

# **Deskovic Foundation**

## **Wrongful Convictions – Systematic Causes and Suggested Remedies**

*A Deskovic Foundation Whitepaper*

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*Based on a Thesis Presented in Partial Fulfillment  
of the Requirements for a Masters Degree in Criminal  
Justice, John Jay College of Criminal Justice of  
the City University of New York.*

**May 13, 2012**

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## **ABSTRACT**

Wrongful convictions have a terrible and irreparable impact on the innocent defendant sent to prison; his family; the victim's family; and future victims preyed upon by the real perpetrator who remains at large.

Our American polity is weakened by wrongful convictions because they cause the public to lose faith in the fairness and objectivity of the criminal justice system to free the innocent and punish only the truly guilty.

Wrongful convictions are thought to be aberrant, unpredictable, and tragic events. To the contrary, they are the consequence of systemic deficiencies in the American criminal justice system.

This thesis summarizes the causes of wrongful convictions; identifies the systemic deficiencies which lead to them; and proposes remedies to limit occurrence of wrongful convictions in the future.

## **PREFACE**

### *It Can Happen To Anybody*

A wrongful conviction is defined as the criminal conviction of an actually innocent person. Actual innocence does not mean innocence based on a defect in the legal proceedings. It means factual innocence. A wrongful conviction is the conviction of someone who had no involvement in the crime charged whatsoever.

A few examples of those who have been wrongfully convicted are: A soldier (Hanes, 2004); a mailman (Pro, 2002); a police officer (“Rhode Island lawyer reflects,” 2003); a truck driver (“NY man wrongly convicted,” 2010); a law student (Weinstein, 2006); and a high school student (Santos, 2006).

The problem of wrongful conviction transcends race. There have been 180 African Americans; eighty-two Caucasians; twenty-one Latino’s, two Asian-Americans, and four of unknown race who were proven innocent by DNA testing (“Facts on Post-Conviction,” n.d.). DNA exonerations have occurred in thirty-four states (“Facts on Post-Conviction,” n.d.). Many more have been cleared via other methods. The same systemic deficiencies that lead to wrongful convictions in one jurisdiction lead to them in other jurisdictions, both in cases with DNA evidence and those without it.

The phenomenon of wrongful conviction has broad implications. Not only is the wrongfully convicted individual unjustly deprived of his freedom, his family is dramatically impacted, as is society at large, because the real perpetrator remains free of police suspicion and often strikes again.

The study of this subject is not an academic exercise for me. At age seventeen, I was convicted of the brutal rape and murder of my high school classmate, Angela

Correra. DNA proved that semen found in her vagina was not mine.<sup>1</sup> Despite this key fact, I was wrongfully convicted based upon a coerced, false confession obtained after seven and half hours of interrogation when I was a vulnerable sixteen years old; fabrication of other evidence; prosecutorial misconduct; fraud by the medical examiner; and an inept public defender. I pursued seven appeals, all of which failed.

In 2006, the Westchester County District Attorney finally agreed to DNA testing of forensic evidence found on Ms. Correra and at the crime scene. The results matched the real perpetrator because, three and half years after he murdered my classmate, he murdered a school teacher with young children; was caught and convicted; and his DNA put into the databank. After the DNA evidence in *People v. Jeffrey Deskovic* was tested in 2006 and matched him, not me, he confessed to Angela's murder. Had he gotten away with murder a second time, I would still be in prison.

On November 2, 2006, the District Attorney consented to dismissal of all charges against me on the grounds of my actual innocence and the judge apologized to me on behalf of the State of New York. At that point, I had served sixteen years in prison for brutal crimes I did not commit. I entered prison at age sixteen and walked out at age thirty-three. My adolescence and formative years were stolen from me.<sup>2</sup>

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<sup>1</sup> Snyder, McQuillan, Murphy and Joselson, *Report on the Conviction of Jeffrey Deskovic* (June 2007 at 30) (“crime scene DNA evidence introduced at trial proved that the semen recovered from the victim's body was not his.”) (hereinafter as “Deskovic Report”).

<sup>2</sup> On November 2, 2006, the trial judge admitted “the undeniable fact that nothing can be done in this courtroom here today to erase the pain and suffering endured by you and your loved ones over the past sixteen years.” *Deskovic Report* at 31. The report authors concluded: “It is obvious that an enormous and horrific injustice was imposed upon Jeffrey Mark Deskovic by the State of New York” (p. 30). Their conclusion stands in stark contrast to the finding twelve years earlier of New York's Appellate Division -- stated with unabashed certainty -- that, “On the afternoon of November 15, 1989, the defendant struck the victim over the head with a blunt object, and dragged her into a

## INTRODUCTION

### *The Advent of DNA Testing to Establish Innocence*

In 1974, James Bain was wrongfully convicted in Florida of raping and kidnapping a nine year old boy. The victim's uncle was an assistant principle at a local high school. The victim described the perpetrator and the uncle told authorities his nephew's description matched Bain, a student at the high school. Bain was misidentified in a photographic array. The witness later testified at deposition that he had been asked to "pick out Jimmie Bain." Alibi evidence proved that Bain was with friends until 10:30 P.M. until he returned home where he watched television and fell asleep with his sister until the police arrived. He never confessed and always maintained his innocence.

Blood is grouped according to antigen as A, B or 0 (zero), meaning neither A nor B. Bain had AB blood which is very rare, less than 0.5% of the population. An FBI analyst, William Gavin, testified at trial that semen in the victim's underwear was blood group B and that Bain's blood group was AB with a weak A, and therefore, Bain could not be ruled out as the rapist.

Bain's defense attorneys called a serology expert, Dr. Richard Jones, who testified that, to the contrary, Bain's blood type was AB with a strong A, and therefore, the semen found in the victim's underwear could not be Bain's. In other words, the FBI witness did not say Bain was ruled in as the perpetrator, only that he supposedly could not be ruled out – hardly proof beyond a reasonable doubt – and the defense serologist said Bain, in fact, was conclusively ruled out.

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wooded area, where he beat, raped and strangled her." *People v. Deskovic*, 201 A.D.2d 579, 579, 607 N.Y.S.2d 957, 957 (2d Dept.,1994).

Yet, Bain was convicted and spent thirty-five years in prison. During that time, he unsuccessfully sought DNA testing five times before the test was finally allowed. It proved he was actually innocent (Laughlin, 2009; Laughlin & Nipps, 2009; Stacy, 2009).

Since the first DNA exoneration in 1989 (Blumenthal, 2007; Carlton, 2007), there has been an explosion of DNA exonerations, currently numbering 289. DNA testing spurred development of several organizations dedicated to clearing the wrongfully convicted where testing can demonstrate actual innocence. The accuracy of DNA testing has gained such acceptance in court that it is referred to as “the gold standard” of forensic evidence. (Lynch, 2003; Rabil, 2011) As the U.S. Supreme Court said, “DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.”<sup>3</sup>

However, DNA evidence is no panacea to overturn wrongful convictions because biological evidence is only available in 10-12% of all serious felony cases (Legal Director, n.d.). If a case is among that small percentage in which DNA evidence might make a difference, the wrongfully convicted are faced with two other obstacles: (i) whether the biological evidence has been destroyed; and (ii) if not, whether it has been lost. If biological evidence is either destroyed or lost, then the wrongfully convicted defendant remains in prison unable to prove his innocence. Unfortunately, the destruction or loss of vital DNA evidence is commonplace. The Innocence Project reports that, since 2004, it was forced to close 22% of its cases because of lost or missing DNA evidence (“Facts on Post-Conviction,” n.d.).

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<sup>3</sup> *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009).

DNA exonerations provide a window into the criminal justice system to help gauge the reliability of convictions and identify systemic deficiencies which lead to wrongful convictions. Some startling facts gleaned from the DNA exonerations include the following:

- seventeen of the 289 exonerees served time on death row;
- the average prison stretch served by exonerees is thirteen and a half years;
- since 1989, there have been tens of thousands of cases in which suspects were identified and pursued until pre-trial DNA testing proved they were innocent; and
- the real perpetrators were identified by DNA in 117 of the cases.

(“Facts on Post-Conviction,” n.d.).

Conclusive determinations are more difficult to make in non-DNA exonerations. Although it is sometimes possible to achieve consensus among experts regarding a defendant’s actual innocence, often, such consensus is lacking. Meaningful conclusions cannot be drawn from cases in which the actual innocence of the defendant can be disputed. Thus, cases without DNA evidence, and cases in which the conviction was based largely or wholly upon circumstantial evidence, are more difficult for the wrongfully convicted to overturn.

Exonerations of the actually innocent provide a starting point for social scientists and researchers to examine problems and devise solutions to improve the criminal justice system. One such deficiency is the phenomenon of false confessions. New research on this subject has yielded important results. Psychologists and social scientists have asked: What external factors, such as police or law enforcement tactics, lead to false

confessions; what internal factors, such as a suspect's youth or mental illness, induce false confessions.

Studying these matters is the first step in the process of developing criminal justice reforms. Researchers develop hypotheses and conduct even more research in order to generate statistically validated studies which enable individuals and advocacy groups to lobby elected officials for new legislation that will turn the suggested solutions into law. The goal is to prevent wrongful convictions and thereby make the criminal justice system more accurate and reliable – in other words, more just.

Systemic accuracy and reliability have widespread implications for all involved: the individual; the wrongfully convicted prisoner; and society at large. Each time the wrong person is convicted, dangerous perpetrators remain at large able to strike again. In fact, in wrongful conviction cases, eighty-five actual perpetrators have been identified and convicted of seventy-seven additional violent crimes. (Hampikian, West, & Akselrod, 2011). Had they been apprehended and convicted for the crimes attributed to the wrongfully convicted person, these additional crimes would have been prevented.

In a democracy, most people generally believe the criminal justice system operates objectively to free the innocent and punish the guilty. Not surprisingly, families are frequently devastated by wrongful convictions. The obvious loss is loss of companionship of a wrongfully convicted parent or child sent to prison for years. What is less obvious is what happens when family members are falsely led to believe one of their own committed a terrible crime. Children grow up believing a sibling or parent committed a rape or murder, or parents believe the same of their child. These false beliefs cause hatred to fester within families. When suddenly it is revealed, often years later, that

the imprisoned family member was actually innocent, the damage within the family is usually impossible to repair. The wrongfully convicted person feels abandoned by family members who condemned him, and the family members who condemned him feel overwhelming guilt at having ever believed he was guilty of terrible crimes.

Similarly, a wrongful conviction often causes family members of the rape or murder victim to hate the defendant they were misled to believe was the true perpetrator. The victim's family members frequently experience serious emotional upheaval upon learning their hatred was misplaced. In some instances, misled family members are so invested in their hatred, they find it impossible to accept the defendant's actual innocence, despite incontrovertible proof.

There are tangible economic costs to wrongful conviction. In New York, for example, the average cost of incarceration annually is \$40,000 per inmate (Public Safety Performance, 2007). In addition, taxpayer money is wasted on court time and publically financed defense services, and compensation for the wrongfully convicted person is often in the millions, depending on the number of years served in prison.

Most importantly, public confidence in the criminal justice system is shaken each time the wrong person is convicted. Belief in an accurate and reliable criminal justice system is vital to democracy. Otherwise, the nation is not one governed by consistent laws, but by arbitrary men.<sup>4</sup>

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<sup>4</sup> “[T]e true idea of a republic is 'an empire of laws, and not of men.' That as a republic is the best of governments, so that particular arrangement of the powers of society, or in other words, that form of government which is best contrived to secure an impartial and exact execution of the law, is the best of republics.” --John Adams, *Thoughts on Government* (1776).

This paper begins by distinguishing between legal and factual innocence, and then discusses each systemic deficiency that leads to wrongful convictions:

- misidentification;
- false confessions;
- incentivized witnessing;
- prosecutorial misconduct; and
- inept defense.

The role of the media in setting the stage for wrongful convictions is discussed, as are proposed remedies to detect wrongful convictions:

- standardized evidence preservation systems;
- innocence commissions;
- Second Look programs/Conviction Integrity units within prosecution offices; and
- eliminating the Catch-22 position of the wrongfully convicted in sex offender programs.

This paper ends with a summary recap of the issues, and identifies subjects worthy of further investigation in the future.

## **LEGAL VERSUS FACTUAL INNOCENCE**

Legal innocence is rooted in the principle that, unless and until a person is proven guilty, he is presumed innocent. This presumption is discarded only after the defendant is found guilty in a trial in which all his legal rights were preserved. A person not convicted of a particular crime is deemed legally innocent of that crime. A person convicted at a trial infected with errors by violation of the rules of evidence, bad instructions to the jury, etc., claims legal innocence on appeal because the guilty verdict was rendered unfairly.

Likewise, a person whose conviction is overturned on a point of law is deemed legally innocent because he is restored to the presumption of innocence.

Legal innocence is distinguished from actual innocence. A person convicted of murder where the facts only supported a conviction for manslaughter is legally innocent of murder, but he is not factually innocent of a serious crime. A defendant whose conviction was reversed on a legal ground and is not re-tried for reasons other than actual innocence or discovery of new evidence which casts doubt on his guilt is classified as legally innocent (Findley, 2011; Poveda, 2001; Zalman, 2001).

In contrast, factual innocence, also called “actual innocence,” refers to a person who did not commit the crime charged. Factual innocence means he played no role in the crime whatsoever; was not guilty of a minor role; or acting in concert with the primary perpetrator, such as driving a getaway car; and was not part of a conspiracy to commit the crime. He is completely devoid of blame by virtue of his lack of connection to the crime in any respect whatsoever.

In the innocence movement, and among the law enforcement and legal communities, the phrase “wrongful conviction” refers to the conviction of a person who was factually innocent.<sup>5</sup> When police or prosecutorial misconduct occurs, the waters

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<sup>5</sup> One notable exception is the New York State Bar Association (NYSBA). In its report on wrongful convictions, the NYSBA states that, in the fifty-two cases of “wrongful conviction” reviewed, it was not willing to state the defendants were factually innocent, only that they should not have been convicted (New York State Bar Association, 2009). The reason for this caveat is that non-DNA exonerations can be controversial and a defendant’s factual innocence remains in dispute in the absence of conclusive scientific evidence to exonerate him. For example, where a conviction was overturned because the prosecutor withheld exculpatory evidence, it remains unclear whether the defendant was factually innocent or a possibly guilty person set up by the prosecutor fearful the guilty man might escape conviction.

become muddied regarding a suspect's factual innocence or factual guilt.<sup>6</sup> There is an important distinction between concluding a defendant should not have been convicted and that he was factually innocent.

## **CAUSES OF WRONGFUL CONVICTIONS**

The 290 DNA exonerations documented by the Innocence Project to date provide a valuable resource for identifying the causes of wrongful conviction.

### *Victim Misidentification*

Charles Chatman was wrongfully convicted of aggravated rape in Texas after he was misidentified by the victim, both in a photo array and at a lineup conducted two weeks later. DNA evidence proved he was innocent after he served twenty-seven years in prison. (Blumenthal, 2008; Musa, 2011).

Misidentification is the leading cause of wrongful convictions. The courts and public place great faith in testimonial evidence from a victim who identifies the perpetrator. Such evidence is deemed to be very reliable. It is assumed the crime victim seeks only to have the real perpetrator apprehended and convicted. Yet, DNA exonerations have revealed that eyewitness identification is the least reliable of all evidence. Out of the now 290 DNA-based exonerations, misidentification was the cause of wrongful conviction in a remarkable 75% of cases. In New York's twenty-eight DNA-proven wrongful convictions, fourteen were caused by misidentification (Cutler & Kovera, 2010; "Eyewitness Misidentification," n.d.).

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<sup>6</sup> The NYSBA's statement that it was "not willing to say that the defendants were factually innocent, only that they should not have been convicted," was an attempt to sidestep controversy arising from the study and its conclusions.

Various cognitive, perceptual and psychological factors impact on a victim's recall of the crime, such as the amount of time the victim viewed the perpetrator; lighting conditions; fear; trauma; and the presence of a weapon. All contribute to the unreliability of victim identification. A brief glimpse of the perpetrator under stressful conditions may be less reliable than a longer viewing period. Yet, a lengthy viewing offers no guarantee of accuracy.

The case of Ronald Cotton makes the point. He served ten and a half years in a North Carolina prison before being proven innocent by DNA tests. The victim, Jennifer Thompson Canino, viewed her rapist for quite a long time while she was being raped. Nonetheless, she misidentified Cotton, and did not recognize her actual rapist, Bobby Poole, when she saw him. Poole's guilt was proven by DNA testing (Thompson-Cannino, Cotton, & Torneo, 2009).

The psychological concept of "schema" helps explain this phenomenon. Schema refers to the notion that everyone has a mental framework centered on a specific theme used to organize social information. When confronted with a situation in which details are unclear, the mind tends to fill in the gaps. This phenomenon explains how victims recall a perpetrator's physical appearance when only sketchy details are available. Victims are not lying; rather, they have difficulty distinguishing between what they actually remember from the missing details supplied by their schema (Holst & Pezdek, 1992; Tuckey & Brewer, 2003).

### *Eyewitness Misidentification*

Misidentification takes place not only in police lineups, but also via photo arrays and "show ups". A photo array involves presenting the victim or witness with a set of

head shots, usually six, in which the suspect's photo appears with others. The victim or witness is then asked to pick out the perpetrator from among the photos presented.

A show up occurs when a victim is brought to view a suspect detained by the police. Suggestibility makes shows ups one of the least reliable methods of identification. People tend to assume the man in police custody must be the perpetrator because otherwise, he would not have been arrested. In the witness's mind, the presence of police lends credibility and confidence in the identification.

The Innocence Project has reported on cases involving misidentifications in which:

- a witness made an identification in a “show-up” procedure from the back of a police car hundreds of feet from the suspect in a poorly lit parking lot in the middle of the night;
- a witness in a rape case was shown a photo array where only one photo – that of the suspected perpetrator – was marked by police with an “R” for “rapist”;
- witnesses substantially changed their description of the perpetrator, including key information such as height, weight and presence of facial hair, after they learned more about a particular suspect;
- witnesses only made an identification after seeing multiple photo arrays or lineups – and even then, were hesitant, saying, *e.g.*, they “thought” the person “might be” the perpetrator, but at trial, the jury was informed the witness never wavered in identifying the suspect.

(Eyewitness Misidentification,” n.d.).

One of the most egregious cases of misidentification was that of Anthony Capozzi. He served twenty years in New York prisons for rape, sodomy, and sexual abuse. He was misidentified by three people. According to The Innocence Project:

Biological evidence stored for two decades in a hospital drawer was the key to the 2007 exoneration of Anthony Capozzi, a Buffalo, New York, man who spent 20 years in prison for two rapes he didn't commit. DNA tests in March 2007 showed that another man, Altemio Sanchez, actually

committed the attacks for which Capozzi was convicted. Sanchez was convicted in 2007 of three other murders and is currently serving life in prison. Capozzi was charged with three similar rapes and went to trial in 1987. The rape victims told police their attacker was about 160 pounds – Capozzi weighed 200 to 220 pounds. None of the victims mentioned a prominent three-inch scar on Capozzi’s face. All three victims identified Capozzi in court as the attacker. He was convicted by a jury of two rapes and acquitted of the third. He was sentenced to 35 years. Biological evidence was collected from two victims in 1985 and stored in a hospital drawer. When the evidence was tested in 2007 at the request of Capozzi and his attorney, sperm collected during the rape examinations of both victims matched the profile of Sanchez – and proved that Capozzi could not be the rapist. Capozzi was exonerated and released from state custody in April 2007.

(“Anthony Capozzi,” n.d.; Walter, 2008).

## **REFORMS TO REDUCE MISIDENTIFICATION**

The causes of misidentification have been much researched and long recognized.

Reforms in the identification process could go far in ameliorating this serious defect in the criminal justice process. Some suggested reforms are:

- use of sequential lineups and photo arrays;
- using persons similar in appearance in lineups;
- selecting lineup participants who resemble the perpetrator as described by witnesses;
- informing potential witnesses the perpetrator may not be in the photo array or lineup;
- assuring the victim the investigation will continue whether or not the victim makes an identification;
- use of double blind identification procedures;
- video recording the identification process;
- allowing confidential statements by witnesses regarding their level of certainty about the identification; and, finally,
- eliminating show-ups.

### *Sequential Lineups and Photo Arrays*

When a witness views several people simultaneously – in person or by photo array – the witness often identifies the person who most closely resembles the perpetrator instead of recalling the actual perpetrator from memory. However, the person who most closely resembles the perpetrator may not be the actual perpetrator. To prevent bias from simultaneous viewings, law enforcement should allow witnesses and victims to view one photograph or one person at a time in sequence (Stebly, Dysart, & Wells, 2011).

### *Lineup Choices or Photographs that are Similar in Appearance*

Each person in a lineup or each head shot in a photo array should resemble the description given by the victim. Often, wrongfully convicted defendants were misidentified because they stood out in a lineup or photo array, such as being significantly taller than the other individuals presented, or the only person of a different race. When a person stands out, this makes the lineup or photo array unduly suggestive and renders the identification virtually worthless (Wells et al., 1998; Zarkadi, Wade, & Stewart, 2009).<sup>7</sup>

### *Informing Victims and Witnesses the Perpetrator May Not Be Present*

Informing victims and witnesses the perpetrator may not be present in a lineup, photo array, or show up will guard against undue pressure to select someone, and guard against undue confidence in the selection. Understanding the perpetrator may not be present makes witnesses more relaxed, and reassures them the pool of potential suspects

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<sup>7</sup> *United States. v. Wade*, 388 U.S. 218 (1967).

is larger than the group of persons presented, thereby reducing the artificial focus on those individuals presented (Malpass & Devine, 1981; Malpass et al., 2005).

### *Advising Victims and Witnesses the Investigation Will Continue Whether or Not They Make an Identification*

Informing victims and witnesses the investigation will continue even without an identification will reduce pressure on them to make one for fear the perpetrator will escape justice (Saks et al., 2001).

### *Utilizing the Double Blind Method*

The double blind method is a scientific method in which all parties to the experiment lack information about the persons or things being tested or the expected outcome of the test. This technique yields results that are unbiased and uninfluenced, whether consciously or subconsciously. In identification procedures, use of the double blind method means both the supervising police officer and the witness are ignorant about the suspected perpetrator who may or may not be present in the lineup or photo array. This technique insures the police officer does not inadvertently give the witness cues about which individual is the suspected perpetrator. Eliminating such cues increases the accuracy of the identification (Garrioch & Brimacombe, 2001; Phillips, McAuliff, Kovera, & Cutler, 1999).

### *Video Recording Lineup or Photo Array Procedures*

Video recording helps insure the integrity of an identification and facilitates the review process in court. A video enables an objective review of the identification process, prevents omission of important details about that process, and removes intentional or unintentional bias in officer testimony. (American Bar Association, 2004; Eyewitness Identification, n.d.; Wells et al., 1998).

### *Prohibiting Confidence Statements to Victims and Witnesses*

Identification procedures should be conducted in a clinical atmosphere and police officers should be prohibited from making comments about an eyewitness's selection from among choices in a photo array or lineup. Congratulation serves no purpose except to reinforce a victim's confidence in what may turn out to be a misidentification. At trials in which identification is the principal issue in contention, police encouragement of an eyewitness's choice often makes it difficult for the defense attorney to elicit the eyewitness's sincere thoughts about the strength and accuracy of the identification once it has been bolstered by post-identification comments from police.

Instead, police should ask, "On a scale of one to ten, how confident are you in your identification?" This will help put courts and juries in a better position to evaluate the witness's subjective commitment to the identification at the time it was made.

### *Eliminating Show-Ups*

The phrase "show up" is police jargon for displaying a suspect to a witness shortly after the suspect has been apprehended. Usually, the suspect is either in handcuffs or confined in the back of a police cruiser. Police ask, "Is this the man?" often at or near the crime scene. The problem is that show ups convey the unmistakable impression the police believe the person detained is the perpetrator. This is unduly suggestive to the witness.

### *Implementing Reforms*

According to The Innocence Project, as of April 10, 2011, the following jurisdictions have implemented the "Sequential Double Blind" procedure, defined as

presenting witnesses with one photo or one lineup subject at a time, and then having the witness rule in or rule out the choice before being shown the next photo or person:

- New Jersey, North Carolina and Wisconsin;
- Suffolk County, Massachusetts; Hennepin County and Ramsey County, Minnesota; and Santa Clara County, California; and
- the cities of Northampton, Massachusetts; Madison, Wisconsin; Winston-Salem, North Carolina; and Virginia Beach, Virginia.

The public depends on an accurate criminal justice system. There is no valid reason why the sequential double blind procedure should not be adopted universally. Lawmakers should enact the necessary legislation to standardize it state-wide. So long as implementation is left to the voluntary actions of police departments, every citizen remains at potential risk of being misidentified as an offender.

## **FALSE CONFESSIONS**

Douglas Warney was wrongfully convicted of murder based upon his false confession following twelve hours of interrogation. Warney had an eighth grade education, advanced AIDS, and known mental health problems. Although he correctly stated the victim had been wearing a nightgown and cooking chicken, and that the killer cut himself, Warney got key details of the crime wrong. Specifically, he was wrong about the location of the murder, and wrongly implicated someone confined to a mental hospital. Warney was proven innocent by DNA-testing after serving nine years in prison. His is hardly an isolated case.<sup>8</sup>

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<sup>8</sup> *Warney v. State*, 16 N.Y.3d 428, 947 N.E.2d 639 (2011).

False confessions were the cause of wrongful convictions in 27% of the 289 DNA-proven wrongful conviction cases. Police tactics implicated in inducing false confession include:

- interrogating suspects for extended periods;
- depriving suspects of food and drink;
- misuse or abuse of polygraph testing;
- lying to suspects about non-existent evidence;
- good cop/bad cop tactics;
- false promises to suspects, for example, if they confessed, they could go home; and
- threats (“False Confessions,” n.d.).

### *Lengthy Interrogations*

Interrogating suspects for extended periods causes them to become exhausted and breaks down their will. The suspect grows physically and psychologically tired after many hours during which the same questions are repeated over and over. Isolation and fear contribute to the wearing-down process which is hastened when combined with deprivation of food and drink.

John Kogut was interrogated for eighteen hours and gave five different versions of a false confession. His sixth confession was finally accepted. He served seventeen years in prison before he was proven innocent by DNA-testing. (Drizin & Leo, 2004; Topping, 2005).

### *Misuse of Polygraphs*

In scientific terms, a polygraph test is the psycho-physiological detection of deception. It is based on the observed phenomenon of physiological changes caused by

cognitive dissonance. The act of uttering what the subject knows is false, even in matters of no consequence, causes cognitive dissonance which in turn stimulates minute increases in heart rate, respiration rate, blood pressure and diaphoresis (sweating). The polygraph instrument measures these minute fluctuations which are amplified by galvanometers attached to tracing needles which pass across graph paper. Significant changes in these physiological responses are graphically displayed on the paper. Hence, an aphorism of the polygraph community is, “The body reveals what the mind conceals.”

The problem with the polygraph is that its results may be distorted by many factors that have nothing to do with the truthfulness of the responses. Extrinsic factors can distort a polygraph test, such as ingestion of alcohol, medications, caffeine in coffee, tea and soft drinks, etc. These substances elevate heart rate, respiration and in some cases, blood pressure.

Most people accept that polygraphs can detect deception. Police induce false confessions by lying to suspects that they failed a polygraph test which the suspect, in fact, passed. The crestfallen suspect feels caught and falsely confesses, believing that technology has exposed him. (Kassin, & Gudjonsson, 2004).

### *Tricking Suspects*

False promises, such as telling a suspect that, if he confesses he can then go home, often causes a frightened suspect worn down by endless hours of interrogation to falsely confess out of concern for his immediate well being. The suspect does not think about the future legal consequences of confessing.

### *Threats*

The Fifth Amendment requires a suspect's confession must be knowing, voluntary and freely given without coercion.<sup>9</sup> Nonetheless, law enforcement officials still use threats to obtain confessions. Threats, similar to false promises the suspect will be released upon confessing, compel the suspect to focus on his immediate need for self-preservation without considering the long term consequences of confessing.

### *Minimizing the Risk of False Confessions*

Video recording of the entire interrogation which leads to a confession is vital. Researchers have concluded the camera should be focused on the interrogator "because this particular vantage point may facilitate decision makers' capacity to detect coercive influences, which in turn could, in some cases, improve assessments of the confession's reliability" (Lassiter, Geers, Handley, Weiland, & Munhall, 2002).

The entire police interaction with a suspect should be recorded. Otherwise, police can claim the suspect confessed when the camera was not rolling. If any part of the police interaction occurs off camera, the judge and jury are deprived of critical information which may reveal the confession was induced by police coercion.

Several states have adopted this measure, either by legislation or judicial precedent. Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oregon, Wisconsin, and the District of Columbia have enacted legislation requiring that all custodial interrogations be recorded. State Supreme Courts have mandated video recording of interrogations in Alaska, Iowa, Massachusetts, Minnesota, New Hampshire, and New Jersey (Gershel, 2010; The Justice Project, 2007).

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<sup>9</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Failure to record a suspect's confession should result in exclusion of this evidence. Video recording should include a clear view of the interrogators and the suspect. This helps judges and juries determine if the interrogation was contaminated, either deliberately or inadvertently, by police conveying details about the crime in the course of questioning (Garrett, 2010).

Lengthy interrogations, lying about polygraph results, false promises and threats, all of which have been linked to false confessions, should be banned. Confessions should be truly free and voluntary, otherwise the Fifth Amendment right against self-incrimination is meaningless.<sup>10</sup> To deter threats and false promises which lead to false confessions, police must face the prospect of real penalties, such as exclusion of unrecorded or manipulated confessions in evidence, and financial and career consequence for such misconduct. In appropriate cases where such misconduct caused a wrongful conviction, police should face criminal penalties.

### *Hearings on the Actual Truthfulness of Confessions*

The law should provide for a pre-trial hearing to determine the truthfulness and reliability of confessions, and empower judges to exclude those determined to be false or unreliable. Currently, pre-trial hearings on confessions are limited to voluntariness.<sup>11</sup> However, because there is an 80% conviction rate in cases with confessions (Conti, 1999), it is critical to catch false confessions before they are presented at trial. This could

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<sup>10</sup> *Malloy v. Hogan*, 378 U.S. 1, 7(1964) ("the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary'")

<sup>11</sup> *Jackson v. Denno*, 378 U.S. 368 (1964); *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 (1965).

be achieved by pre-trial hearings on the actual truthfulness of confessions. The judge would evaluate whether: (i) the defendant correctly described crime details known only to the perpetrator; (ii) the confession is contradicted by known facts about the crime; (iii) the confession is contradicted by external or forensic evidence; (iv) the confession is contradicted by statements by co-defendants; (v) the defendant was asked open-ended questions to elicit a narrative answer, or asked leading yes-or-no questions; and (vi) the police fed details of a crime to the defendant which he later incorporated into his confession, as happened in the Central Park Jogger case discussed below.

The judge could ascertain if any of the factors linked to false confessions were present, such as lengthy interrogation; deprivation of food and drink; false statements about polygraph results; lying about non-existent inculpatory evidence; hints of leniency; false promises; threats; or other disqualifying factors.

In addition, expert testimony could be presented to provide contextual information regarding factors that lead suspects to falsely confess, such as the psychological phenomenon of an “internalized false confession,” *i.e.*, when an actually innocent suspect temporarily comes to doubt his own innocence.

### *False Confession Expert Testimony*

If the trial judge refuses to exclude a confession before trial, then defendants must be allowed to present expert testimony at trial to explain why the confession was false and should be discredited by the jury. Experts do not opine on the truth or falsity of a particular confession, but instead, provide context by describing the factors which lead suspects to falsely confess. Such contextual information will assist juries in evaluating

the truthfulness and reliability of the defendant's confession and counter the widely held misconception that a truly innocent person would never falsely confess. (Soree, 2005).<sup>12</sup>

### *Safeguarding Vulnerable Populations*

Suspects with cognitive or psychological problems often try to make up for their deficiencies by pleasing authority figures. Leaving these vulnerable suspects alone with police determined to extract a confession is a recipe for disaster. Those with known mental health or cognitive deficiencies should never be questioned outside the presence of an attorney.

Similarly, children and teens are more vulnerable to pressure from authority figures than adults, and therefore, more likely to make false confessions. They should not be interrogated without counsel present.

Support for this proposition is found in the Supreme Court's recent decision in *J.D.B. v. North Carolina*.<sup>13</sup> J.D.B. was a thirteen-year-old seventh grader who confessed to burglary after he was seen at school with a digital camera matching one of the stolen items. He was interrogated in a closed-door conference room by a uniformed police officer on detail at the school. At first, J.D.B. denied involvement in the burglary, but after thirty minutes of interrogation and the threat of imprisonment, he confessed. He was not Mirandized beforehand, nor permitted to call his grandmother who was his legal

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<sup>12</sup> Once hostile to such evidence, the courts are now just beginning to endorse the value of such expert testimony. *See, e.g., People v. Bedessie*, --- N.E.2d ----, 2012 WL 1032738 (2012) (“in a proper case expert testimony on the phenomenon of false confessions should be admitted”).

<sup>13</sup> \_\_\_ U.S. \_\_\_, 131 S.Ct. 2394 (2011).

guardian, nor told he was free to leave the room. The policeman let him catch the bus home after he revealed where he hid the other stolen items.

The trial court denied J.D.B.'s motion to suppress the confession as involuntary and he was adjudicated a delinquent. The North Carolina Court of Appeals and state Supreme Court affirmed. They rejected the notion that J. D. B.'s age was relevant to the issue of voluntariness. In a 5-4 decision, the U.S. Supreme Court reversed and held a suspect's age was a factor to be considered in determining whether his confession freely and voluntarily given. Among other things, the Supreme Court acknowledged that custodial police interrogations entail "inherently compelling pressures" that "can induce a frighteningly high percentage of people to confess to crimes they never committed," and cited studies that this phenomenon is especially true for juveniles.

The high court also recognized that the interrogations of children should meet a different standard than those of adults. The court stated that children are not miniature adults; "generally are less mature and responsible than adults"; "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"; "are more vulnerable or susceptible to ... outside pressures" from authority figures; and therefore, less able to perceive the "freedom to leave".<sup>14</sup>

Likewise, if a child's age is relevant to the voluntariness of his confession, it is critical to assessing whether his confession was, in fact, false.

## **INCENTIVIZED WITNESSING**

The danger of incentivized witnessing is clear: in cases of wrongful conviction, witnesses frequently were encouraged not only to sing, but to compose. An egregious

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<sup>14</sup> *Id* at 2403.

example is provided by the Northwestern University Law School Center on Wrongful Convictions:

Rolando Cruz and Alejandro Hernandez were twice convicted of the 1983 abduction, rape, and murder of 10-year-old Jeanine Nicarico in DuPage County. They initially were tried together and sentenced to death in 1985. After their convictions were reversed in 1988 on the ground that their trials should have been severed, separate re-trials ended in another sentence of death for Cruz and 80 years for Hernandez. In all, six snitches testified at the trials. Four, Stephen Ford, Steven Pecoraro, Dan Fowler, and Robert Turner, claimed Cruz had admitted the crime, and the others, Jackie Estremera and Armino Marquez Jr., claimed Hernandez had. After Ford came forward, prosecutors dismissed burglary charges against him. Pecoraro, Fowler, and Turner denied being offered or receiving anything in return for testifying, but one of the prosecutors later testified on Turner's behalf at a re-sentencing hearing. Estremera was facing contempt sanctions at the time he implicated Hernandez, and Marquez received leniency on pending burglary charges. Shortly after the first trial, Brian Dugan, a repeat sex offender, confessed that he alone committed the crime. Although his confession was detailed and compelling, prosecutors insisted he and Cruz and Hernandez had committed the crime together. They clung to that theory even after DNA linked Dugan but not Cruz and Hernandez to the rape after the second trial. In 1995, Cruz and Hernandez were exonerated when it became obvious that sheriff's deputies had fabricated an inculpatory statement that they attributed to Cruz at both trials. Cruz and Hernandez received pardons based on innocence in 2002.

Incentivized witnessing, simply described, is when a witness is provided money, immunity from prosecution, reduced punishment, release from prison or some other benefit in exchange for testimony (Innocence Project, 2008). One danger of incentivized witnessing is that, when desperate prisoners have no truthful information to trade, they resort to lying.

Incentivized witnessing causes or contributes to wrongful convictions in all fifty states. Several cases illustrate the problem. Roy Brown served fifteen years in prison in New York for murder until he was proven innocent by DNA. His conviction was secured, in part, by an incentivized witness who falsely claimed that Brown called him up and

confessed to the crime. The false witness met Brown during a short stint in jail on a minor charge. (O'Hara & Stith, 2008; "Wrong and Rights," 2009).

Additional cases reported by The Center on Wrongful Convictions in which actually innocent defendants were sent to death row based upon incentivized witnessing include the following:

- Larry Hicks served two years for a double murder in Indiana. His incentivized witnesses were two women. He was cleared after the women recanted their testimony;
- Madison Hobley served thirteen years for an arson/murder which claimed seven lives in Illinois. His incentivized witness was a suspect in a similar arson in the same neighborhood. Hobley was pardoned based upon actual innocence;
- Verneal Jimerson served eleven years for a double murder in Illinois. His incentivized witness was a purported accomplice. The police promised him release from prison in exchange for testifying against Jimerson who was later exonerated by DNA evidence. The three actual perpetrators were later convicted;
- Richard Neal Jones served four years in Oklahoma for murder. His incentivized witness was one of the actual killers. He was cleared based on the confession of one of the real perpetrator's confederates;
- Curtis Kyles served fourteen years for murder in New Orleans. His incentivized witness was the actual killer. Kyles was cleared by evidence proving the perpetrator lied;
- Fredrico M. Macias served ten years in Texas for a double murder. He was cleared by a solid alibi. His incentivized witness was an accomplice who falsely testified pursuant to a plea agreement;
- Steve Manning served ten years in Illinois for a murder and armed robbery. His incentivized witness was a jailhouse informant. The prosecution eventually dismissed all charges against Manning;

- Walter McMillian served ten years in Alabama for murder. He was cleared by exculpatory documents which had been withheld at his trial. His incentivized witness was the actual murderer.<sup>15</sup>

The problem of perjured testimony from incentivized witnesses is statistically significant. Incentivized witnesses were the cause of wrongful convictions in 15% of the 289 DNA-proven wrongful convictions, and in many more non-DNA exonerations (“Informants,” n.d.).

### *One Remedy: Corroboration via Electronic Recordings*

The Center on Wrongful Convictions suggests the following measures to prevent wrongful convictions arising from incentivized witnessing: (i) jailhouse informants should be secretly wired to electronically record incriminating statements made by targets; and (ii) law enforcement authorities should electronically record discussions with potential informants, and provide copies to the defendant’s lawyer pre-trial. Advances in technology make it possible to wire informants with compact transmitting devices that appear as innocent objects.

There is no doubt an inmate takes a serious risk in surreptitiously recording admissions from fellow inmates. There is an inmate code in prisons. An informant discovered with clandestine recording equipment would be seriously endangered.

On the other hand, offering to release or reduce prison time to jailhouse snitches encourages them to commit perjury. Criminals dehumanize their victims and have little

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<sup>15</sup> *The Snitch Sytem - How Snitch Testimony Sent Randy Steidl and Other Innocent Americans To Death Row*, A Center On Wrongful Convictions Survey (Winter 2004–2005)  
[www.law.northwestern.edu/.../issues/causesandremedies/snitches/SnitchSystemBooklet.pdf](http://www.law.northwestern.edu/.../issues/causesandremedies/snitches/SnitchSystemBooklet.pdf).

compunction about falsely implicating a fellow inmate in order to gain some advantage for themselves.

Unfortunately, the law permits incentivized witnessing, even though it is a kind of legal bribery. Federal law makes it a felony to give or promise a witness “anything of value” in exchange for testimony. A defense lawyer who promised something of value to a witness in exchange for his or her testimony would be guilty of a serious crime. Yet, prosecutors do it routinely and the law permits it.

In 1988, a defendant named Singleton argued what is good for the goose is good for the gander, and challenged the ubiquitous practice of prosecutors bribing accomplices with offers of leniency in exchange for their testimony incriminating others. A three-judge federal appellate panel agreed that this practice violated the federal bribery statute.<sup>16</sup> The whole edifice of purchased prosecution testimony was threatened with collapse.

However, the full court sitting *en banc* promptly reversed the upstart panel, and ruled that “in light of the longstanding practice of leniency for testimony,” it must be “presumed” that if Congress had intended to “overturn this ingrained aspect of American legal culture, it would have done so in clear, unmistakable, and unarguable language.”<sup>17</sup> The double standard which permits prosecutorial bribery makes it essential use of recording equipment be a condition for admission of informant testimony at trial.

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<sup>16</sup> *United States v. Singleton*, 144 F.3d 1343 (10<sup>th</sup> Cir., 1998).

<sup>17</sup> *United States v. Singleton*, 165 F.3d 1297 (10<sup>th</sup> Cir., 1999.)

The Supreme Court case, *Giglio v. United States*,<sup>18</sup> obligates prosecutors to disclose deals made with informants -- be they jailhouse informants, accomplices, or eyewitnesses. Under *Giglio*, the defense is entitled to know what incentives the witness received in exchange for his or her testimony. At trial, cross-examination of an informant about his deal with prosecutors is vital, and often makes the difference between conviction and acquittal.

Unfortunately, penalties for violating the *Giglio* disclosure obligation are practically nonexistent. The case of *U.S. v. Sterba*<sup>19</sup> makes the point. The defendant was charged with soliciting a minor in an Internet chat room for sex. The government's entire case was based on one witness, a Customs informant, who testified at trial using her Customs alias. After both sides rested, defense counsel told the judge his investigator could not find any record this witness, in fact, existed. The prosecutor was forced to reveal her real identity. It came to light that she had a criminal record, was previously involved in Internet pornography and other crimes, and had been paid by the Government for her testimony. In other words, the Government violated *Giglio*. The court granted the defense motion for a mistrial, and barred re-trial based on the prosecutors' misconduct.

However, if defense counsel had not dispatched an investigator to look into the witness's background, Sterba likely would have been convicted and sentenced to many years in prison. The prosecutor was never disciplined for presenting the witness via her alias. Prosecutors who fail to disclose deals with informants should face real penalties -- financial, career, and in appropriate cases, even criminal.

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<sup>18</sup> 405 U.S. 150 (1972).

<sup>19</sup> 22 F.Supp.2d 1333 (M.D. Fla.,1998)

### *Another Remedy: Eliminate All Rewards for Testimony*

Measures advocated for by The Center on Wrongful Convictions could improve things, but legislatures should consider eliminating incentives to give testimony altogether, precisely what the overruled appellate panel in *Singleton* did. Incentivized witnessing simply poses too great a risk of fabricated testimony. Merely learning of the witness's deal with the government in exchange for testimony may not be enough to view that testimony with sufficient skepticism to prevent a wrongful conviction.

### **BAD LAWYERING**

*Gideon v. Wainwright*<sup>20</sup> was the Supreme Court's landmark decision establishing an indigent's right to assigned counsel in criminal cases. The court emphasized the critical importance of good lawyering without which a defendant, "may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." Hence, a good lawyer is necessary "at every step in the proceedings" because, "[e]ven though a defendant is innocent, without competent representation, he could be convicted."

Thus, the court held it is critical that "a defense attorney thoroughly investigate the facts of a case, locate witnesses, make an opening statement, cross examine witnesses to test their credibility, object to rulings which could prejudice a defendant's case, review evidence, possibly put on a case for the defense, and make a closing argument that sharpens and clarifies the issues." All of this "is crucial to an accurate verdict."

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<sup>20</sup> 372 U.S. 335 (1963). The right applies to all felony cases and any misdemeanor case in which the defendant is sentenced to a term of imprisonment, *Scott v. Illinois*, 440 U.S. 367 (1979) or a suspended sentence of imprisonment. *Alabama v. Shelton*, 535 U.S. 654 (2002).

Jimmy Bromgard was exonerated by post-conviction DNA testing after fourteen years in a Montana prison. The young victim picked out Bromgard in videotaped footage, but was not sure he was the right man. Instead, she said she was “60%, 65% sure” he was her assailant. When asked at trial to rate her confidence in the identification without percentages, she replied, “I am not too sure.” Despite this serious uncertainty, she was allowed to identify Bromgard as the man who raped her.<sup>21</sup>

Bromgard’s assigned counsel never objected to this shaky in-court identification. The prosecution’s identification case was buttressed by misleading testimony from the state’s forensic expert who falsely claimed that semen in the victim’s underwear could not be typed. As a result, the case came down to hairs found on the victim’s bed sheets. The expert testified that head and pubic hairs found at the crime scene were indistinguishable from Bromgard’s hair samples, and claimed there was less than a one in ten thousand (1/10,000) chance these hairs did not belong to Bromgard. This damning testimony was entirely fraudulent because there has never been an established forensic standard by which hairs can be statistically matched through microscopic inspection. The criminalist simply plucked this 1-in-10,000 number out of thin air.

Bromgard’s defense attorney never hired an expert to debunk the state’s junk science forensic testimony. Likewise, he made no motions to exclude the uncertain identification by the victim. He presented no opening statement; did not prepare a closing statement; and failed to file an appeal after Bromgard’s conviction (“Jimmy Ray Bromgard,” n.d.).

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<sup>21</sup> [http://www.innocenceproject.org/Content/Jimmy\\_Ray\\_Bromgard.php](http://www.innocenceproject.org/Content/Jimmy_Ray_Bromgard.php).

His case highlights the problem of innocent defendants who are convicted or advised to plead guilty based on seriously inadequate defense representation. Indigent defendants, relying upon public defenders, are more likely to receive inadequate representation than those who can afford to hire an attorney. According to The Innocence Project (“Bad Lawyering,” n.d.), “A review of convictions overturned by DNA testing reveals a trail of sleeping, drunk, incompetent and overburdened defense attorneys, both at trial and on appeal. And this is only the tip of the iceberg. In some of the worst cases, lawyers have: slept in the courtroom during the trial; been disbarred shortly after finishing a death penalty case; failed to investigate alibis; failed to call or consult experts on forensic issues; and failed to show up for hearings.” (“Bad Lawyering,” n.d.).

Not surprisingly, many of the 289 DNA exonerees were indigents represented by public defenders. They were all innocent, and all wrongfully convicted. In some cases, overburdened, inexperienced and underfunded public defenders simply were not equipped to do battle against the state and all its resources. In other instances, systemic deficiencies, such as limited budgets, inadequate manpower, inability to hire experts, and excessive case loads, prevented otherwise competent defense attorneys from doing an effective job.

Indigent defense in the United States is provided by each state; there are no national standards. Criminal defendants are simply forgotten in the state budget process, and indigent defense services feel the pinch. A recent report on Michigan’s indigent defense services found a system wholly incapable of upholding a defendant’s constitutional right to an adequate defense. The report, prepared by the National Legal Aid and Defender Association (2008), found:

judges handpicking defense attorneys; lawyers appointed to cases for which they were unqualified; defenders meeting clients on the eve of trial and holding non-confidential discussions in public courtroom corridors; attorneys failing to identify obvious conflicts of interest; failure of defenders to properly prepare for trials or sentencing; attorneys violating their ethical canons by not zealously advocating for clients; inadequate compensation for those appointed to defend the accused. (p. i-ii).

### *Inadequate Resources for Post-Trial Defense Representation*

While *Gideon* guaranteed all indigents an unconditional right to assigned counsel at trial, at the penalty phase of capital cases,<sup>22</sup> and thereafter, on a first appeal as of right,<sup>23</sup> that right does not extend to habeas corpus proceedings,<sup>24</sup> or other post-conviction proceedings<sup>25</sup> where most wrongful convictions are overturned based on newly discovered evidence, a retroactive change in the law, post-trial discovery of jury misconduct, and similar matters which cannot be raised on a direct appeal. Indigents have no right to assigned counsel for post-conviction proceedings even when the defendant has been sentenced to death.<sup>26</sup>

Typically, a petition for a writ of habeas corpus is used to collaterally attack a conviction for violation of the defendant's constitutional rights. Prisoners file many habeas petitions and the courts dislike them. As a result, the courts have devised complex rules and procedural pitfalls unfamiliar to many lawyers and most prisoners.

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<sup>22</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>23</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>24</sup> *Ross v. Moffitt*, 417 U.S. 600 (1974).

<sup>25</sup> *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

<sup>26</sup> *Murray v. Giarratano*, 492 U.S. 1 (1989).

The failure of society to provide assigned counsel for post-conviction proceedings has terrible consequences for wrongfully convicted prisoners. Thomas Arthur's case is a dramatic example. Arthur was on death row for twenty-five years and unsuccessful in his quest to obtain DNA testing because he had no assigned lawyer to represent him in post-conviction proceedings and missed several deadlines (DeMonia, 2001).<sup>27</sup>

In many DNA-proven and non-DNA wrongful conviction cases, the defendant's actual innocence was established long after the appeals process had been exhausted. In such cases, the defendant was lucky enough to find an attorney and investigator willing to work *pro bono* to uncover previously unknown evidence of innocence. But many who claim actual innocence simply have no such luck, and as a result, it is impossible to know what percentage of wrongful convictions remain uncorrected.

Unfortunately, even when indigent defendants have assigned counsel, the relative skill, resources and dedication of that counsel are often lacking. The Supreme Court and highest courts of most states have greatly restricted Sixth Amendment ineffective assistance claims, and as a result, it is difficult to demonstrate that assigned counsel was lacking even where it is plain the defendant did not receive competent representation. For example, courts have refused to condemn as ineffective trial counsel who slept during court proceedings; failed to object to plainly inadmissible evidence; failed to challenge

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<sup>27</sup> According to his website, <http://www.thomasarthurfightforlife.com/>, Arthur now has counsel working with The Innocence Project in New York. Arthur was scheduled for execution four times, the latest on March 29, 2012. The execution warrant was stayed by the Alabama Supreme Court.

critical legal errors by the trial judge; had conflicts of interest; or engaged in other egregious conduct detrimental to their clients.<sup>28</sup>

## REMEDIES TO THE INEFFECTIVE ASSISTANCE PROBLEM

There are a number of reforms needed to ensure the poor receive decent legal representation. Among these reforms are uniform state wide defense; equal pay for defense and prosecuting attorneys; reducing caseloads; parity for defense and prosecution budgets, particularly for expert witnesses; and more complete representation for post-conviction proceedings.

### *Uniform Statewide Defense*

Each state should have a statewide public defender system instead of separate indigent services provided by individual counties. A statewide system would provide more uniform representation across rural and urban areas, and is amenable to greater institutional oversight.<sup>29</sup>

### *Equal Pay*

Prosecutors and full-time public defenders should receive equal pay to insure the government does not disproportionately attract better legal talent. In some parts of the country, entry-level pay is higher for prosecutors than defenders, and likewise, the top salaries go to senior prosecutors, not senior defenders.

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<sup>28</sup> *People v. Tippins*, 173 A.D.2d 512, 570 N.Y.S.2d 581 (2d Dept., 1991) is a salient example. The defendant's "court-appointed attorney ... was found to be sleeping during portions of his trial" which the New York appellate court called "reprehensible," and yet, refused to find the indigent defendant was denied effective assistance of counsel. It was not until five years later that a federal appellate court overturned the state courts in the defendant's habeas corpus proceeding. *Tippins v. Walker*, 77 F.3d 682 (2d Cir., 1996).

<sup>29</sup> This reform was advocated in a study entitled *The State of Indigent Defense in New York* commissioned by former New York State Chief Judge, Judith Kaye.

Likewise, assigned counsel from the bar should receive meaningful fees to defend indigent defendants. In Westchester County, New York, for example, indigents in all misdemeanor cases and many felony cases are represented by assigned counsel under § 18-b of New York's County Law. Defenders get paid only \$45 per hour, and their fees are capped at \$2,500 per case. No lawyer in private practice can survive on such paltry fees. Inadequate pay creates financial incentives for assigned defenders to pressure their indigent clients to plead guilty instead of defending their cases to trial. On any given evening, one can visit the local courts in Westchester and see the same 18-b lawyers processing defendants, one after the other, through guilty pleas after having just met their clients in the hallway.

### *Reduced Caseload*

Legal Aid and assigned lawyers suffer under the yoke of impossible case loads. There should be a limit to the number of cases a defense attorney can be assigned. It is not unusual for public defenders in New York to carry 50-100% over the maximum case load permitted by the governing Appellate Division.<sup>30</sup>

### *Equal Budget and Manpower for Public Defenders; Equal Ability to Hire Experts*

There must be a level economic playing field between prosecutors and public defenders. Currently, prosecutors have much larger budgets and more staff, and can afford to hire experts to help review evidence and prepare cases for trial. In contrast,

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<sup>30</sup> *Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for Fiscal Years 2006-2007* (noting “the problem of excessive caseloads has been a central theme of every report the Committee has issued” over the past decade, and things are “significantly worse” with Legal Aid defenders carrying “caseloads that were substantially in excess of the First Department’s maximum.”)

public defenders have smaller budgets, more limited staff, lack resources to routinely hire experts and must ask judges to approve funds for that purpose.<sup>31</sup> Judges sometimes resent such requests, no doubt reflecting their response to the pressure on them to control court costs.<sup>32</sup>

### *Assigned Counsel for Post-Conviction Proceedings*

Under the Sixth Amendment, the indigent are entitled to assigned counsel for trial and a first appeal, but not post-conviction proceedings. Yet, as noted above, most wrongful convictions are remedied in post-conviction proceedings long after appeals have been exhausted. Accordingly, legislation is needed to insure indigents claiming actual innocence have access to counsel, lest poverty condemn them to a life in prison for crimes they did not commit.

## **PROSECUTORIAL MISCONDUCT**

Jabbar Collins served sixteen years for murder in New York based upon prosecutorial misconduct before to his conviction was overturned in 2010. Federal district judge Dora L. Irizarry freed Collins after Brooklyn prosecutors conceded that Collins was entitled to habeas relief. She noted that Collins had uncovered numerous documents

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<sup>31</sup> Phyllis E. Mann, *Understanding the Comparison of Budgets for Prosecutors and Budgets for Public Defense*, National Legal Aid & Defender Association, [http://www.nlada.net/library/article/na\\_understandingbudgetsforprosanddefs](http://www.nlada.net/library/article/na_understandingbudgetsforprosanddefs)

<sup>32</sup> *State and County Expenditures for Indigent Defense Services in Fiscal Year 2002*, by The Spangenberg Group (on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf> (“Witness testimony ... revealed that, in one Nevada county, judges punish attorneys who request funds to hire experts ....”)

showing that prosecutors had withheld evidence, coerced witnesses and lied to the court and the jury (Fass, 2010; Robbins, 2010).

Prosecutors are duty-bound not only to prosecute the guilty but also to protect the innocent. To fulfill that duty, the law requires they disclose exculpatory material to the defense which bears on guilt or punishment.<sup>33</sup> Failure to disclose such material renders the subsequent legal proceeding unreliable and is a frequent cause of wrongful convictions. Although this obligation is well established, the extent to which some prosecutors will break the law is shocking.

Prosecutorial misconduct is as varied as it is reprehensible. According to The Center On Wrongful Convictions, egregious practices engaged in by rogue prosecutors include:

- “Courtroom misconduct (making inappropriate or inflammatory comments in the presence of the jury);
- “introducing or attempting to introduce inadmissible, inappropriate or inflammatory evidence;
- “mishandling of physical evidence (hiding, destroying or tampering with evidence, case files or court records);
- “failure to disclose exculpatory evidence;
- “threatening, badgering or tampering with witnesses;
- “using false or misleading evidence; and
- “improper behavior during grand jury proceedings.”

### *Inappropriate or Inflammatory Comments Before the Jury*

Inflammatory comments bias the jury against the defendant. This type of misconduct is commonly found in inflammatory rhetoric during opening arguments or

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<sup>33</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

summations, but can arise when presenting evidence designed to degrade defendants or their attorneys.

### *Inadmissible or Inflammatory Evidence*

The purpose of the rules of evidence is to ensure that a trial is fair and verdicts are accurate. Circumventing evidentiary rules makes verdicts unreliable. Polygraph test results, while admissible for bail applications, sentencing and other matters outside trial, are inadmissible at trial to prove a defendant's guilt or vouchsafe a witness's truthfulness. The reason is because, "Polygraph techniques have not attained a sufficient degree of scientific accuracy to make their results acceptable as courtroom evidence, and, second, the danger that juries will give undue weight to lie detector evidence, viewing it as a virtually infallible indicator of truthfulness."<sup>34</sup>

All lawyers know this, yet, prosecutors try to get this evidence before juries too often. For example, in Michigan, seventeen men were separately prosecuted on the complaint of a fourteen year old in-patient resident of a state psychiatric hospital who had a diagnosed sexual disorder. In one case, the defendant had a strong alibi. The prosecutor secured a conviction by asking the girl, after her credibility had been damaged on cross-examination, whether she had taken a polygraph test. Following a defense objection which the trial judge sustained, the prosecutor then asked the police investigator whether the alleged victim had taken a polygraph test. The conviction was reversed on appeal, with the appellate court noting, "It is rare indeed that an appellate court is confronted with such an openly disclosed intent on the part of a trial attorney to place before a jury

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<sup>34</sup> Prof. Bennett Gerhsman, *Prosecutorial Misconduct* (1999).

improper and prejudicial testimony,” and suggested the trial judge should have declared a mistrial and held the prosecutor in contempt of court.<sup>35</sup>

### *Junk Science and Fabricated Evidence*

Kennedy Brewer served fifteen years in a Mississippi prison for murder. Steven Hayne, M.D., the medical examiner who autopsied the victim, testified that he found several marks on the child’s body he claimed were bite marks. Hayne called in Dr. Michael West, a forensic odontologist, to analyze the marks. West concluded that nineteen marks found on the victim’s body were “indeed and without a doubt” inflicted by Brewer. He further asserted that all nineteen marks were made only by Brewer’s top two teeth, and that somehow, the bottom teeth left no impressions.

Bite mark analysis has never been scientifically validated. What is more, West already had been discredited by the time of Brewer’s trial as the first member of the American Board of Forensic Odontology to be suspended for his testimonial misconduct. Despite this, the court allowed his testimony. In response, the defense presented Dr. Richard Souviron, a founding member of the board, who testified the marks were not human bite marks at all, but in fact, insect bites sustained while the victim’s body was immersed in water for days. Souviron testified it would be impossible to leave repeated bite mark impressions with only the top two teeth. However, the jury was impressed by West, not Souviron.

Brewer was exonerated by DNA testing which identified the real perpetrator. Innocence Project Co-Founder, Peter Neufeld, said, “It is well known across Mississippi that [a medical examiner] works closely with police and prosecutors to make

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<sup>35</sup> *People v. Brocato*, 17 Mich.App. 277, 169 N.W.2d 483 (Mich.App. 1969).

determinations in autopsies that suit their criminal investigations and prosecutions. It's also well known that [another doctor] will dispense with professionalism and objectivity to provide favorable testimony for prosecutors, even if his misrepresentations and fabrications could lead to the execution of innocent people." ("Evidence Proves," 2008).

### *Failing to Disclose Exculpatory Evidence*

In one extreme case, Anthony DiSimone was granted habeas corpus relief by the federal courts because the Westchester County District Attorney withheld its knowledge that someone besides DiSimone admitted to stabbing the victim in the chest.<sup>36</sup>

### *Threatening, Badgering or Tampering with Witnesses*

Three witnesses recanted their testimony in the Jabbar Collins case, and revealed they had been threatened by prosecutors and police. One said that the prosecutor threatened to, "hit me over the head with a coffee table or lock [him] up for a couple of years for perjury" if he did not testify as the government wanted. It was only after this witness came forward that the Brooklyn District Attorney suddenly conceded that Collins should be freed. The sudden turnaround happened at the evidentiary hearing before judge Irizarry who determined the D.A.'s office had withheld evidence, coerced witnesses and lied to the court and the jury. She called the prosecution's lack of contrition  
Type equation here."sad," "shameful" and "beyond disappointing." (Fass, 2010).

### *Using False or Misleading Evidence*

It is unseemly for any prosecutor -- a law enforcement agent and officer of the court -- to knowingly present false evidence to the jury. Doing so violates a defendant's

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<sup>36</sup> *DiSimone v. Phillips*, 518 F.3d 124 (2d Cir., 2008).

constitutional right to due process of law.<sup>37</sup> Yet, a survey of wrongful conviction cases reveals it happens more often than the public might suspect.

Shih Wei Su was convicted of attempted murder in Queens County, New York, and served twelve years before his conviction was overturned when the federal court of appeals found that, “The prosecution knowingly elicited false testimony from a crucial witness,” and falsely denied to the trial judge a reduced sentence deal had been struck with the key prosecution witness in exchange for his testimony against Su.<sup>38</sup> A civil jury later awarded Su \$3.5 million in damages (Farmer, 2009).

Marci Stein, a former Westchester County special education teacher, was convicted of rape, sodomy and other crimes for allegedly have sex with three teenage students. The Appellate Division noted the “issue of ... complainant's credibility vis-à-vis that of the defendant was paramount” to the outcome of the case, and threw out her conviction because prosecutors failed to disclose that two of the students had filed claims against the school district, and therefore, had an incentive to see her convicted in order to make money on those claims.<sup>39</sup>

To make matters worse, the prosecutor lied to the jury and denied in summation the students intended to sue: “The failure to turn over this evidence was aggravated by the Prosecutor’s argument during summation that there was no evidence that the complainants were bringing civil lawsuits as a result of the defendant’s conduct,” and had

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<sup>37</sup> *Napue v. People of State of Illinois*, 360 U.S. 264 (1959).

<sup>38</sup> *Shih Wei Su v. Fillion*, 335 F.3d 119 (2d Cir., 2003).

<sup>39</sup> *People v. Stein*, 10 A.D.3d 406-07, 781 N.Y.S.2d 654, 656 (2d Dept., 2004).

the jury not been misled and knew the truth, it would have “affected the outcome of the trial.” (O’Donnell, 2004).<sup>40</sup>

### *Improper Behavior during Grand Jury Proceedings*

A grand jury proceeding is sometimes called a “one horse show.” There is no judge present; no defense attorney; and witnesses cannot have an attorney present to advise them. This gives prosecutors enormous power because they control the entire show, acting both as presenter of the state’s case and interpreter of the law. This led former New York State Chief Judge Sol Wachtler to sardonically observe, “Any prosecutor who wanted to could indict a ham sandwich.”<sup>41</sup>

Because they have so much power before grand juries, prosecutors are mandated to act within the rules. Even so, prosecutors have engaged in various activities before the grand jury held to be forms of misconduct in grand jury proceedings. Among them are:

- “improprieties in the interrogation of a witness;
- “undermining a witnesses legal safeguards;
- “using the grand jury for illegitimate purposes;
- “non-disclosure of exculpatory evidence;
- “using unreliable evidence;

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<sup>40</sup> Stein fought for over four years until she was finally freed. Rather than face the expense and emotional burden of a re-trial, she agreed to plead guilty to misdemeanors and be sentenced to time served, as this was equivalent to her acquittal after re-trial. Unfortunately, doing so caused her civil rights lawsuit against Westchester County and her school district to be dismissed based on the so-called “unfavorable outcome” doctrine. *Stein v. County of Westchester*, 410 F.Supp.2d 175 (S.D.N.Y. 2006).

<sup>41</sup> Sam Howe Verhovek, *Wachtler's Reversal of Fortune; Fallout From Chief Judge's Arrest Likely to Extend to Courts*, New York Times, (November 09, 1992).

- “intruding into the grand jury’s deliberation; and
- “conflicts of interest.”

In one case, a narcotics indictment was dismissed because “the prosecutor’s interrogation of the defendant was deliberately designed to prejudice him.”<sup>42</sup>

### *A Possible Remedy - New Trials*

A 2003 report from The Center for Public Integrity is very telling about the iniquitousness of prosecutorial misconduct nationwide: “Local prosecutors in many of the 2,341 jurisdictions across the nation have stretched bent or broken rules while convicting defendants. Since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 cases.”

USA Today reporters Brad Heath and Kevin McCoy completed a six-month study of more than 200 cases where Justice Department prosecutors either broke the law or violated legal ethics to obtain convictions, sending dozens of innocent people to prison. Heath and McCoy found forty-seven cases in which defendants were either exonerated or released after evidence of misconduct surfaced. (Heath & McCoy, 2010). Another study released in October 2010 by the Northern California Innocence Project focused on cases from 1997-2009, and revealed that courts found prosecutorial misconduct in 707 cases (Ridolfi & Possley, 2010).

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<sup>42</sup> *U.S. v. Samango*, 607 F.2d 877, 882 (9<sup>th</sup> Cir., 1979) (“Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role.”)

These studies demonstrate that prosecutorial misconduct is all too commonplace in many jurisdictions. Such misconduct can and does lead to wrongful convictions. The innocent spend, on average, thirteen and a half years in prison (“Mission Statement,” n.d.).

One problem is that courts are loath to disturb the finality of convictions. As a result, they uphold a guilty verdict despite prosecutorial misconduct based on the so-called “harmless error” rule whereby appellate courts re-weight the trial evidence in the cold record and claim the outcome would have been the same even without the prosecutor’s misconduct. In 548 out of the 707 cases in the Northern California Innocence Project study, the courts failed to overturn the conviction. The rule begs the question why, if prosecutorial misconduct is so often harmless, prosecutors repeatedly engage in it.

### *The Not So Harmless Error Doctrine*

The problem with prosecutorial misconduct is an epistemological one: once the trial has been infected with misconduct, it is impossible to say with certainty the outcome would have been the same. Misconduct influences how judges and juries not only perceive the facts but also how they view the defendant. To insure innocent defendants are not wrongfully convicted, it is essential all criminal trials be free of prosecutorial misconduct. Harmless error analysis does not deter misconduct, but to the contrary, encourages daring prosecutors to push ethical limits secure in the knowledge doing so likely will not undermine a guilty verdict.

Former Supreme Court Chief Justice William Rhenquist famously said, “the Constitution entitles a criminal defendant to a fair trial, not a perfect one,”<sup>43</sup> and harmless error analysis is employed to save guilty verdicts even in cases where the defendant’s constitutional rights were violated.<sup>44</sup> Harmless error doctrine puts the wrongfully convicted person in a position from which it is often impossible to overturn an unfair trial. Legislation mandating automatic reversal in every case infected by prosecutorial misconduct is needed. Such legislation is the only way to effectively deter widespread prosecutorial abuses and change the culture of permissibility which makes such misconduct so widespread.

*An Additional Remedy: Criminalizing Intentional Prosecutorial Misconduct, and Removing Civil Immunity for Errant Prosecutors*

In the introduction to his famous treatise, *Prosecutorial Misconduct*, Bennett Gershman, a former prosecutor and law professor, writes, “A prosecutor’s violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by the courts, and almost never by disciplinary bodies.” Likewise, in its study entitled “Preventable Error,” the Northern California Innocence Project states that, “those empowered to address the problem -- California state and federal courts, prosecutors and the California State Bar -- repeatedly fail to take meaningful action.” (Ridolfi & Possley, 2010).

Ironically, as the law stands, prosecutors have absolute immunity from criminal penalties and civil rights actions based on their performance as advocates during the

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<sup>43</sup> *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

<sup>44</sup> *United States v. Hasting*, 461 U.S. 499 (1983).

judicial phase of a criminal case, and they enjoy qualified immunity for their conduct during the investigatory phase of a case prior to arrest.<sup>45</sup>

Legislation is urgently needed to criminalize clear cut, intentional prosecutorial misconduct that leads to wrongful convictions. In addition, such legislation should remove a prosecutor's absolute immunity from civil rights actions and tort suits in order to effectively deter rogue prosecutors who would engage in such illegal and unethical behavior. The current system simply does not work. As professor Gershman told the reporters for the USA Today study, "The system is not able to control this type of behavior. There is no accountability."

Those who oppose such legislation argue it would chill prosecutors and make them less productive for fear they could be prosecuted or sued for doing their jobs zealously. The argument simply does not wash. No prosecutor who played within the rules and lawfully pursued his/her mandate would be chilled by such legislation, only those who venture way beyond the boundaries of legitimate prosecutorial behavior which actually caused an innocent defendant to be convicted.

## **THE CATCH-22 OF SEX OFFENDER PROGRAMS**

In 1990, Yusuf Salam, Antron McCray, Raymond Santana, Korey Wise, and Kevin Richardson were all wrongfully convicted of rape and assault in the infamous "Central Park Jogger" case. Although none of the youths admitted to raping the victim, following lengthy and aggressive interrogations, they admitted to other misdeeds in the park, and were convicted based on those confessions. Twelve years later in 2002, they were proven innocent when Matias Reyes, for the first time, informed law enforcement

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<sup>45</sup> *Imbler v. Pachtman*, 424 U.S. 409 (1976).

officials that he, alone, raped the jogger, and DNA testing confirmed he alone provided the semen and public hair found inside and on her.<sup>46</sup>

### *The Current Policy*

The New York State Department of Corrections administers its sex offender program which poses unreasonable obstacles and pitfalls to wrongfully convicted prisoners incarcerated for sex crimes. An explicit condition of the program requires participants to admit their guilt, both to an instructor and other prisoners in the offender group. Moreover, they must do so orally and in writing, and spell out details of their sex crimes. Failure to admit guilt, either verbally or on paper, results in immediate removal from the program, and the prisoner is deemed to have “refused” the program by insisting he is actually innocent. The “refusal” is recorded in the prisoner’s file and used against him before the Parole Board which invariably denies parole to any inmate who insists on his actual innocence.<sup>47</sup>

The thinking behind this policy is based on the rationale used by Alcoholics Anonymous and other twelve-step programs to treat addiction. The first step requires the addict to admit he has a problem. This rigid one-size-fits-all approach does not take into account the reality that some wrongful convictions are for sex crimes, and few wrongful convictions are detected and corrected immediately after trial. This rigid policy places the wrongfully convicted prisoner in a *Catch-22*: he must choose between falsely admitting guilt when he is innocent in order to complete the program and maximize his chances of

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<sup>46</sup> *People v. Wise*, 194 Misc.2d 481, 752 N.Y.S.2d 837 (N.Y.Cnty, 2002).

<sup>47</sup> Jeffrey Deskovic, “NYS Department Of Corrections Sex Offender Program Damns Innocent, Wrongfully Convicted – Part I” *Westchester Guardian* (Nov. 5, 2009).

parole, or maintain his innocence and thereby fatally damage his chances of being paroled to end his wrongful incarceration.

This *Catch-22* is no mere theoretical possibility. To date, there have been 289 people cleared by DNA evidence across the country, and of these, twenty-eight were in New York (“Search the Profiles,” n.d.), including a number of innocents convicted of sex crimes. Some examples are graphically displayed as follows:

John Kogut, Dennis Halstead, and John Restivo (co-defendants)	Rape and Murder	16 years
Scott Fappiano	Rape	21 years
Alan Newton	Rape	21 years
Terry Chalmers	Rape and Sodomy	7 ½ years
Vincent Jenkins	Rape	16 years
Kerry Kotler	Rape	10 ½ years
Steven Barnes	Rape and Murder	19 ½ years
Leonard Callace	Sodomy and Sexual Abuse	5 ½ years
Anthony Capozzi	Rape	20 years
Michael Mercer	Rape, Sodomy and Robbery	10 ½ years
Charles Dabbs	Rape	7 years
Victor Ortiz served	Rape and Sodomy	11 ½ years
James O’Donnell served for attempted sodomy and assault	Attempted Sodomy and Assault	2 years

(“Browse the Profiles,” n.d.).

What if these men shared the misfortune of many others who never had legal representation post-trial, and were never able to obtain a DNA test? They would still be in prison and their release on parole would have been their only reprieve. Yet, they could not be paroled without falsely admitting they committed the sex crimes that DNA evidence conclusively proved was committed by some other perpetrator.

It is unseemly that the state, clothed with its moral weight and obligation to mete out justice, would put those wrongfully convicted of sex crimes in this position, knowing

the above record of innocent men wrongfully convicted for sex offenses, and likewise knowing that hundreds of wrongful convictions have been documented over the last several decades.

### *A Possible Remedy*

The Department of Corrections should either administer the sex offender program without forcing participants to admit guilt, and/or change parole policy to eliminate the adverse impact on those who maintain their actual innocence. If the Department of Corrections refuses to adopt such policies, then legislation is needed to amend the Corrections Law to that end.

## **THE ROLE OF THE MEDIA IN SETTING THE STAGE FOR WRONGFUL CONVICTIONS**

In 1988, Byran Halsey was convicted of a murder and spent nineteen years in prison before he was proven innocent by DNA testing (“A fair deal,” 2009). Halsey was subjected to a constant barrage of prejudicial pre-trial publicity. Public opinion stirred up by sensational news coverage was so strong against him that court spectators jeered loudly when it was announced he would not be put to death because one juror held out against capital punishment. (Casiano & Mueller, 2007).

The news media, unlike the courts, are not obligated to present case coverage with a presumption of innocence. To the contrary, in notorious cases, news media invariably presume the defendant’s guilt, and statements by police and the prosecution are accepted at face value and taken as gospel truth. In such cases, the media become an adjunct of prosecutors. It is the rare reporter who remains neutral, cautious, skeptical and in search of alternative explanations to write a balanced story in a notorious case. The

consequences of sensational media coverage of notorious cases are far reaching and substantial.

### *Prejudicial Pre-Trial Publicity*

Judges are human and damaging media coverage can influence them to make bad rulings of law to ensure a guilty verdict. Potential jurors develop strong feelings that a notorious defendant is guilty and in some cases, falsely say during jury selection they were not influenced by pre-trial coverage in order to maneuver themselves onto the jury in their quest to ensure the hated defendant is convicted.

Sensational media coverage infects ongoing trials. It is a polite fiction rejected by judges and lawyers alike that jurors invariably obey initial trial instructions not to read about the case or discuss it with others. In today's world, telephones are hand-held computers which provide instantaneous communication with family and friends, and immediate access to written, video and audio commentary about a pending case on the Internet.

Media coverage pressures prosecutors to seek maximum outcomes and refuse to extend plea offers in cases where doing so would serve the ends of justice. Likewise, media coverage often pressures judges to impose long sentences lest the judge face the wrath of editorial commentators and bloggers.

Prosecutors frequently use the media to foment hatred for defendants. One of the better known examples is the Duke Lacrosse case in which Durham County prosecutor, Michael Nifong, grandstanded at daily press conferences before national media to bolster his run for North Carolina Attorney General.

One reporter wrote, “As Reade Seligmann choked back tears on the witness stand, the 21- year-old Duke University lacrosse player dubbed ‘Flustered’ by teammates was poised, compelling and clearly hurting. He told of a world turned ‘upside down’ and of experiencing ‘as lonely a feeling as you can ever imagine’ after he was indicted for allegedly raping a stripper at a team party on March 13, 2006. He described the stinging slights from former friends, the terrifying death threats—and the inescapable media horde.” (Rachel Smolken, *Justice Denied* (2007).

Approximately three hundred media stories presuming the players’ guilt were written or aired about the case (Elder, 2008). The false charges were eventually dismissed when the North Carolina Attorney General stepped in and declared Seligmann and his co-defendants to be affirmatively innocent.

Subsequently, the North Carolina bar accused Nifong of making public statements “prejudicial to the administration of justice,” citing fifty examples of false statements to the media,<sup>48</sup> and engaging in “conduct involving dishonesty, fraud, deceit, or misrepresentation” for his deliberate withholding of DNA evidence he later admitted failed to connect Seligmann and lacrosse teammate, Collin Finnerty, to the twenty-eight year old stripper who accused them of attacking her.<sup>49</sup> Nifong indicted the players for

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<sup>48</sup> Michael Biesecker, Benjamin Niolet and Joseph Neff, *DA on the Spot For Comments*, Charlotte News & Observer (April 22, 2006).

<sup>49</sup> Associated Press, *N.C. Bar Files Ethics Charges Against Duke Lacrosse Prosecutor*, (December 12, 2006).

rape and kidnapping based on her claims. He is the first sitting district attorney in North Carolina history to be disbarred.<sup>50</sup>

### *Remedies*

Slanted, prejudicial, and guilt-presuming new stories cause great harm. In the Duke Lacrosse case, the prosecutor started and stoked a media witch hunt against innocent students for his own craven political purposes. The media went along for the ride and willingly became cheerleaders for the prosecution, tossing the presumption of innocence out the window. Unbelievable as it may seem, the Duke players were lucky. Their parents were wealthy, thus enabling them to hire quality attorneys. The state Attorney General did something unheard of, he intervened in a case run by a local district attorney to declare the defendants innocent of all criminal wrongdoing.<sup>51</sup> And the players were never wrongfully convicted and sent to prison. If these defendants had been indigents relying on public defenders, they likely would have been found guilty, sentenced to prison never to be heard from again, and remain publicly excoriated to this day.

What can be learned from this case? Columnist and attorney Stuart Taylor had advice for reporters: “Read the damn motions. If you’re covering a case, don’t just wait for somebody to call a press conference. Read the documents. We should never take a prosecutor’s word as fact.” Taylor also cautioned that defense assertions are not necessarily false: “Yes, many defense lawyers will say almost anything to get their clients

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<sup>50</sup> Sylvia Adcock, *Prosecutor in Duke Case Gives Up His Law License*, (The Washington Post, June 17, 2007).

<sup>51</sup> Aaron Beard, “Prosecutors Drop Charges in Duke Case,” Associated Press (Thursday, April 12, 2007).

off most of the time, but don't just ignore what they say, look at what they're telling you. And do they have the evidence to back it up?"

Exhorting reporters to do their homework may be asking a lot, given the pressures of today's twenty-four hour news cycle. Defense attorney Jim Cooney adds, "The national media seem to believe balance requires them to report anything someone says, whether it's true or not. The fact-checking aspect of reporting seems to have fallen by the wayside." Ruth Sheehan wrote numerous guilt-presuming articles about the Duke players. In retrospect, she pledged, "I will approach cases in a different manner now. I will be much more cautious. I had a visceral reaction to that case as it was being described by the prosecutor." (Smolken, "Justice Delayed," 2007.)

## **LOST AND DESTROYED EVIDENCE**

Alan Newton served twenty-one years in prison in New York for a rape he did not commit. During thirteen of those twenty-one years, police claimed they could not locate the rape kit containing vital biological evidence. When it was finally located and subjected to DNA testing, the results proved Newton's actual innocence (Vasquez, 2006).

While evidence is sometimes lost or damaged over time, preservation of DNA evidence is absolutely vital. DNA evidence should be maintained by the same standards that hospitals maintain tissue samples, and the law should mandate preservation of biological evidence so that it remains available indefinitely. There have been cases in which defendants were cleared by DNA evidence ten, twenty, and even thirty-five years later ("Man exonerated," 2009). As noted above, the Innocence Project reported that, out of the 10-12% of all serious felony cases with DNA, they were compelled to close 22%

of the cases since 2004 because biological evidence was either lost or missing (“Facts on Post-Conviction,” n.d.).

### *Standardized Evidence Preservation System*

Many states lack a standardized evidence preservation law which requires criminal evidence be preserved and classified using bar code technology. Yet, in less critical matters, state government files and records are maintained using such technology in the event these files are needed at a later date.

In the private sector, bar code technology is utilized in order to keep track of commercial inventory in many businesses. Biological evidence should be catalogued and coded so that it is available indefinitely for DNA testing which can conclusively determine guilt and innocence. With the stakes so high, preservation of such evidence should be viewed as a matter of paramount importance to a fair criminal justice system.

### **ACTUAL INNOCENCE COMMISSIONS**

As noted above, the average time DNA-exonerated defendants spend in prison is thirteen and a half years (“Mission Statement,” n.d.). Typically, by the time they are exonerated, their appeals have long since been exhausted. Appeals are often denied based on procedural technicalities, and pardons based on actual innocence are often denied in a highly charged political climate. An Actual Innocence Commission provides a forum to investigate and correct wrongful convictions outside the limitations of the appellate and pardons process. Such commissions are urgently needed due to the insufficiencies of post-conviction law and lack of counsel for post-conviction proceedings. Courts frequently issue rubber-stamp dismissals on post-conviction motions, and regard themselves as an extension of law enforcement tasked to protect convictions at all costs.

The merits of an individual case of claimed innocence are often overshadowed by politics and public sentiment, especially in high profile cases.

### *The North Carolina Example*

Greg Taylor was wrongfully convicted of murder and served seventeen years in a North Carolina prison before he was exonerated. The case against Taylor relied on jailhouse snitches who received reduced sentences in exchange for testimony implicating him. There was questionable physical evidence — stains in Taylor's truck that investigators initially took for blood. His appeals were all denied, but because North Carolina enacted the nation's first Actual Innocence Commission, he had another avenue of relief. In February 2010, he became the first person exonerated by the new commission (Chen, 2010).

The North Carolina model is now being studied by officials in other states, defender organizations and wrongful conviction activists. The North Carolina commission has eight members: a superior court judge; prosecutor; victim's advocate; defense attorney; a lay member of the public; a sheriff currently in office; and two members of any vocation selected at the sole discretion of North Carolina's Chief Justice. Members serve three-year terms.

### *Structure and Procedures*

The Commission employs a staff comprised of an Executive Director, investigator, case coordinator, and three attorneys. Commission proceedings are confidential and exempt from freedom of information laws. Commission proceedings become public when the commission determines it has sufficient evidence of actual innocence to merit a hearing. Typically, defendants who claim they were wrongfully

convicted initiate review of their cases, although anyone may refer a case to the commission. Cases involving dead defendants are not considered (“Frequently Asked Questions,” n.d.)

The commission can screen and reject a case at its discretion. Defendants must sign an agreement waiving procedural safeguards and privileges, and agree to fully cooperate with the commission and its staff. If a defendant breaches his agreement, the commission can close its investigation at any time.

Commission staff review cases and report their work to the commissioners without taking a position on the defendant’s guilt or innocence. Evidence previously presented in court is not considered. Commission members function as jurors, and decide whether there is sufficient evidence of actual innocence. If so, the commission then refers the case for judicial review. Commissioners need not be unanimous to refer a case to court; a simple majority of five out of eight is sufficient where the underlying criminal case was tried to verdict. However, for cases in which the defendant pled guilty, all eight commissioners must vote for judicial review.

Referred cases are heard by a three-judge panel appointed by the Chief Justice of the North Carolina Supreme Court. The panel must conduct an evidentiary hearing, and panel judges must not have any prior connection to the case under review. Both prosecutor and defense attorney are present and participate in the hearing. The underlying criminal case is not tried. Instead, the defendant’s claim of actual innocence is tried.

The commission has subpoena power to compel the presence of witnesses. It also prescribes its own rules of procedure. Criminal disclosure statutes apply to panel hearings. To overturn a conviction, all three judges must agree the defendant was proven

innocent by clear and convincing evidence, a standard higher than the preponderance standard used in most civil cases, but lower than the reasonable doubt standard in criminal cases. The panel's decision may not be appealed. Priority is given to cases for defendants not incarcerated for other crimes. If exonerated, these defendants are immediately released. Victims are notified and may present their positions to the commission. Victims are permitted to attend hearings unless the panel determines their presence would be disruptive.

### *A Better Model*

Other states should adopt Actual Innocence Commissions, but not necessarily follow the North Carolina model which, as demonstrated herein, has several flaws. Stacking the eight-man commission with a prosecutor, judge, victim's advocate, and sheriff weights it too heavily in favor of law enforcement, especially given the likelihood that lay members will follow the lead of authority figures. A commission so weighted makes it unlikely an actually innocent defendant can muster five out of eight panel votes in all but the most egregious cases.

The unanimity rule applied to cases in which the defendant pled guilty makes no sense. Actual innocence should rise or fall on the evidence, regardless of the plea or verdict. For defendants exonerated by DNA evidence, it makes no sense a 5-3 vote will get the defendant convicted at trial an actual innocence hearing before the judicial panel, but not the defendant who pled guilty. There are many reasons why an innocent defendant might plead guilty. These include mental frailty; poor defense counsel; fear of a longer sentence after trial; coercion; threats to family members; etc.

Limiting evidence of actual innocence to new evidence never presented in court is unduly restrictive. A commission is much more likely to review evidence used in prior court proceedings more searchingly than a busy trial judge. To determine probable innocence, all evidence should be considered; anything less is unfair and impractical.

Finally, the commission should have the power to grant final relief. It is costly and inefficient to refer cases back to a three-judge court. Judges, like prosecutors, draw their salaries from the state, and too often see themselves as an extension of law enforcement which wrought the wrongful conviction at issue. If judges were truly inclined to catch and correct wrongful convictions rather than protect guilty pleas and verdicts, there would be no need for innocence commissions in the first place.

As of April 11, 2011, the North Carolina commission has received 756 cases, and of these, referred only three for judicial review all of whom were exonerated. This statistic raises questions in light of the 290 DNA exonerations nationally over the last two decades, *i.e.*, an average of nearly six per state. Either North Carolina's criminal justice system operates at a fairness level twice that of other states on average, or the commission may be overly restrictive in choosing which cases to refer for judicial review.

## **SECOND LOOK PROGRAMS WITHIN DISTRICT ATTORNEYS OFFICES**

On January 3, 2007, Charles Chatman was cleared after serving twenty-seven years for a rape he did not commit. Chatman was convicted when he was twenty years old. He is now forty-seven. The cause of his wrongful conviction was misidentification. His image was erroneously picked out of a photo array. After earlier tests proved inconclusive, Chatman agreed to Y-STR testing, an advanced form of DNA testing that

can determine a genetic profile from a small sample. The risk was that this final laboratory test could consume the remaining biological evidence in the case.<sup>52</sup>

In the end, it proved to be a risk worth taking, as the genetic profile proved another man committed the rape for which Chatman was serving a ninety-nine year sentence.<sup>53</sup>

Chatman was cleared by the Conviction Integrity Unit established by Dallas District Attorney Craig Watkins in 2007. It was the first unit of its kind in the nation.<sup>54</sup> The unit, in collaboration with The Texas Innocence Project, reviews cases in search of potential wrongful convictions. Inmates previously denied DNA testing by former Dallas District Attorneys can have their prior requests reviewed, and where warranted, DNA testing conducted. If the results are exculpatory, then Watkins's office joins in a defense motion to throw out the conviction.<sup>55</sup>

The role of the public prosecutor is different from that of a defense attorney. Whereas defenders are duty-bound solely to advance the interests of their clients without regard to the interests of others, prosecutors wear two hats and are duty-bound to secure convictions and at the same time, pursue justice. In the words of the U.S. Supreme Court, "Prosecutors have a special duty to seek justice, not merely to convict."<sup>56</sup>

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<sup>52</sup> [http://www.innocenceproject.org/Content/Charles\\_Chatman.php](http://www.innocenceproject.org/Content/Charles_Chatman.php).

<sup>53</sup> *Id.*

<sup>54</sup> [http://dallasda.co/webdev/?page\\_id=73](http://dallasda.co/webdev/?page_id=73).

<sup>55</sup> Jennifer S. Forsyth and Leslie Eaton, "The Exonerator -- The Dallas D.A. is Reviewing Old Cases, Freeing Prisoners -- and Riling His Peers," *Wall Street Journal*, Nov. 15, 2008, <http://online.wsj.com/article/SB122669736692929339.html>

<sup>56</sup> *Connick v. Thompson*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1350, 1362 (2011).

The duty to “seek justice” means helping to free the wrongfully convicted and prevent wrongful convictions in the future. There have been many instances in which prosecutors blocked DNA testing and/or fought claims of innocence despite compelling evidence favoring the defendant. Likewise, there have been some instances of praiseworthy actions by prosecutors who agreed to dismiss pending charges or vacate convictions based upon convincing evidence of innocence.

The Steven Barnes case is such an example. Barnes was wrongfully convicted in New York for a murder and rape and served nineteen and a half years in prison before being exonerated by DNA. The Oneida County District Attorney consented to DNA testing in 1996. The results were inconclusive, and when DNA technology advanced and Barnes again requested testing in 2007, the Oneida County District Attorney once again agreed to the test. When the genetic evidence did not match Barnes, prosecutors joined in his motion to overturn the conviction, and on January 9, 2009, dropped all charges against him.<sup>57</sup>

Second Look programs in prosecution offices represent perhaps the best means of correcting wrongful convictions. Often, poor defendants cannot afford private attorneys to undertake an adequate post-trial investigation which frequently entails the use of outside experts. In New York, once a defendant’s appeal has been rejected by the Court Of Appeals, the state’s highest court which routinely does not agree to hear meritorious cases, the state is no longer obligated to provide free representation to indigents. Although the federal courts can appoint counsel for poor defendants, they often decline to

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<sup>57</sup> [http://www.innocenceproject.org/Content/Steven\\_Barnes.php](http://www.innocenceproject.org/Content/Steven_Barnes.php).

do so. Therefore, Second Look programs such as the Dallas County Conviction Integrity Unit provide resources otherwise unavailable to many wrongfully convicted indigents.

In order to create the unit, Watkins first had to obtain funding. He went before the Dallas County Commissioners. Two of the five members were opposed, and argued that the unit would place the District Attorney's office in the role of defense counsel. In a 3-2 vote, Watkins secured enough funds to hire two attorneys, one investigator, and one secretary, but not the budget that he needed. To make up the shortfall, he collaborated with The Texas Innocence Project, and now has law student interns liaising with paid staff reviewing cases. There are currently than 400 cases under review for which Watkins's predecessor successfully blocked DNA testing. There are eight cases awaiting test results. To date, thirty people have been cleared by the Watkins unit, seven of them based on DNA evidence ("Conviction Integrity Unit," n.d.).

Larry Fuller served nineteen and a half years out of a fifty-year sentence for sexual assault based on a misidentification. Initially, the victim stated that she could not identify her assailant because the room was barely lit and the crime took place about an hour before sunrise. A week later police pressed her to make an identification. After viewing one photo array she said that Fuller "looks like the guy," but that she could not be sure. After being shown a second array she then said she was sure Fuller was her assailant.<sup>58</sup>

In addition, a serological test was performed on semen from the victim's rape kit. Fuller's blood type matched the perpetrator's blood type. Approximately 46% of the

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<sup>58</sup> [http://www.innocenceproject.org/Content/Larry\\_Fuller.php](http://www.innocenceproject.org/Content/Larry_Fuller.php).

population has type O and 40% has Type A blood.<sup>59</sup> Therefore, serological testing did not exclude Fuller, but certainly did not identify him as the perpetrator. At trial, however, a prosecutor inaccurately summed up the scientific testimony by saying “it placed Mr. Fuller among twenty percent of the male population that could have committed the crime.” Fuller first contacted the Innocence Project in the mid 1990s. A DNA test performed in 2003 was inconclusive, but a 2006 test conclusively ruled him out as the assailant, and he was released (Tharp, 2009).

Following the Watkins example, upon taking office, Harris County District Attorney Patricia Lykos set up her own Second Look unit. It cleared Michael Green who served twenty-seven years for a rape committed by someone else. In July 2005, Green mailed a request for DNA testing typed in his cell to the trial judge who assigned a public defender to deal with the request. Green’s application languished for three years in the Harris County District Attorney’s office. In 2008, Patricia Lykos, a former judge and police officer, was elected District Attorney, and one of her first official acts was to reverse that office’s longstanding reluctance to admit mistakes. She assigned two assistant district attorneys and an investigator to do nothing but comb through some 185 cases involving requests for DNA tests, and seventy-five other cases involving claims of actual innocence. So far, that work has led to the release of three men, including Green.<sup>60</sup>

The idea of Second Look programs is slowly beginning to spread. In August 2010, newly elected Manhattan District Attorney Cyrus Vance Jr. announced creation of his own Conviction Integrity Unit to examine closed cases involving claims of actual

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<sup>59</sup> [http://www.craigmedical.com/blood\\_typing\\_facts.htm#](http://www.craigmedical.com/blood_typing_facts.htm#) (blood type frequency percentages).

<sup>60</sup> McKinley, New York Times, August 13, 2010 at A12)

innocence, and to prevent future wrongful convictions (Italiano, 2010). Likewise, in his successful campaign to become New York State Attorney General, Democrat Eric Schneiderman proposed an Anti-Wrongful Conviction Unit within the AG's office (Schneiderman, 2010).

### *How a Second Look Unit Should Run*

First, professional staff would have to become thoroughly educated about the causes of wrongful convictions to insure reviewers know what to look for. Jim Dywer's book *Actual Innocence* should be required reading. Among other things, staff would need to become familiar with the factors and variables affecting false confessions; misidentifications; junk science; incentivized witnessing; inept defense attorneys; and prosecutorial misconduct of all kinds. No one previously involved in prosecutorial misconduct or who turned a blind eye to such misconduct should be allowed to work in the unit.

Second, the district attorney would need a budget and plan to obtain needed funds from the county or state legislature, and lobby for resources to hire full time staff. Personnel could be obtained in a variety of ways without increasing overall operating costs, such as partnering with an Innocence Project, a local law school clinic, and major law firms with pro bono programs for their associates.

Third, the unit should be run on a full time basis with a supervising district attorney responsible for the unit's overall work. Periodic progress reports should be required to hold everyone assigned to the unit accountable.

Fourth, unit members must be free to communicate their concerns about colleagues in the DA's office who may have contributed to a wrongful conviction

without fear of reprisals. Unit members must be instructed their first duty is to the wrongfully convicted and not to other prosecutors; that they must avoid blind obedience to authority, especially where they uncover questionable or unethical conduct about colleagues. To achieve this end, the unit ideally should be physically separated from the rest of the district attorney's office, just as Internal Affairs units within police departments are typically situated away from individual precincts.

### *Re-Examine DNA Cases*

Cases with biological evidence are the easiest to resolve by DNA testing to rule in or rule out the integrity of a defendant's conviction. Biological evidence should be tested in every case in which DNA is available to test. Unit members should screen for cases involving:

- use of blood type to convict – often, DNA tests have led to exonerations in such cases;
- those in which prior DNA test requests were successfully blocked;
- those in which the record indicates DNA-testable material is likely available.

In addition, in those cases in which convictions rested in whole or in part on positive DNA matches, unit members should determine which laboratory produced the results; whether there have been any documented problems at that lab; whether the lab was accredited at the time the incriminating test was performed; whether there have been problems with specific laboratory personnel who worked on the case under review; and an independent review of staff education to ensure that all involved were credentialed criminalists qualified to perform the testing and reach reliable conclusions about test results.

There have been cases in which juries were presented with erroneous DNA inclusions caused by laboratory contamination and an innocent defendant was then convicted.<sup>61</sup> Wrongful convictions were proven by further testing which revealed the contamination and initial laboratory errors. If any laboratory or lab personnel are uncooperative with unit inquiries, this should trigger a new test at a different laboratory to verify the test results and testimony given by lab personnel at trial. Other prosecution offices, the defense bar, various Innocence Projects and other innocence groups should be alerted about recalcitrant laboratory directors or personnel, or those found to have made mistakes which led to a wrongful conviction.

### *Re-examine Non-DNA Cases*

Prisoners have an uncanny sense of those among them who did not belong in prison. Perhaps the key feature which distinguishes the wrongfully convicted is that they professed their actual innocence from the outset and consistently maintained their innocence through the appeals process. Counsel for these defendants should be invited to meet with Second Look staff to discuss the case under review and develop leads for heretofore undiscovered evidence. Defenders are often in the best position to point out how the original verdict was unreliable.

In cases where no defense attorney is available, the review would begin by reading the case record to identify matters worthy of further investigation based on the issues discussed in this thesis.

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<sup>61</sup> Paul C. Gianelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C.L. Rev. 163 (2007-08) (“Some defendants who were convicted based on evidence provided by the lab have been exonerated,” citing Josiah Sutton and George Rodriguez as two examples.)

### *Re-examine Confessions*

Second Look staff should examine the circumstances surrounding a confession; determine if conditions were present to make the confession unreliable; ascertain if the confession was corroborated or contradicted by other established facts surrounding the crime; etc. Where appropriate, false confession experts should be consulted.

### *Re-examine Identifications*

Likewise, if the conviction were secured by eyewitness identification of the victim or a third party who had a limited opportunity to view the perpetrator, or who viewed him in traumatic circumstances, the victim or witness could be re-interviewed to determine if he/she still feels confident in the identification after the passage of time. Staff should inquire if the defendant unduly stuck out in a lineup; whether police intentionally or unintentionally gave cues as to the identity of the perpetrator; whether the witness was pressured to select a particular individual as the perpetrator; etc. Where appropriate, eyewitness misidentification experts should be consulted.

### *Re-examine Experts*

Second Look staff can follow a checklist to re-examine expert testimony for issues common to all forensic testimony. Staff should ask if laboratory experts were:

- reputable;
- properly certified to perform laboratory testing;
- specially educated in the subject matter on which they gave opinion testimony;
- employees of a laboratory which was properly certified; and
- ever flagged in other cases where misconduct was at issue.

Particular attention should be paid to the expert's testimony. Unit staff should ask if the expert:

- followed correct laboratory protocols;
- followed or deviated from the consensus view of other experts in the field;
- statistically overstated findings;
- engaged in sound research;
- followed established forensic methodology and principles;
- offered testimony about matters criticized as junk science, such as microscopic hair analysis; bite mark analysis; fingerprint analysis based on too few matching patterns; etc.

### *Re-examine Witness Integrity*

Perhaps no area of investigation in non-DNA cases is more important than witness integrity. Unit staff should ask:

- was a reward of any kind given in exchange for the testimony?
- if so, was that reward disclosed to the court and defense?
- did the witnesses and/or prosecutor deny the witness received a reward?
- was the conviction secured by the testimony of a jailhouse informant?
- were there witnesses to some key matter or event in the case who were never called, and if so, why?
- were there any alternative suspects never pursued by police investigators, and if so, why?<sup>62</sup>, and
- most importantly, has any witness recanted his or her testimony for any reason?

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<sup>62</sup> The New York State Bar Association's Report on Wrongful Convictions (2010) recommends investigating alternative suspects until they can be ruled out, even after an arrest had been made.

### *Re-Examine Disclosure of Exculpatory Evidence*

The failure to turn over exculpatory material is perhaps the most common form of prosecutorial misconduct. Aggressive prosecutors weigh the consequences of violating this constitutional requirement against what they perceive to be the strength of their cases, knowing that courts will refuse to vacate convictions even in the face of blatant *Brady* violations based on the harmless error doctrine or the appellate court's determination that evidence of the defendant's guilt was overwhelming. Second Look staff should perform a thorough search to ascertain if all exculpatory material was turned over, including intra-office memoranda; E-mails; other electronically stored information; crime scenes notes; laboratory reports; documents identifying alternative suspects; etc. There must be no "sacred cows," no untouchable materials or issues.

### **PREVENTING WRONGFUL CONVICTIONS BEFORE THEY OCCUR**

As Ben Franklin said, "An ounce of prevention is worth a pound of cure." It is far better to prevent wrongful convictions in the first place than to remedy them after the fact. This means instituting new protocols in prosecutors' offices to scrutinize cases based on the variables identified in this thesis. Hence, cases built upon confessions require careful evaluation of the defendant, police tactics, corroborating evidence, and recordings of the interrogation. Prosecutors must keep in mind that, as noted above, 25% of the nation's 290 DNA-proven wrongful convictions involved false confessions. Prosecutors can reject cases built upon coerced confessions and insist police investigators amass additional reliable evidence to support the charges.

Prosecutors should insist police departments – in effect, their clients -- record all interrogations without pause from start to finish. There is no downside to law

enforcement in adopting this protocol. To the contrary, it protects honest cops who are falsely accused of coercion, and provides the information needed to determine if a confession is unreliable or the statements of a key witness should be regarded with skepticism. A 2004 Illinois study of 200 police departments that record interrogations found that police personnel embraced the measure as good law enforcement practice (Sullivan, 2004).

An additional benefit to complete recording of confessions is that proof of the clearly voluntary nature of a confession leads to more plea bargains, as defense attorneys can gauge the likely impact of that confession on the jury. More plea bargains save precious prosecutorial resources and keeps court costs down by decreasing the number of trials.

Prosecutors should review cases based on identification with care, and search for telltale signs of misidentification, such as a victim's description of a perpetrator is not congruent with the suspect's physical characteristics, lineups and photo arrays were presented in a suggestive manner; etc.

Most importantly, staff who man Second Look units should be aware that systemic deficiencies lead to wrongful convictions, and be on the lookout for false confessions, misidentification, incentivized witnessing, bad lawyering, junk science, prosecutorial misconduct, and prejudicial pre-trial publicity.

## **SOCIAL MOVEMENTS AND ADVOCACY ORGANIZATIONS**

A movement is a collection of individuals bound together in common cause because in unity there is strength. The phenomenon of wrongful convictions will not be addressed absent pressure from advocates. Legislators are far more influenced and

spurred to action by groups pressing for particular legislation than by individual advocates acting alone. Effective pressure group tactics include: flooding officials with E-mails, faxes, and phone bank calls; picketing; protests outside legislative houses or public meetings; street demonstrations; leafleting; bloc voting; and strategically placed and timed letters to the editor.

By nature, social movements wax and wane, often stirred into spontaneous action by some external event, at other times pacific and inactive in the wake of legislative accomplishment. In contrast, advocacy organizations staffed by experts maintain a continuous level of activity to achieve specified goals. Advocacy organizations are generally not-for-profit corporations which enjoy charitable status by statute. Wrongful convictions will not be reduced in the absence of advocacy organizations dedicated to the cause of preventing and overcoming wrongful convictions, and social movements inspired to achieve that goal.

The primary focus of innocence groups has been on DNA cases. More legal resources are needed to address the wrongfully convicted in non-DNA cases.

Likewise, more is required to address the needs of the wrongfully convicted, both those awaiting exoneration and those who are now free. This population faces major medical, social and psychological obstacles in their re-integration in society and adjustment to the world outside of prison. To date, few programs exist to assist them in that task. Innocence groups have experts in litigation to overturn wrongful convictions and lobbyists to press for needed legislative reforms, but few social workers and psychologists to assist individual innocents make the transition from prison to civil society. More needs to be done in this area.

## **FUTURE STUDY - TOWARDS A MORE ACCURATE AND RELIABLE CRIMINAL JUSTICE SYSTEM**

The reforms proposed in this thesis should be further evaluated by lawyers, legislators, judges, legal scholars, forensic experts and criminologists. State legislators on criminal justice committees should conduct hearings and invite experts to testify about proposed legislation to mandate:

- video recording of interrogations;
- pre-trial hearings to challenge the accuracy and reliability of a confession;
- admission of false confession expert testimony at trial;
- improved identification procedures;
- an improved public defender system that eliminates resource handicaps;
- availability of counsel to indigents in post-conviction proceedings in which most wrongful convictions are overcome;
- criminalization of clear cut, intentional prosecutorial misconduct;
- removal of prosecutorial immunity from civil rights lawsuits;
- elimination of incentivized witnessing;
- elimination of the twelve-step program requirement that defendants who proclaim their actual innocence must admit to crimes they insist they did not commit, and altering parole board criteria which penalizes such defendants because they refused to admit to someone else's crimes;
- Second Look programs/Conviction Integrity units within the prosecution offices;
- a standardized evidence preservation system; and
- establishment of actual innocence commissions.

In addition, there are issues not identified in this thesis which merit future study, among them: (i) cataloguing all cases in which forensic experts caused wrongful

convictions by presenting juries with fraudulent science, such as bullet lead analysis, dog scent identification, bite mark comparisons, and microscopic hair analysis; (ii) wrongful convictions based on fingerprint identifications which failed to comply with minimal matching standards; (iii) wrongful convictions based on shaken baby syndrome where diagnostic criteria were absent or inadequately presented; (iv) wrongful convictions reversed based on brainwave fingerprinting; (v) longitudinal psychological studies of exonerees and problems they face in re-integration with civil society; (vi) why some exonerees commit crimes after their release from prison; (vii) development of policies and laws to avoid prejudice to inmates who assert they were wrongfully convicted before parole boards; and (viii) historical analysis and cataloging of all cases in which the innocent were put to death.

## **CONCLUSION**

Too many Americans view the criminal justice system through a utilitarian lens and regard wrongful convictions as the price the few must pay for the many. They understand there always will be errors in the criminal justice process, and as a result, some innocents will be wrongly convicted and imprisoned, but regard this outcome as acceptable to serve the larger interests of the majority.

The public must be educated to reject this pernicious view which is antithetical to the ideals of any democratic society. Wrongful conviction advocates must make it their overarching goal to promote, in Justice Harlan's words, "the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."<sup>63</sup>

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<sup>63</sup> *In re Winship* 397 U.S. 358, 372 (1970).

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