insists.

No one, that is, but the killers of three eight-year old boys.

Posted 2/8/24

WRONG PLACE, WRONG TIME, WRONG COP

Recent exonerees set soul-wrenching records for length of wrongful imprisonment



Glynn Simmons

Don Roberts

For Police Issues by Julius (Jay) Wachtel. “There never really was any real evidence. Just being a Black kid in the wrong place at the wrong time.” [That’s how lawyer John Coyle explained](#) how his client, Mr. Glynn Simmons, came to be wrongfully convicted for murdering an employee and wounding a customer during the December 30, 1974 armed robbery of an Edmond, Oklahoma liquor store. Mr. Simmons, a 22-year old resident of Louisiana, and his alleged crime partner, Don Roberts, a 21-year old who lived in Texas, were charged with the crime two months later. Their arrest was based on their identification by a customer who viewed them during a live lineup. Belinda Brown, then 18, had been shopping for tequila and was wounded during the holdup.

Mr. Simmons and Mr. Roberts wound up in that lineup in a most unorthodox way. Robberies had beset Edmond. Several weeks after the liquor store holdup police obtained a confession from a local man to two other robbery-murders. He and his brother, whom police suspected of being a helpmate, had recently attended a party in Oklahoma City, and officers sought to identify everyone present. It so happened that the get-together took place at the residence of Mr. Simmons’ aunt, who lived in Oklahoma. Mr. Simmons, who had recently relocated from Louisiana, was there. So was Mr. Roberts, with whom Mr. Simmons was then unacquainted.

There were actually *two* witnesses to the liquor store robbery: Ms. Brown and an employee who came through unscathed. At first, neither offered much promise. Ms. Brown complained that “...if I waited much longer” she wouldn’t be able to remember

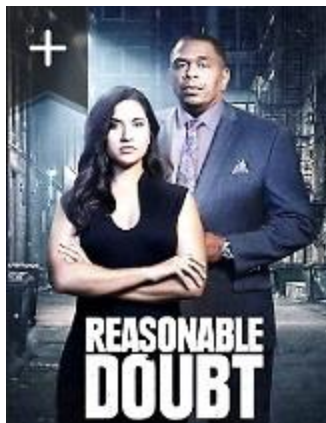
the robbers' faces because "it would get all jumbled up in my mind and it wouldn't be the same." And the employee said that she froze on the robbers' guns and would be unable to recognize their faces.

More than a month later police staged eight live lineups of persons who attended the party. According to a police report that was withheld from the defense, Ms. Brown identified six persons, including Mr. Simmons, Mr. Roberts, and the recently confessed murderer, as being the (two) perpetrators. Ms. Brown conceded she was uncertain and said that she "wanted to think about the identification 'overnight'."

No matter. By the June, 1975 trial date Ms. Brown had become certain that Mr. Simmons and Mr. Roberts were the bandits. Although her original description of Mr. Simmons as large and corpulent was way off (he's a small man), she confidently identified both defendants in court.

Mr. Simmons' primary defense was the testimony of four Louisiana-based friends who confirmed that he was still living there when the Edmond robbery took place. But two other friends weren't called, and affidavits from five others never came into play. (Mr. Simmons' lawyer was disbarred years later for poor performance, although apparently not over this case.) Indeed, Ms. Brown's identification constituted the sole evidence of the defendants' guilt. But she must have impressed jurors, as it took them only a bit over two hours to convict Mr. Simmons and Mr. Roberts. That shocked the prosecutor. He later conceded being troubled by the manner in which they were identified: "...quite candidly, it was one of the few cases I have been involved in that the verdict a week later could easily have been different."

But it wasn't. Mr. Simmons and Mr. Roberts wound up on death row. Fortunately, a state supreme court ruling about the death penalty reduced their punishment to life without parole. Don Roberts was paroled in 2008 after serving 33 years. Mr. Simmons, though, remained behind bars. Ultimately it was that secret, damning police report that made the difference. And, as well, the implication, backed by a comparison of gun calibers, that the man who confessed to the robbery-murders and his brother were the *real* culprits.



In April, 2023 the Oklahoma County D.A. [petitioned for Mr. Simmons' release](#) over a "Brady" violation, meaning the State's failure to reveal exculpatory information. On July 23, 2023, after serving "forty eight-years, one month and 18 days," [Mr. Simmons was released on bond](#). And in December a judge ruled

that there was “clear and convincing evidence” of Mr. Simmons’ innocence and absolved him altogether. Want more? “[A State of Denial](#),” the September 13, 2021 episode of *Investigation Discovery*’s “Reasonable Doubt” reality-TV series, is about this case.



Alfred Chestnut



Andrew Stewart



Ransom Watkins

“[On behalf of the criminal justice system, and I’m sure this means very little to you, I’m going to apologize.](#)” On November 25, 2019, thirty-six years after their imprisonment for shooting and killing a 14-year old boy, Alfred Chestnut, Andrew Stewart and Ransom Watkins were declared innocent and freed. Judge Charles Peters’ move was hardly controversial. After all, it had been sought by Baltimore’s chief prosecutor, Marilyn Mosby, [who agreed with innocence project attorneys](#) that the case had been deeply flawed from the start:

I’m sorry. The system failed them. They should have never had to see the inside of a jail cell. We will do everything in our power not only to release them, but to support them as they re-acclimate into society.

Just how that “failure” came to be involved two chronic causes of wrongful conviction: police pressure on eyewitnesses, and, as in the case of Glynn Simmons and Don Roberts, the withholding of key evidence. [It’s not that police had little to go on.](#) After all, the killing, whose objective was supposedly to steal the wearer’s desirable Georgetown University jacket, took place during class hours. And the three defendants – they were then sixteen, and each was a former student – happened to be at the school visiting. What’s more, when approached by police, Chestnut was wearing just such a jacket.

But Chestnut and his friends denied any involvement. As for the jacket, the youth claimed it had been a gift (his mother later confirmed it with sales receipts). A school

security guard also said that, before the killing took place, he escorted the three visitors outside and locked the door. But the focus on them persisted. On two successive days police showed a photo lineup to two of three boys who had been walking with the victim. (One wasn't there when the killer approached, and the other two ran off when he drew his gun.) None identified any of the three. But one did pick out another youth, 18-year old Michael Willis, whom the security guard observed across the street after the killing.

Still, Chestnut, Stewart and Watkins remained very much in the cross-hairs. We know nothing about their reputation, nor why they had switched to a different school. Their behavior, though, did get them kicked out on that fateful day. And there *was* that jacket. Officers soon struck gold. A fourth student said that she saw the shooting take place and identified the three from the lineup. And when the original set of witnesses was brought back for a third go-around, they confirmed it. What's more, the youth who picked out Michael Willis said he only did so because Willis was "from the neighborhood." Case solved!

At trial a defense investigator testified that two of the prosecution's witnesses told him that the accused was *not* involved. Another reportedly claimed that he was told not to speak with the defense. Defense lawyers also brought in three students whose accounts contradicted the prosecution's version of events. One said that he saw two other boys try to take the victim's jacket. But Michael Willis, whom authorities now believe was the killer, was unmolested. And after accumulating a substantial arrest record, he was himself murdered in 2002.



Why did "the system" fail Glynn Simmons, Don Roberts, Alfred Chestnut, Andrew Stewart and Ransom Watkins? And, as our "[Wrongful Conviction](#)" essays have reported, so many others? Let's self-plagiarize from "[Damn the Evidence - Full Speed Ahead!](#)":

When serious crimes aren't promptly resolved, pressures mount from within and outside the ranks, to say nothing about forces within oneself. That's when "confirmation bias," the natural tendency to "interpret events in a way that affirms one's predilections and beliefs" rears its ugly head. Should detectives fall prey, they may accept "evidence" that might otherwise seem sketchy or

implausible (“[House of Cards](#)” and “[Guilty Until Proven Innocent](#)”). And as our guardians rush along, pressuring witnesses and turning “no” and “maybe” into “yes”, what’s inconsistent gets disputed or is simply ignored (“[Can We Outlaw Wrongful Convictions II](#)”). Indeed, that’s how a “house of cards” gets built (“[The Ten Deadly Sins](#)”).

Eyewitness identification – that is, mis-identification – was a key factor in both cases. In past decades, “separating the wheat from the chaff” was, even more so than today, a matter of all-too-fallible human judgment. Thirty-plus years ago DNA was “in its infancy.” And there were no video cameras recording everyday life. Assessing the accuracy of citizen observations was wholly left to the cops. Naturally, detectives are under pressure to solve crimes, and especially crimes of violence. Sometimes, though, there are several potential evil-doers. Stir in that nasty, all-too-human predilection for “confirmation bias,” and it really does create “[A Recipe For Disaster](#)”.

We can’t get into the heads of the officers whose misfires cost innocent men decades in prison. [But journalists who dug deeply into the second example](#) claim that Baltimore’s detectives had fomented a deviant, reckless subculture that relied on coercion and intimidation to get witnesses to go along. Still, what shapes the initial decision to pick on, say, Jack instead of Bob? In our experience “on the street,” such choices are often influenced by suspects’ criminal records. Alas, what we’ve read about these cases doesn’t mention whether the innocents had previously tangled with the law. And it gets trickier. Consider the first case. Edmond’s cops had recently corralled an admitted armed robber. He and his brother are now believed to have committed the liquor store murder. Why weren’t they targeted from the very start? Could it be because eyewitnesses didn’t pick them out?

Detectives often face complexities. After all, that’s what “detecting” is all about. Alas, when they encounter a “whodunit”, the pressures of the job - after all, they *do* have other cases - can provoke a move to simplify things. Yet *all* kinds of policing are complex. Consider the ambiguities and lack of compliance that patrol officers encounter every hour of every day. What’s the solution? *quality* policing, meaning a craftsmanlike approach to the job. It’s definitely *not* (and must *not* be) about “making numbers”. That can generate disasters such as wrongful convictions. Or, turning to other demanding occupations, cause airplane parts to fly off mid-air. Here’s what a retired Boeing engineer [said about the recent 737 Max-9 imbroglio](#):

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...I would argue that the most like scenario is that the employees felt rushed, and employees were feeling rushed because the corporation is pressuring the factories to produce these planes and pump them out the door.

Alas, productivity is often relied on, in policing and elsewhere, to evaluate performance. Want to read more about the influence of the “numbers game” on policing? Download [“Production and Craftsmanship in Police Narcotics Enforcement”](#). And let us know what you think!

Posted 9/5/14

WRONGFUL AND INDEFENSIBLE

Coerced confessions cost two innocent men thirty years in prison

By Julius (Jay) Wachtel. On September 3, 2014, nearly thirty-one years after their arrest and imprisonment for the rape and murder of an 11-year old girl, a North Carolina judge declared Henry McCollum, 50, and Leon Brown, 46, factually innocent. McCollum had served his entire term on death row.

It never had to happen. McCollum and Brown, who had recently arrived in the small town where the murder occurred, were detained by police shortly after the crime. Unsurprisingly, after hours of grilling, the mentally retarded half-brothers confessed.

Within weeks a local resident, Roscoe Artis, confessed to another rape/murder. (His confession was genuine, and he was convicted and imprisoned.) Artis happened to live only a block from where the body of the victim supposedly slain by McCollum and Brown was found. Inexplicably, prosecutors ignored the lead. Although the accused promptly repudiated their confessions, it was to no avail. It took nearly three decades for authorities to test DNA on a cigarette butt found near the girl's body. You guessed it - it proved a perfect match for Artis.

Joe Britt, the original prosecutor, and Ken Snead, a retired state investigator, unashamedly denounced the exonerations. "It's a tragic day for justice," said Britt. "Someone should have been called today to refute the evidence [for exoneration]," said Snead.

Really.

What happened in North Carolina seems disturbingly similar to the case of the Central Park Five, one of the most "celebrated" episodes of wrongful conviction in modern times.

In April 1989 police arrested five youths for the brutal rape and beating of a jogger in New York City's Central Park. Each was put through the wringer, and four confessed on tape to an assistant D.A. Although the four promptly recanted, all five were convicted and were sentenced to terms up to fifteen years. But in 2002 a miracle happened. Troubled by his conscience, the real perpetrator, who was serving time for an unrelated rape/murder, came forward and said he alone was responsible. His improbable but highly welcome confession was promptly corroborated by DNA.

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Despite the D.A.'s vehement protests (he claimed, among other things, that the five could have participated in the crime) their convictions were quickly vacated. New York City later acknowledged that the five men were innocent and, on the day this very post was published, settled their legal claims for \$41 million.

Settled, but with fingers crossed behind its back. "The City of New York has denied and continues to deny that it and the individually named defendants [i.e., cops and prosecutors] have committed any violations of law or engaged in any wrongful acts." According to city attorney ("corporation counsel") Zachary Carter, "Our review of the record suggests that both the investigating detectives and the assistant district attorney acted reasonably, given the circumstances with which they were confronted."

In other words, stuff happens.

Over the years Police Issues examined many wrongful convictions that had been precipitated by false and coerced confessions. Here are a few:

- George Allen, a schizophrenic, exonerated in 2012 after serving twenty-nine years for murder. Evidence aside from his "confession" included erroneous blood work. Conveniently, prosecutors ignored fingerprints found at the scene that weren't his.
- Damon Thibodeaux, exonerated in 2012 after serving sixteen years for murder. Authorities ignored DNA that wasn't his.
- Douglas Warney, a former psychiatric inpatient with an IQ of 68, exonerated in 2006 after serving nine years for murder. DNA eventually identified the real killer.
- Jeffrey Deskovic, also exonerated in 2006 after serving 15 years for rape and murder. Deskovic was convicted even though DNA recovered from the victim wasn't his. It did, however, ultimately identify the real killer.
- Earl Washington, a mentally disabled man with an IQ of 69, exonerated in 2000 after serving 18 years for murder (and nearly being executed.) Again, he did not match victim DNA; again, the real suspect was ultimately arrested.

As before we could close by setting out ways to prevent these all-too preventable tragedies. For example, recording entire interviews, not just, as in the case of the Central Park Five, the juicy parts, where the suspects (falsely) confess.

But this time we'll let the reader page through our former posts (see below for links). Really, this latest example literally screams for a new approach. So here goes. When

cops and prosecutors use unduly suggestive or coercive interrogation techniques, or purposely turn a blind eye to indicators of possible innocence, why not arrest and prosecute *them*?

There *is* some precedent. Remember Michael Morton, the Texas man who served twenty-five years for killing his wife? Except, of course, that he didn't do it. Last year Texas judge Ken Anderson, Morton's one-time prosecutor, served nine days in jail and accepted disbarment for failing to disclose exculpatory evidence to Morton's defense attorney.

Current statutes prohibit various kinds of misconduct by government officials. Morton's persecutor (yes, we meant to say that) was charged with evidence tampering, tampering with a government record and contempt, for lying to a judge in a pretrial hearing. To stem the plague of mistaken arrests and wrongful convictions it may be necessary to craft new laws. For example, that require police and prosecutors make good-faith efforts to investigate indications of innocence, and which outlaw using threats and coercion when taking statements.

Does that seem too harsh? It's not outlandish to require that government officials, whose goofs can and have caused unspeakable injury (including executing the wrong man) at least try to do quality work. On the other hand, perhaps the authorities have already reformed. Perhaps advances in DNA and other forensic techniques make catastrophic errors a thing of the past. Perhaps twenty years into the future there will be no more examples of innocents serving decades in prison.

Perhaps not.

Posted 12/19/07

YOUR LYING EYES

Poor witness ID + pressure to solve a crime = tragedy

Inspiring stories don't come around often, so when the Orange County (CA) Register published the [first installment](#) of a two-part series on the exploits of a Santa Ana police detective, we curled up for a good read. Then he recoiled in horror.

No, we weren't horrified by the crime, terrible as it was. A man driving a black, shiny 4-door Cadillac picked up a prostitute. She was driven to a secluded place, forced to perform unspeakable acts, choked nearly to death, then for good measure thrown in a dumpster. Fortunately, she survived. Amazingly, she had memorized six digits of the car's license plate. Unfortunately, there was no match in the DMV database.

Why did our ears curl? In horror at the investigation. In [part two](#) of the series we learn that four months after the crime a Santa Ana patrol officer caught two men having sex in a Cadillac. Although the car was white, the license plate didn't match and the act was between members of the same gender, police placed a photo of the driver in a six-pack and showed it to the victim. Sure enough, she picked him out, and the man was arrested. At the preliminary hearing she nailed him again, this time in person. Despite the man's protests, the judge bound him over for trial based on her identification alone.

End of story? Thankfully, no. Three days later the DNA came back. There was no match. Although prosecutors don't necessarily dismiss cases under such circumstances - after all, prostitutes can have multiple sex partners -- this time they did.

It's a good thing. Five years later the FBI's national databank spat out an alert that the DNA profile entered by Santa Ana police matched a DNA profile from a rape in a small Washington town. Police there had a suspect. He lived in Westminster, Calif., a city near Santa Ana. Our intrepid detective went to the man's house. Bingo! A black 4-door Cadillac. Bingo! Its license plate was nearly identical to what the victim reported. Officers followed the car until its driver discarded a cigarette butt, then pounced on the roach. Bingo! The DNA matched. Lock him up!

They did. Unfortunately, the suspect killed himself while out on bail. Case closed. What if there hadn't been DNA to exculpate the first guy? Can you say "wrongful conviction"?

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Indeed, eyewitness goofs are the leading cause of wrongful convictions. DNA has made the magnitude of the problem all too apparent. For a classic example look no further than [Ronald Cotton](#), whose wrongful conviction for two rapes has become a case study in misidentification. (It took the innocent man eleven years to get out, but who's counting?)

Yes, there's a catch. Since a perpetrator's DNA is only present in about twenty percent of violent crime, most wrongfully convicted persons have to try to prove their innocence another way. And prove it they must: once a jury renders a verdict of guilty the burden shifts from the State to the defendant. Imagine how Rhode Island police detective [Jeffrey Scott Hornoff](#) must have felt when he was convicted for murdering his wife based on nothing more than lying about an affair. Hornoff spent six years in prison before the real killer, tortured by his conscience, stepped forward to confess. (The killer's brother had known all along but kept quiet.)

DNA aside, what can a cop do to reduce the risk of arresting the innocent? In the present example, the 20-year Santa Ana PD veteran spoke eloquently of his determination to find the prostitute's killer. "She was a righteous victim, and I felt bad for her. If you read the police reports, you'd be sympathetic to her too, even if she was a prostitute."

What's wrong with that? Detectives should be motivated by one thing alone: discovering the truth. Pressures from the boss or the public, desire for recognition, and yes, even sympathy for the victim can lead to hasty decisions and poor police work, with catastrophic consequences for innocent persons and for others who may be victimized because the actual perpetrator remains at large.

No one knows that better than [David Allen Jones](#). A mentally retarded man with an IQ of 62, he was talked by LAPD detectives into confessing to murdering four prostitutes in 1992. Although DNA recovered from the victims was not his, Jones was nonetheless tried and convicted under the theory that his DNA was masked by the DNA of the victims' other sexual partners. Nine years later, an LAPD detective working cold cases matched the four rape/murders attributed to Jones plus six more to another man already in prison for rape. Jones was freed and received settlements of \$720,000 from Los Angeles and \$74,600 from the State compensation board.