

## MY THREE DECADES WITH DARRYL HUNT

*Mark Rabil\**

### I. 2006 AT THE HOTEL HELIX: FLASHBACK TO 1984

Darryl Hunt and I were waiting in the lounge of the Hotel Helix in Washington, D.C. to attend a screening of *The Trials of Darryl Hunt*,<sup>1</sup> a documentary about his twenty-year saga from wrongful conviction to exoneration.<sup>2</sup> It was the summer of 2006, well over two years after the State of North Carolina released Darryl from

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\* Director, Innocence & Justice Clinic, Wake Forest University School of Law, and Assistant Capital Defender, North Carolina Office of the Capital Defender, Forsyth Regional Office.

<sup>1</sup> THE TRIALS OF DARRYL HUNT (Break-Thru Films 2006). The film premiered at the 2006 Sundance Film Festival and was nominated for the Grand Jury Prize. See *The Trials of Darryl Hunt*, HBO DOCUMENTARY FILMS, [http://www.breakthrufilms.org/press\\_docs/TODH\\_PRESS\\_NOTES.pdf](http://www.breakthrufilms.org/press_docs/TODH_PRESS_NOTES.pdf) (last visited Mar. 12, 2012). It won numerous awards at film festivals in the United States and internationally, including a nomination for best documentary at the 2007 Spirit Awards. *Id.* The film premiered on HBO in April 2007. *Id.* Stern and Sunberg received the duPont Award from the Columbia School of Journalism in 2008 for this film. Press Release, Columbia Sch. of Journalism, Office of Pub. Affairs, Program Descriptions of 2008 duPont Winners (Dec. 17, 2007) (transcript available at <http://www.columbia.edu/cu/news/07/12/duPontprofiles.html>).

<sup>2</sup> THE TRIALS OF DARRYL HUNT, *supra* note 1. There are several resources for reading more about the Hunt case. See Phoebe Zerwick, *Murder, Race, Justice: The State vs. Darryl Hunt*, WINSTON-SALEM J. (Nov. 2003) [hereinafter *Murder, Race, Justice*], available at <http://www.darrylhunt.journalnow.com> (this series was extremely significant to the ultimate exoneration of Darryl Hunt and is a good source for original documents from the case); see also STEPHEN B. BOYD, MAKING JUSTICE OUR BUSINESS: THE WRONGFUL CONVICTION OF DARRYL HUNT AND THE WORK OF FAITH (2011) (written by a Wake Forest University Religion Department Professor, who was inspired to speak out for Darryl Hunt in December 2003 by the Zerwick series); JO ANNE NORTH GOETZ & LEIGH SOMERVILLE MCMILLAN, LONG TIME COMING: MY LIFE AND THE DARRYL HUNT LESSON (2007) (written by Darryl's sixth grade teacher who testified as a character witness at the 1985 trial, a great act of courage for a white woman at the time); OFFICE OF THE CITY MANAGER, WINSTON-SALEM, N.C., THE SYKES ADMINISTRATIVE REVIEW COMMITTEE REPORT (Feb. 2007) [hereinafter SARC REPORT], <http://www.cityofws.org/Home/CityGovernment/CityManager/Articles/SARCReportSykes-Hunt>. Following the exoneration of Hunt, the City of Winston-Salem formed a citizens committee to review the Sykes case investigation by the Winston-Salem Police Department. The committee was assisted by the City Manager and two experienced detectives; their report (the *SARC Report*) and an appendix with thousands of pages from the investigation and case are available online on the city's website. See generally REGINA K. LANE & LINDA F. FELKER, FROM VICTIM TO VICTORY: THE STORY OF REGINA LANE THE INTEGON VICTIM OF WINSTON-SALEM (2012) (written by Regina Lane, a woman attached by the same man who killed Deborah Sykes, the victim in the case in which Darryl Hunt was wrongfully convicted).

prison.<sup>3</sup> Darryl started perspiring, became agitated, and said he felt his heart was racing. As we sat, he noticed a lime green flashing light in the lounge. This lime green was the same color as the socks a reporter was wearing on September 14, 1984, the day the police put Darryl, a nineteen-year-old black kid, on display in a fenced-in area in the basement warrant office of the Forsyth County Hall of Justice in Winston-Salem, North Carolina.<sup>4</sup> Darryl focused on those green socks while the white reporters stared at this caged black man whom they saw as the animal who raped and took the life of one of their own, the beautiful white Deborah Sykes, a copy editor for the evening paper, *Twin City Sentinel*.<sup>5</sup> He held back the tears by staring at the green socks.<sup>6</sup> The lime green light twenty-two years later triggered a flashback with this intense physical response for Darryl.

## II. 1993: MY FOUR-YEAR-OLD'S ADVICE

My four-year-old daughter stood in the doorway of our bedroom, hand on her hip, and gently advised me, "what you have to do is look at her sideways, and remember her the way she was." She saw that I had been crying at the bedside of her mother, distraught over

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<sup>3</sup> See *After Two Decades in Prison, Helping Other "Homecomers,"* INNOCENCE PROJECT BLOG (Feb. 9, 2010), [http://www.innocenceproject.org/Content/After\\_Two\\_Decades\\_in\\_Prison\\_Helping\\_Other\\_Homecomers.php](http://www.innocenceproject.org/Content/After_Two_Decades_in_Prison_Helping_Other_Homecomers.php).

<sup>4</sup> See *Murder, Race, Justice*, *supra* note 2.

<sup>5</sup> Within a few days of the crime, on August 13, 1984, Tom Sieg, a columnist for *The Twin City Sentinel*, wrote about how hard this had been on the reporters and staff. Tom Sieg, *Tragedy Hits Home: We Often Write of Death; This Time We Lived It*, TWIN-CITY SENTINEL (Aug. 13, 1984), in SARC REPORT, *supra* note 2, at app. "In a sense, we had become victims of violent crime. The emotions, which we have described so often with such familiar words, came to us as strangers." *Id.* Many of those at *The Sentinel*, Sieg wrote, anticipated "what could only be hollow justice if and when the killers are apprehended." *Id.* Sieg went on: "As the shock subsided over the weekend, anger didn't. For some, as we thought about the kind of people who could simply end a human life without reflection, and probably without remorse, there was another emotion." *Id.* Sieg quoted a young reporter, David Snyder, who said, "It makes you hate . . . That's the same thing you've heard other people say before, but you never really hear it until it comes from inside." *Id.* Within a few weeks of the charge, Sieg became convinced that Hunt was innocent and began to secretly provide us with important information, such as the fact that State's eyewitness Thomas Murphy was a former Ku Klux Klansman.

<sup>6</sup> *The Winston-Salem Journal* article on September 15, 1984 described Darryl as he stood in that cage:

Hunt's face betrayed no emotion as the charge was read to him. Hunt is tall and thin, with his hair in short, tight braids. At the warrants office yesterday he wore a black wool hat, a light-colored vest over a patterned white T-shirt, jeans with the legs rolled up to the knees, white tennis shoes and athletic socks stretched over his calves.

Jon Healey, *Man Already in Jail is Charged in Sykes Murder*, WINSTON-SALEM J., Sept. 15, 1984, available at <http://darrylhunt.journalnow.com/documents/OldStories/19840915.html>.

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Pam's confusion and pain as the cancer cells spread to her brain. Her sentences were becoming incoherent. Periodically, she screamed in pain. This was late May 1993, just a week before Pam died from breast cancer diagnosed twenty-two months earlier. In my lexicon, it was also just a few weeks before hearings in the Darryl Hunt case, hearings on whether the police had intimidated defense witnesses before his 1990 murder retrial. What did my daughter mean by her advice, "look at her sideways?"

Even now, more than eighteen years after that day in May 1993, I struggle to discern the meaning of those words. Maybe they were simply words to soothe. Perhaps she was telling me to "see" with some sense other than my eyes. Was she tapping into the collective subconscious and suggesting that I begin to see with "the sidelong glance" of Aphrodite, or the "mind's eye" of meditators and prophets? When I found her in the tree house in the backyard later that day talking on her play phone with Pam, I thought there was some direct line of communication between the two of them, mother and daughter, a line beyond talking.

Just a few weeks earlier, Pam was in the hospital so the doctors could drain fluid from her lungs. Finally, I began to realize that my role was not to find a cure for her cancer, but simply to be present with her, to love her. For the first twenty months of her illness, I tried to read everything I could, to question every doctor, and be a cheerleader. I was out on a run when, just out of the corner of my eye, I saw myself standing on a bridge with Pam. It was the drawbridge going onto Sunset Beach, North Carolina, our usual vacation spot. This was the spot where, as I drove onto the bridge at the beginning of the week, in my mind's eye, I envisioned myself driving back onto the mainland at the end of the week. It was a spot where time stopped. On this day in May 1993, Pam and I simply shared the space for this moment, without disease, anger, or grief. Maybe this was the meaning of my daughter's confirmatory advice, to "look at her sideways," to take the long view, to focus not on the pain before my eyes, but on the life she shared with me and our girls.

### III. THE INTENTION OF THIS REFLECTION

My daughter's advice to me has become one of several mysterious phrases and riddles that continue to haunt and inspire me. Another of these phrases was given to me by my classmate Monte Creque, in her high school valedictory speech: "Never buy shoes in the

morning.”<sup>7</sup> Since our feet expand by about a shoe size over the course of the day, we should go shoe shopping in the afternoon. Monte explained that we should not set our goals in life too soon. I believe that it also means that we should not focus on a specific outcome, as lawyers, in our cases, lest we miss the real story, yet to be revealed. Walker Percy gave similar advice in suggesting that we tour without a guidebook, lest we see only what we are told to see and miss greater sights.<sup>8</sup> For an attorney, not focusing on a specific outcome for a client is very hard, particularly for me as a defense lawyer in a capital case trying to save my client’s life. However, I have seen time and again that such attachment to outcome, rather than focusing on the story of what happened, on the details of a client’s life, can be counterproductive.

Another phrase that follows me is one that was often repeated to me by a former law partner: “It’s a long worm that never turns.” My former partner learned that phrase from a corporate attorney with whom he worked in the legal department of Integon Insurance Company. He used it whenever attorneys on the other side of a case would not cooperate with us, or whenever we lost a battle in court. In other words, he used it to say, our time will come, that the tide will turn. This mantra had its origin with the character Froggy (known for the strange, guttural, frog-like sound of his voice) who said, at the end of one episode of the old television series *Our Gang*, “It’s a long worm that never turns.” Froggy, in turn, must have read the 1845 poem by Robert Browning, *Flight of the Duchess*, in which Browning wrote, “It’s a long lane that knows no turning.”<sup>9</sup> Browning read his Shakespeare: “The smallest worm will turn being trodden on.”<sup>10</sup> I always thought of the “worm” in the Froggy phrase as fate, or “wyrd,” symbolized by the “wyrn” or dragon fought by King Beowulf at the end of his life.<sup>11</sup> For now, I see the phrase as karmic: the seeds of the truth of what happened travel,

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<sup>7</sup> Dr. Monte Creque, Valedictory Address at Bishop McGuinness Memorial High School Graduation, Winston-Salem, N.C. (May 1973).

<sup>8</sup> See Mark Rabil, *The Message in the Bottle: The Life and Letters of Tom Fowler*, N.C. ST. BAR J. (Fall 2004), at 8, 9. Tom Fowler was a dear friend, another law school classmate, who died in May 2004. Tom always advised me to proceed without expectations, but hoping for surprises, just as the writer Walker Percy promoted touring without a map or guidebook, so that we can recover the ability to see things for what they are, not as they are symbolized. See TOM FOWLER, *CAROLINA JOURNEYS: EXPLORING THE TRAILS OF THE CAROLINAS, BOTH REAL AND IMAGINED* xii (2004).

<sup>9</sup> Robert Browning, *The Flight of the Duchess*, in *DRAMATIC ROMANCES AND LYRICS* (1845) (line 872).

<sup>10</sup> WILLIAM SHAKESPEARE, *THE THIRD PART OF HENRY THE SIXTH*, act 2, sc. 2, line 17.

<sup>11</sup> MARK HUDSON, *BEOWULF* (Wordsworth Editions Limited ed. 2007) (lines 2702–10).

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and ultimately, with patience, with faith, the true story will be told. Then again, maybe Froggy's phrase is as straightforward as the old Zen koan: "How do you go straight ahead on a narrow mountain path which has ninety-three turns?"<sup>12</sup>

#### IV. THE IMPLICIT HAZARDS OF THIS WORK

My main warning here is that prosecutorial and criminal defense practice, including post-conviction, habeas, and innocence clinic work, are rife with the subconscious or implicit hazards of tunnel vision, cognitive bias, racial and ethnic prejudice, and attachment to a winning outcome. I know about these dangers in both life and law, assuming there is a dividing line. In life, I suffered some of these hazards as a caregiver for my wife: biases about cancer patients and about my—the man's—duty to provide and save from pain and suffering, and attachment to finding a cure, a "good" outcome. It is ironic that being a cancer patient caregiver and criminal defense lawyer, particularly my work in capital defense, bear similar risks. I suffered from most of these risks as I paddled the waters of pretrial, trial, appeal, and post-conviction, on behalf of one client, Darryl Hunt. Men and women who have been wrongfully convicted, like Darryl, suffer tremendously—psychologically, emotionally, and financially. Those of us who fight for the wrongfully charged or convicted suffer from different hazards.

#### V. THE CASE THAT WAS THE CASE FOR ME (*STATE VS. DARRYL HUNT*)

On December 22, 2003, Willard Brown confessed to killing Mrs. Deborah Sykes on August 10, 1984.<sup>13</sup> That is, he confessed only after the police found that his DNA matched the vaginal swab from the rape kit, confronted him three days earlier, and were in the process of booking him on rape and murder charges.<sup>14</sup> He pled guilty in December 2004 and is serving a sentence of life plus ten years.<sup>15</sup> It is likely that Brown raped another woman, at the same spot where he killed Mrs. Sykes, in mid-June 1984 within a day

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<sup>12</sup> See, e.g., Konrad Ryushin Marchaj Osho, *Loving Each Turn*, ZEN MOUNTAIN MONASTARY ONLINE (Summer 2009), <http://mro.org/zmm/teachings/ryushin/ryushin4.php>.

<sup>13</sup> *Murder, Race, Justice*, *supra* note 2.

<sup>14</sup> *Id.*; see also, Phoebe Zerwick, *Hunt Exonerated*, WINSTON-SALEM J., Feb. 6 2004, available at <http://truthinjustice.org/hunt-exonerated.htm>.

<sup>15</sup> Dan Galindo, *Brown Declines Interview with Panel on Sykes Case*, THE WINSTON-SALEM J., June 15, 2006, available at <http://darrylhunt.journalnow.com/epilogue/20060615.htm>.

after he was released from prison, and a third woman in January 1985 not too far away. Regina Lane identified him from an in-person lineup as her rapist in a fourth incident on February 2, 1985, which started just two blocks from where the Sykes murder happened.<sup>16</sup> However, the police dissuaded Ms. Lane from pressing charges because it would have called into question the case against the man they had already charged with the Sykes murder—Darryl Hunt.<sup>17</sup> For over nineteen years, Brown was able to keep his secret, saying, at his plea hearing on December 16, 2004: “It’s part of the game, it’s all been a game. The devil started it, and I played it. I just took something I can’t give back.”

Darryl Hunt was twice wrongfully convicted of one of Brown’s crimes, the August 1984 rape and murder of Mrs. Sykes. Throughout the years, for better or for worse, I stayed with my representation of Darryl, from the fall of 1984, through his 1985 and 1990 trials, his numerous appeals in state and federal courts, onward through his 2003 release and 2004 pardon of innocence, and eventually to his civil settlement with the City of Winston-Salem, North Carolina in 2007. I recite some of the key facts here.

Darryl was a nineteen-year-old African-American teenager when the State charged him with Brown’s crime.<sup>18</sup> The jury spared him the death penalty because the jury foreman at the first trial in 1985 was never convinced that he was guilty.<sup>19</sup> That first jury deliberated three days before returning a guilty verdict on the first degree murder charge, but only by agreeing, in advance, on a life sentence instead of death. The all-white 1990 jury<sup>20</sup> deliberated

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<sup>16</sup> *A Message from Regina Lane*, BREAK-THRU FILMS, THE TRIALS OF DARRYL HUNT FILM WEBSITE, <http://www.breakthrufilms.org/the-trials-of-darryl-hunt/reginas-story> (last visited Mar. 12, 2012).

<sup>17</sup> See Minutes of the Public Safety Committee of Winston-Salem (Feb. 14, 2007), available at <http://www.cityofws.org/Assets/CityOfWS/Documents/2011%20CC-Comm.%20Mtg%20n%20PDF/PubSfty%20021411.pdf> (statement of Rev. Carlton Eversky).

<sup>18</sup> See *Murder, Race, Justice*, *supra* note 2.

<sup>19</sup> Shortly after the 1985 trial, my co-counsel Gordon Jenkins and I spoke to the jury foreman. He shared his notebook with us and talked to us for nearly three hours about the trial. He actually misunderstood the words of the instruction on “reasonable doubt,” writing it down in his notes as “a reason of doubt.” The bottom line was that he was never convinced, with certainty, that Hunt was guilty. He made sure that the other jurors understood that if he voted for guilty, to end the three day deliberations, he would never agree to the death penalty, due to his “doubts,” however defined. A defendant in North Carolina may not be sentenced to death unless the jury is unanimous, and a life sentence is imposed by the judge if the jury cannot agree on life or death. N.C. GEN. STAT. § 15A-2000(b) (2011).

<sup>20</sup> Jennifer Parrish Taylor, *The Trials of Darryl Hunt*, UNIV. OF THE DIST. OF COLUMBIA, DAVID A. CLARKE SCH. OF LAW (Oct. 28, 2011), <http://www.law.udc.edu/news/76936/School-News-The-Trials-of-Darryl-Hunt.htm>. For the second 1990 jury in rural Catawba County, North Carolina, no blacks were summonsed for the venire, and thus the jury was all-white.

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quickly, less than two hours, before finding him guilty. He was not facing the death penalty at the second trial,<sup>21</sup> which had been moved to the rural, white Catawba County, due to the extensive publicity. The judge sentenced him to life in prison.<sup>22</sup>

The most heinous of crimes for a black male in the southern United States was the taking and killing of a white woman. In 1984, when Darryl was accused, I knew that in the not too distant past, angry mobs quickly lynched many black men in the south<sup>23</sup> or governments lawfully executed them after brief trials.<sup>24</sup> One North

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For the first 1985 more urban Forsyth County, North Carolina jury, a number of blacks were summonsed. Many were excused for cause due to opposition to the death penalty. However, the prosecutors excused six of the seven remaining blacks with peremptory challenges (when no reason is required to be given by the attorneys); these people were in favor of the death penalty and were employed citizens with no criminal records. This was before *Batson v. Kentucky* made it unconstitutional for attorneys to excuse jurors based upon their race. *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986).

<sup>21</sup> See N.C. GEN. STAT. § 15A-1335 (2011); *Bullington v. Missouri*, 451 U.S. 430, 445–46, 446 (1981) (finding a double jeopardy violation to try defendant for death on retrial when first jury unanimously rendered life verdict, on grounds that first jury “acquitted” defendant of death penalty and it would be putting defendant twice in jeopardy for life).

<sup>22</sup> See *Murder, Race, Justice*, *supra* note 2. At the time, for a crime committed in 1984, life in prison meant natural life, with parole eligibility after twenty years. In a case like this, however, parole was highly unlikely to be granted by the North Carolina Parole Commission and commutation of the sentence by the Governor was just as unlikely. In 1994, the North Carolina Legislature changed the possible sentence for first degree murder to either the death penalty or life without the possibility of parole. N.C. GEN. STAT. § 15A-2002 (2011).

<sup>23</sup> See James Allen & John Littlefield, *Photographs and Postcards of Lynching in America*, WITHOUT SANCTUARY, <http://withoutsanctuary.org/main.html> (last visited Mar. 12, 2012); see also TIMOTHY B. TYSON, BLOOD DONE SIGN MY NAME 14 (2004); Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle With Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2064 (2010); *Negro Beast Attacks Defenseless White Child*, BURLINGTON NEWS (Aug. 27, 1920). Mr. L.C. Allen, the grandfather of another law school classmate of mine, Louis Allen, was appointed in the morning to represent a black man accused of raping a white child for a trial that afternoon; before there could be a trial, a mob took the man from the Sheriff and his deputies as they were transporting him from the jail to the courthouse and shot him to death a few miles out of town. *Id.*

<sup>24</sup> Between 1910 and 1961, sixteen black men from Forsyth County, North Carolina were executed for allegedly raping white women or killing white men. See *Executions Carried Out Under Current Death Penalty Statute*, N.C. DEPT OF PUB. SAFETY, <http://www.doc.state.nc.us/dop/deathpenalty/personsexecuted.htm> (last visited Mar. 12, 2012). During this period, no whites from Forsyth County were executed by the State. *Id.* In those days death was a still a possible sentence for crimes other than murder, such as rape. There was a hiatus on executions from 1962 to 1984 because of the temporary unconstitutionality of the death penalty in the United States. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). In response, North Carolina made the death penalty automatic for first degree murder, and North Carolina’s death row population grew to one-hundred and twenty, the largest in the nation. See *Woodson v. North Carolina*, 428 U.S. 280, 285–86 (1975). In 1976, the Supreme Court ruled that automatic death penalties were unconstitutional. *Id.* at 301. In response to *Woodson*, North Carolina passed a new capital punishment statute, effective in 1977, providing for a “guided discretion” model in which the death penalty is never automatically imposed, and the jury weighs and considers “aggravating” and “mitigating” factors before rendering a life or death verdict. N.C. GEN.

Carolina District Attorney was giving golden noose lapel pins to his assistants who succeeded in securing a death sentence.<sup>25</sup> The lead detective, in this horrible, highly publicized case, later stated, “I considered any black male in town to be a suspect.”<sup>26</sup>

No murder weapon was found. The autopsy showed that Sykes had been stabbed sixteen times, with one fatal wound to the heart, and that she was sexually assaulted.<sup>27</sup> The North Carolina State Bureau of Investigation (“SBI”) Laboratory found semen on the vaginal swabs from the rape kit.<sup>28</sup> The crime occurred between 6:30 a.m. and 7:00 a.m., in an area hidden by bushes, beside a creosote post fence, near a power substation, just across the street from a fire station in downtown, and only a mile away from where Pam and I lived, in Winston-Salem, North Carolina. Someone made a 911 call at 6:53 a.m., identifying himself as “Sammy Mitchell” and saying that a man was assaulting a woman, but the dispatchers misunderstood the location and sent a police car to the wrong location.<sup>29</sup> The body was not found for about eight hours, and then only after Sykes’ employer, the publisher of the newspaper, called the chief of police to complain.<sup>30</sup>

No physical evidence connected Darryl Hunt to the August 10, 1984 crime. Darryl’s blood type (type B) did not match the semen from the rape kit (type O).<sup>31</sup> The 1985 jury found him guilty based upon the unlikely coincidence that three eyewitnesses, of different

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STAT. § 15A-2000 (2011). From 1984 to the last execution carried out in North Carolina in 2006, two blacks and two whites from Forsyth County have been executed. *Executions Carried Out Under Current Death Penalty Statute*, *supra*.

<sup>25</sup> Joseph Neff, *Union Co. Prosecutor to Resign*, NEWS & OBSERVER, <http://www.newsobserver.com/2004/08/11/93657/union-co-prosecutor-to-resign.html#storylink=misearch> (last modified Sept. 22, 2009). The former District Attorney of Union and Stanley Counties, North Carolina, Ken Honeycutt, used to give out noose lapel pins as a “morale booster” to prosecutors who won a death verdict. *Id.* In my experience, some prosecutors still see death verdicts as “good for morale” in their offices.

<sup>26</sup> SARC REPORT, *supra* note 2, at 37.

<sup>27</sup> See OFFICE OF THE CHIEF MEDICAL EXAMINER, STATE OF N.C., DEBORAH SYKES AUTOPSY REPORT (1984) (on file with author).

<sup>28</sup> See SARC REPORT, *supra* note 2, at 44.

<sup>29</sup> *Id.* at 11 n.19.

<sup>30</sup> See *id.* at 10–11.

<sup>31</sup> *Id.* at 6, 15–16. At both trials, SBI Lab serologist Brenda Bissette testified that the victim’s vaginal fluid, which was type O (she was a “secretor,” meaning that her blood type could be determined from testing bodily fluids, such as semen, vaginal fluid, and saliva) could have “masked” or covered up Darryl Hunt’s semen, which was a type B (secretor). *Id.* Hunt’s friend and co-defendant, Sammy Mitchell, was type A (secretor). Mitchell was indicted by the special prosecutors in early 1990 but he was never tried. Charges against Mitchell were dismissed when Hunt was exonerated on February 6, 2004. Willard Brown is a type O (secretor), and the police knew that Brown was a type O secretor in 1986. *Id.*

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races and from different walks of life, agreed he was the killer.<sup>32</sup> Thomas Murphy, a white Ku Klux Klansman; Johnny Gray (real name: Johnny McConnell) a black man and well-known criminal; and Rodger Weaver, a white hotel clerk.<sup>33</sup> Those three also testified at the 1990 retrial, with the addition of Kevey Coleman, a black man not wearing his contact lenses on the morning of the murder, who first identified Willard Brown as the man he saw.<sup>34</sup>

The juries were unmoved by significant impeachment evidence of each of these alleged eyewitnesses. Thomas Murphy, a self-described former preacher for the KKK, drove by the scene of the crime just before the murder and saw a black man with his arm around a white woman.<sup>35</sup> When he arrived at work, he commented to a co-worker that he had just seen “another white woman gone wrong” and that it would be a “shame” if they had children. Murphy testified that between 1984 and 1990 Darryl’s skin tone had, literally, changed from dark to medium brown. “You could paint him purple and he’d still be the same one,” he said. In the 1993 oral argument in the North Carolina Supreme Court, the assistant attorney general argued that Murphy’s characterization was not that different from Michael Jackson’s change in skin tone from dark brown to almost white. The juries were also unaffected by Murphy’s earlier mistaken identification of someone else as the killer, a black man who had time records to show he was working at The Lighthouse Restaurant on the morning of the murder.

Twelve days after the murder, Johnny Gray came forward to collect the \$10,000 reward money, but identified Terry Thomas, a tall black man, as the rapist and killer: “I swear on my mother’s grave.”<sup>36</sup> The police had walked Gray by a room in which Thomas was sitting in a chair. Police determined that Thomas had the fortune to be in jail on the day of the murder,<sup>37</sup> and did not serve

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<sup>32</sup> Interview by Jenkins & Rabil with jury foreman (1985) (on file with author).

<sup>33</sup> See SARC REPORT, *supra* note 2, at 16.

<sup>34</sup> *Id.* at 58–59.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.* at 72.

<sup>37</sup> I write this as an established fact, that jail records verify that Thomas was in jail on August 10, 1984. That was the conclusion of the City Manager in 1985. However, in writing this article, I saw that a bad copy of a jail computer record was given to the defense in discovery prior to the 1990 trial that seems to indicate that Thomas may have been released from jail on bond on August 8, 1984, two days before the murder; the record could also be read to indicate that Thomas was in jail on August 10, 1984, and released a few days later. In the mid-nineties, a deputy sheriff working part-time at the grocery store I frequent, who used to be a jailer, told me that during the mid-1980s there was a jail staff person who worked deals with inmates to let them out early, in return for drugs or money. The Sheriff did not charge her because it would have been too scandalous. One time in the 1990s, when I saw former

him with the first degree murder warrant they had prepared. The police were overjoyed that Gray came forward and identified himself as the man who made the 911 call on the morning of August 10, 1984. This gave Gray credibility with the police because they had not yet made the existence of the call made at 6:53 a.m. on the morning of the murder public and because they already determined that Mitchell did not make the 911 call. However, in that call, Gray falsely identified himself as “Sammy Mitchell,” and it was that name that led police, on the night of the murder, to question Darryl Hunt; Hunt and Mitchell were best friends in the summer of 1984. District Attorney Donald Tisdale had a grudge against Mitchell because Mitchell had escaped a conviction in an assault case he prosecuted. Tisdale decided that Mitchell was guilty of the Sykes murder because of the Gray 911 phone call, and instructed police to charge Hunt—who admitted that he was with Mitchell on the morning of August 10, 1984—to put pressure on him to testify that Mitchell was guilty.

At the trials, Gray denied knowing Sammy Mitchell, despite having told police that he had seen Mitchell numerous times. When shown an in-person lineup in September, 1984, Gray identified two individuals, Darryl Hunt and another man, by writing down the numbers, “1–4.” During the 1985 trial, the prosecutors tried to hide the fact that he wrote down two numbers. Alderman Larry Little finally found out from Gray’s girlfriend that Gray identified two people from the lineup. When I questioned Detective Daulton about this, he brought laughter to the courtroom by saying that Gray was saying that “the number one suspect was number four.” Assistant District Attorney Richard Lyle was upset with Daulton at the next court recess, and told him that he just “blew” the case. None of these credibility problems stopped the jury from believing Gray.

The juries did not seem to care that hotel night clerk Rodger Weaver described the black man he saw come into the nearby Hyatt House shortly after the murder as someone with a Michael Jackson, jeri-curl hairstyle—the hair style shown on the cover of the *Thriller* album. We called an African-American cosmetologist to testify that

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District Attorney Tisdale at the YMCA—we used to see each other there in later years—he told me that he toyed with the idea of writing a novel—a fictionalized version about the case—but with Terry Thomas being the real killer; The jail records were wrong. If the jail records did incorrectly show a release date after 8/10/84, then Thomas was accidentally saved from a wrongful conviction and would have likely been convicted and perhaps executed. When Gordon and I interviewed Thomas in 1985, he came across as being seriously mentally ill and he told us that “the Mafia killed that lady.”

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it would have taken several hours to convert Darryl's hair from corn rows to a jeri-curl, to no avail. Nor did it matter that Weaver initially told police he saw nothing, that he told the District Attorney in the Fall of 1984 that he "did not think he could identify anybody," or that he picked Hunt from a lineup ten months after the crime, after his photograph appeared in the local papers and on television news dozens of times.

Little weight was also given to problems with the identification of Darryl Hunt by the young black man, Kevey Coleman, who was walking home from work on the morning of the crime and initially told police that he was unable to make any identification whatsoever because he was not wearing his contacts.<sup>38</sup> However, after the police threatened him with being charged with the murder and took his photograph and fingerprints, he made the identification of Hunt.<sup>39</sup>

I was twenty-nine-years old and four years out of law school when I was appointed by the court, along with Gordon W. Jenkins,<sup>40</sup> one of the partners in the small law firm that employed me, to represent Darryl. Neither of us had represented anyone in a murder case as of 1984, much less a death penalty case.<sup>41</sup> I was terrified. I saw a lot of another Forsyth County capital trial earlier in 1984, that of Lloyd Gambrell, also a black man charged with killing a white person. My wife Pam, who was a law school classmate of mine, was assisting Mr. Gambrell's attorney, David Hough. Hough was court-appointed to represent Gambrell, and Pam was his young associate. I remember Superior Court Judge Thomas Seay chastising David for having another attorney helping him, especially a woman. "I'm not paying for *that girl*," Judge Seay told him, referring to the fact

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<sup>38</sup> See SARC REPORT, *supra* note 2, at 58–59.

<sup>39</sup> See *id.* at 26–28, 58–61. Kevey Coleman did not come forward as a witness before the first trial and only testified at the second trial. In 1993, all of his thirteen statements to the police were finally given to the defense. Only five of his statements had been disclosed prior to the 1990 trial. None of the thirteen statements recorded that he initially identified Willard Brown as a perpetrator, and that fact was not made public until 2007, after the City completed an investigation. See *id.*

<sup>40</sup> Gordon Jenkins continued working on the case until a new trial was ordered by the Supreme Court in 1989. James E. Ferguson II and Adam Stein became involved as appellate counsel in 1985, and represented Darryl in the first appeal of the Sykes case and in the retrial of the Sykes case in 1990. Assistant Appellate Defender Ben Dowling-Sendor became involved in 1992 and continued until 2004. Ferguson was my co-counsel in state and federal court from 1993 until 2004.

<sup>41</sup> By today's standards, neither of us would have been qualified to represent a capital defendant as lead counsel. See OFFICE OF INDIGENT DEF. SERVS., RULES FOR PROVIDING LEGAL REPRESENTATION IN CAPITAL CASES, *available at* <http://www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%202.pdf> (last amended May 20, 2011).

that he, the judge, would set whatever attorney fee was to be paid by the State.<sup>42</sup> One day during that trial, as the jury was deliberating whether to sentence him to life or death, a white bailiff came over to Mr. Gambrell, taunted him, acted out a lethal injection in his own arm, and walked away laughing.

In my first four years of practice, I heard the word “nigger” used frequently by court officials, from judges to prosecutors to officers, in the back halls of the Forsyth County courthouse. I saw prosecutors remove blacks from criminal juries on a regular basis. I had no hope that Darryl would have a fair trial, free of racial bias, in Forsyth County. Ironically, I watched the film *To Kill a Mockingbird* on television the Sunday before the 1985 trial started. I was inspired by the courage of Atticus Finch, but the film also fanned the flames of my fears.

During the first ten months of representing Darryl, I felt that the best we could do was save Darryl from the death chamber. We became convinced of Darryl’s innocence almost immediately, and then the pressure mounted. We believed in his innocence because he answered all questions without hesitation, was specific about where he was at the time of the crime—on the other side of town sleeping at the McKee’s house—was willing for us to do any type of scientific testing to prove his innocence, had a soft-spoken, gentle manner and exhibited no anger. There is no greater burden on a criminal defense lawyer than representing an innocent client, especially in a highly publicized, racially charged case that could end in the client’s execution.

The tension for us and our families was exacerbated by the fact that we were white lawyers in a segregated town representing a black kid charged with the worst of crimes: the rape and murder of a beautiful young white woman. On a daily basis, people asked us, “How can you represent that man?” or, “How can you say race is a factor—I mean, a black man did it, right?” I still hear stories from my children about comments made by their friends’ parents as the years progressed.<sup>43</sup>

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<sup>42</sup> Now, an indigent defendant facing the death penalty in North Carolina has the right to two qualified attorneys. N.C. GEN. STAT. § 7A-450 (2011).

<sup>43</sup> A few years ago, I reread *To Kill a Mockingbird*, and felt somewhat better about putting my children through all the years of criticism because of my representation of Darryl. Early in the case, after Scout and Jem were hearing criticism of their father for defending Tom Robinson, Scout asked Atticus why he was defending “a Negro.” HARPER LEE, *TO KILL A MOCKINGBIRD* 82–83 (1960). Atticus told his children that:

[I]f I didn’t I couldn’t hold up my head in town, I couldn’t represent this county in the legislature, I couldn’t even tell you or Jem not to do something again. . . . Because I could

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While a teenager, Darryl played pickup basketball at a recreation center with Larry Little, the city councilman (called “alderman” at the time) from the district. Little founded the local chapter of the Black Panther Party in the 1970s.<sup>44</sup> I remembered reading about him in my high school years, and being afraid of the Panthers due to the negative media coverage. By the early 1980s, Larry was in politics. Larry felt like he knew Darryl and doubted the truth of the charges. He conducted his own investigation, spoke to police officers he knew, and went to see Darryl. Shortly after we were appointed in the case, Larry called and wanted to meet with us because he believed Darryl was innocent. I knew his reputation in the white community. Our law firm was at first hesitant to involve him in the case. It turns out that it was one of the best decisions we made. He formed the Darryl Hunt Defense Committee, which helped raise several thousand dollars to pay for a private investigator and expert witnesses, such as an eyewitness identification expert and a jury selection expert.<sup>45</sup> Larry opened doors for us to interview witnesses in the black community and essentially worked as an unpaid investigator. He interviewed Johnny Gray one day while Gordon and I listened in our investigator’s van to the transmission from a wireless microphone. He found significant impeachment evidence for us about Gray and other witnesses over the years. He helped maintain strong support from the black ministers,<sup>46</sup> their churches and congregations, and generated extensive media coverage over the years. In the end, he brought political pressure to bear that helped lead to Darryl’s freedom.

There was a price to pay, however, by our involvement of Larry Little. White people, especially those in power in the prosecutor’s office and the police department, hated Larry. The case became as much about proving Larry Little wrong as it was about whether Darryl Hunt was guilty. Our work with Larry over the years

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never ask you to mind me again. Scout, simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one’s mine, I guess.

*Id.* at 83.

<sup>44</sup> *Council Member Nelson Malloy and Former Alderman Larry Little to Be Honored for Civil Rights Leadership*, CITY OF WINSTON-SALEM, N.C. (Feb. 13, 2008), <http://www.cityofws.org/Home/Departments/MarketingAndCommunications/NewsArchive/News2008/Articles/CouncilMemberNelsonMalloyAndFormerAldermanLarryLittleToBeHonored>.

<sup>45</sup> *See id.*

<sup>46</sup> Reverend Carlton Eversley, Reverend John Mendez, and Imam Khalid Griggs were the primary ministers who worked throughout the decades with Larry Little and the Darryl Hunt Defense Committee, from 1984 until 2007.

exacerbated the racist resentment against us.

The energy generated by my fears during the first ten months of the case proved useful, as we were at least able to raise enough questions about guilt to save Darryl from the death penalty at the first trial. For Darryl, it was not a victory, but a sentence that this twenty-year-old kid would spend the rest of his life in prison, in facilities full of white guards and inmates who would attempt to kill him for the crime of raping and murdering a white woman.

From 1985 through 1989, there were a city manager investigation and a police department Internal Affairs investigation that gave us fodder for a motion for a new trial, a joint police and SBI re-investigation, and a successful appeal to the North Carolina Supreme Court.<sup>47</sup> District Attorney Tisdale lost his bid for re-election in 1986 because the African-American precincts voted against him by margins greater than ninety percent because of the Hunt case.<sup>48</sup> After the new District Attorney and the State Attorney General declined to be the prosecutors in the new trial granted in 1989, the Administrative Office of the Courts appointed a nearby District Attorney, Dean Bowman, and his chief assistant, Jimmy Yeatts, to be the special prosecutors. Venue for the trial was moved to Catawba County and an all-white jury convicted Darryl again in 1990.

At the second trial, the State again called its main eyewitnesses—the Klansman Murphy, the known criminal Gray, and the hotel clerk Weaver. But this time, the State called an additional eyewitness, a young African-American man, Kevey Coleman, who was walking home from work around the time of the murder and saw two black men with Deborah Sykes. He had not come forward as a witness before the first trial. His name did not even come up until 1986, when a person looking for a reward called the police. Coleman admitted that he was not wearing his contacts on the morning of the crime, and that he did not make an identification of Darryl Hunt and Sammy Mitchell until after the police threatened to charge him with the crime. At the second trial, there were also two other African-American witnesses who claimed to have seen Sammy Mitchell near the crime scene on the morning of the murder. The most significant strategy change for the State at the second trial was that the special prosecutors argued that Darryl

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<sup>47</sup> See *State v. Hunt*, 378 S.E.2d 754 (N.C. 1989).

<sup>48</sup> See Phoebe Zerwick, *Another Look, A New Trial: Investigators Bring Back Old Witnesses, Gain Some New Ones; Police Get a Break on an Earlier Killing*, WINSTON-SALEM JOURNAL (Nov. 20, 2007), <http://darrylhunt.journalnow.com/stories/partfive/story.html>.

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raped Deborah Sykes but he committed the crime with Sammy Mitchell and Johnny Gray. The all-white jury quickly bought the State's case and again convicted Darryl of first degree murder. Mitchell was charged but never tried. Gray was never charged.

As soon as the 1990 trial ended, our private investigator, Richard McGough, and I met and decided to continue working to solve the crime and free Darryl. We knew that something had gone terribly wrong. Our three main witnesses—Lisa McBride, Willis Reynolds, and Al Kelly—who would have testified that Gray alone killed Deborah Sykes did not appear for trial. We suspected the reason was because they had been threatened or intimidated by the police. The more we investigated, the more our fears were confirmed. These three people confirmed to us that the police had scared them away from the 1990 trial. Our new appellate attorney, Assistant Appellate Defender Ben Dowling-Sendor, filed a motion for a new trial based upon affidavits we obtained about witness intimidation. The Supreme Court ordered a hearing and Superior Court Judge Pat Morgan was assigned the case. During the hearings in June 1993, Ben obtained an order from the Supreme Court requiring Judge Morgan to review the SBI report and police reports that had not been given to the defense. The judge released nearly three thousand pages of reports that were exculpatory and should have been given to the defense before the 1990 trial.

In August 1994, just over a year after Pam died, Judge Morgan ruled that the nearly three thousand pages of previously concealed police and SBI reports made no material difference in the case and denied a new trial. To me, this was shocking because the evidence hidden from the defense team included everything from significant impeachment evidence of each of the State's eyewitnesses to new evidence of third party guilt. I left that hearing, distraught, and I drove to Ocean Isle Beach, on the North Carolina coast, to join my two daughters who were vacationing with Pam's parents and family.

That night, I sat among the dark dunes on the beach, listened to the sounds of the waves, and watched the passersby. A little boy came along, carrying a large flashlight, shining the light in many directions. He ran to see a crab here, a shell there. I wondered, as I sat, if he saw me sitting there in the dark, watching him. I realized this was a metaphor for my work and my life. I only saw what appeared in the tunnel of light before me. Sometimes, it was the light I shone myself. Other times, it was a light shone by others, perhaps even as a distraction. I thought that these three thousand

pages of new discovery in Darryl's case were a deflection. The truth lay elsewhere. Evidence was hidden.

The evidence that lay hidden in the darkness was much worse than my conspiratorial mind could concoct. Not only were the police aware, *by 1986*, that Willard Brown was identified by Regina Lane as the man who raped her in February 1985, but also that Brown was a blood type O—the same as the Sykes' rapist—and that Kevey Coleman had identified Brown to the police as a man with Sykes just before her murder. And, in 1993, we found out that another one of the things that lay hidden was that a new type of DNA testing was possible—Polymerase Chain Reaction (“PCR”) analysis—and that the special prosecutor was aware of this *in 1989*.

In July 1993, we discovered through the documents that Judge Morgan released to us that a new type of DNA testing was possible. PCR was a method invented by Dr. Kary Mullis, a scientist who grew up in North Carolina. He won the Nobel Prize for inventing PCR.<sup>49</sup> We read in the newspaper in July 1993 that Kirk Bloodsworth was set free from a wrongful rape and murder conviction in Maryland through the use of PCR.<sup>50</sup> From documents released to us by Judge Morgan, we saw that the special prosecutors against Darryl were aware that the PCR methodology was available in 1989. The FBI Lab referred the prosecutors to Dr. Ed Blake in California to conduct PCR testing. The paper trail ended there, with no indication that Dr. Blake was ever contacted. Rather than disclose the possibility of PCR testing, the prosecutors told the defense in 1990 that Cellmark said that the samples were “too degraded” for any DNA testing. This was not true. Rather, there was an insufficient quantity of sample from the rape kit to conduct

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<sup>49</sup> On October 12, 2011, Dr. Mullis and Darryl Hunt met at Wake Forest University where Dr. Mullis was delivering a lecture. John Hinton, *Nobel Winner, DNA Exoneree Meet*, WINSTON-SALEM J., Oct. 13, 2011, <http://www2.journalnow.com/news/2011/oct/13/wsmet01-nobel-winner-dna-exoneree-meet-ar-1493247/>. Darryl was able to thank him for his invention of PCR, a technique which had led to the freedom of scores of DNA exonerees. *Id.* In his lecture, Dr. Mullis described how he “thought up” PCR while driving down the road thinking of something else: “Things happen in a way by accident and then society approves of it. . . . It just came to me while I was thinking of something totally different. . . . It crept up on me.” He stopped his car and wrote it down on a gas receipt in the glove compartment. Kary B. Mullis, Nobel Laureate, *The Story of PCR: How the Polymerase Chain Reaction was Invented*, 2011 Oakley R. Vail Lecture at Wake Forest University (October 12, 2011). He also noted that science, unlike law and religion, “has consistently produced things that benefit us.” Then he pointed out Darryl in the crowd as this guy over here who “got out of jail because of some crazy scientist in California who invented something.” *Id.*

<sup>50</sup> See *Meet the Exonerated: Kirk Bloodsworth*, NORTHWESTERN LAW BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/mdBloodsworthSummary.html> (last visited Mar. 12, 2012).

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Restriction Fragment Length Polymorphism (“RLFP”) DNA testing, but there was a sufficient amount for PCR testing, in which a small amount of genetic material is replicated so that DNA comparisons can be made.

We made a motion to have this PCR analysis conducted on the swabs from the rape kit in the Sykes case. The State fought the testing, arguing that this DNA/PCR analysis is “a highly speculative science,” and that “both sides would be disappointed in the results.” The judge rejected the State’s arguments and ordered the testing in April 1994. In October 1994—just two months after Judge Morgan ruled against Darryl in his two hundred and ten page ruling—DNA testing excluded Darryl as the source of the semen from the rape kit. Sammy Mitchell, Johnny Gray, and Mrs. Sykes’ husband were also excluded by DNA. On November 10, 1994, Judge Morgan ruled, however, that Darryl could have been an accomplice to the underlying felonies of rape, sexual assault, robbery, or kidnapping and that actual penetration, or even ejaculation, would not have been required for a finding of guilty under a theory of felony murder. The judge’s legal reasoning flew in the face of the fact that the rapist did ejaculate, the semen did not match the victim’s husband, and the State’s two other suspects—Sammy Mitchell and Johnny Gray—who were also excluded by DNA. The state and federal courts upheld this ruling between 1994 and 2000. Two governors refused to consider clemency for Darryl, between 2000 and 2003, based upon the DNA that excluded Darryl.

#### VI. THE COINCIDENCES THAT LED TO THE MIRACULOUS 2003 RELEASE

Darryl Hunt spent another decade in prison with everyone knowing that his DNA did not match the semen from the rape kit. But in December 2003 there was finally a DNA match to, and confession by, the real perpetrator, Willard Brown. The State finally relented, giving up on its evolving, single-suspect-to-multiple-suspect theories. On Christmas Eve, 2003, District Attorney Thomas J. Keith agreed to Darryl’s release from prison. That Darryl’s release ever occurred was nothing short of a miracle. Briefly, here are the coincidences, the seeming failures, and the unlikely events that had to occur for Darryl to be released.

A new law was passed in 2001<sup>51</sup> making it possible for inmates to

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<sup>51</sup> N.C. GEN. STAT. § 15A-269 (2011).

request DNA testing in their cases. In 2002, after waiting two years for two governors to act on Darryl's clemency petition, to no avail, we filed a motion under the new law asking for the DNA in the Sykes case to be compared to the DNA in the state and federal DNA databanks. This was a long shot.

In early 2003, *The Winston-Salem Journal* published an editorial suggesting that the District Attorney agree to the DNA testing. This editorial caused the District Attorney to change his position and he eventually agreed to an order requiring the DNA databank testing in April 2003.

The evidence was submitted to the North Carolina SBI Laboratory in May 2003, but the Lab refused to conduct the testing.

Following the order for DNA databank testing, a new editor at *The Winston-Salem Journal*, Les Gura, got approval from the managing editor for a series on the Darryl Hunt case, which had been divisive in Winston-Salem for nearly two decades. Gura was sensitive to cases of wrongful accusation because of a magazine article he wrote a few years earlier in Connecticut about a likely innocent man who was accused of murder.<sup>52</sup> Gura assigned *Journal* writer Phoebe Zerwick to write the series. I met with her on a number of occasions, gave her over twenty thousand pages of reports and transcripts to review, and eventually set up an interview of Darryl.

In November 2003, after a six month investigation, the *Journal* published an eight-part series about the case.<sup>53</sup> This series put the case in a new light for the white community by demonstrating all the unanswered questions about the case.<sup>54</sup> That week, the SBI Lab told me that they were not going to do the testing because it was against their policy to retest evidence that had already been tested by another lab. Judge Cromer was reading Zerwick's series and he was aware of the importance of the case to the city. When I let him know that the SBI was refusing to obey his order, he threatened the SBI with contempt unless they conducted the DNA databank testing. At this point, the SBI complied.

If the SBI Lab had conducted the databank testing when ordered, there would not have been a connection made to Willard Brown. This is because Willard Brown was not in the database at all, and

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<sup>52</sup> Les Gura, *Are You Wrong About James Van de Velde?*, HARTFORD COURANT (Apr. 1, 2001), [http://articles.courant.com/2001-04-01/news/0104010668\\_1\\_lotus-notes-message-james-van-de-velde](http://articles.courant.com/2001-04-01/news/0104010668_1_lotus-notes-message-james-van-de-velde).

<sup>53</sup> See *Murder, Race, Justice*, *supra* note 2.

<sup>54</sup> See *id.*

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his brother, Anthony Brown, who was a so-called “near hit,”<sup>55</sup> was not included in the database until July 2003. When the “near hit” to the brother was found in December 2003, the police were ready to charge Anthony Brown, but to be sure it was his DNA, the SBI took the evidence to the Alabama Crime Lab for a new type of DNA testing, capillary electrophoresis. The Alabama Crime Lab ruled out Anthony as the source, but told police that it could be a relative. This was contrary to what the North Carolina SBI Lab said to the police investigators.

During the *Journal* series, the mother-in-law of Regina Lane—the victim from February 2, 1985 kidnapping and rape who identified Willard Brown as her attacker—called Phoebe Zerwick to tell her about the rape and that she always thought the same person who killed Deborah Sykes raped her daughter-in-law. Zerwick asked police about this, and was told that Willard Brown was in prison on August 10, 1984, the day of the Sykes murder, and could not have been the killer. The police misrepresented Brown’s release date as September 1984 instead of the actual release date in June 1984. Zerwick wrote about the case as a missed opportunity.

When Anthony Brown was excluded by DNA and the police began looking for a possible relative of his to test, they noticed that Willard Brown was listed as the suspect in the February 1985 Regina Lane rape case. This file and that name were available to the new officers assigned to the case because Zerwick asked questions about it while writing her series just a few weeks before. Police rechecked the records and determined that Willard Brown was actually released in June 1984, two months before the Sykes murder.

Police found Willard Brown in the Forsyth County jail just days before his scheduled release. They went to question him, gave him a cigarette to smoke, took the butt to the SBI Lab for DNA testing, and on December 19, 2003, the Lab called and told them Willard Brown’s DNA matched the vaginal swab from the Sykes rape kit. Police confronted Brown and he denied involvement. Per the orders of the police, Brown was placed in administrative segregation at the jail and not even his public defender was allowed to see him.

District Attorney Tom Keith initially reacted to the DNA match of Brown by saying the State had known that more than one person

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<sup>55</sup> A “near-hit” is a misnomer in that it is actually a total exclusion if all of the alleles in the DNA sample from the crime scene sample (in this case the semen on the vaginal swab from the rape kit) do not match the DNA of suspect (the brother of Willard Brown).

was involved since the 1994 DNA testing. This published remark angered us as Darryl's lawyers and supporters, and we called a meeting of the Hunt Defense Committee, this time including white ministers who now were upset because they had read the *Journal's* series. The ministers called a news conference demanding Darryl's release on December 20, 2003. I drove my family to Syracuse, New York for Christmas with my wife's relatives.

On December 22, 2003, while the police were serving Brown with a warrant for the first degree murder and rape of Sykes, he spontaneously confessed, apologizing to Darryl Hunt, Sammy Mitchell, and the Sykes family. He admitted he was the lone killer. He went to the crime scene and showed the police where everything happened. District Attorney Tom Keith called to tell me this, and suggested that I return to North Carolina because he would probably agree to Darryl's release. I left my family and flew back to Winston-Salem.

Incredibly, Brown rejected attempts by the police to get him to say that he acted with Darryl Hunt and Sammy Mitchell. The State even offered him a deal for second degree murder.

On December 23, 2003, we waited for a decision by the District Attorney. Late that night, he called to say he could not agree to the release because of difficulties with further questions to resolve about Brown. I left the church where Larry Little and many of Darryl's supporters had gathered. I was quite angry over the delay.

Early on the morning of Christmas Eve, District Attorney Tom Keith called and said he would agree to the release and that I should delay my flight back to New York. We met at the courthouse with the judge, negotiated an order, and Darryl was released just before noon.

In May 2004, Regina Lane's mother-in-law asked Darryl and me to come see her in the hospital. She was terminally ill. She told us that she almost died from cancer a year earlier and felt that God allowed her to survive another year so that she could make the call to Phoebe Zerwick in November 2003 so that the connection could be made to Willard Brown. She died a week after we spoke with her.

It was incredible that Willard Brown was even alive in December 2003 given his lifestyle of crime, drugs, and drinking. If he had not been alive, his DNA could not have been matched.

Along the way, Darryl could have accepted plea bargains and been released. In 1990, he turned down an offer of "time served," rejecting my advice, the advice of all his attorneys and supporters,

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except for Reverend John Mendez. None of us believed Darryl would get a fair trial in Catawba County. Instead, he endured another trial and another thirteen years of incarceration. In 1993, he turned down an offer to plead guilty to second degree murder, be sentenced to a term of years, and eligible for parole. If Darryl had pled guilty to a crime he did not commit, then the DNA match would never have been completed and Willard Brown would not have been charged, punished, and convicted.

Had it not been for all these unlikely events converging in November and December 2003, it is very unlikely that Darryl Hunt would have been freed. To me, these coincidences added up to a miraculous conclusion. I am thankful that Darryl had the faith to continue fighting and that we maintained our faith in the process of continuing to fight for him.

## VII. DARRYL HUNT AND POSTTRAUMATIC STRESS DISORDER

In my career as a lawyer, I presented the stories of many criminal and civil clients who suffered from Posttraumatic Stress Disorder (“PTSD”),<sup>56</sup> but I never saw the state triggered before me until that evening with Darryl at the Hotel Helix in 2006. I knew that images or sounds associated with the traumatic event could trigger a crisis for someone who suffered trauma, but seeing Darryl that evening brought it all home for me. Darryl, even eight years after his release, tells me about the current effects of his nearly twenty years of imprisonment. He rarely sleeps deeply, a pattern to which he became habituated, out of fear that someone would try to kill him in his cot. Inmates and guards told him of plots by white supremacists and guards to kill him. When he does sleep, he awakens in the middle of the night and sits on the side of his bed waiting for a guard to give him permission to go to the bathroom. When he was first released, he waited for doors to open for him, the way the guards in the booth would press a button to open sets of secure doors between buildings. He is reticent to trust anyone, to confide in people, a habit developed in prison for fear that someone would weave a lie and turn informant.<sup>57</sup>

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<sup>56</sup> See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81 (4th ed. 1994).

<sup>57</sup> This is a justifiable fear for an inmate, even when he actually has no contact with an informant at all. In Darryl's case, Donald Haigy and Jesse Moore, two white inmates who never spoke to Darryl, testified about alleged admissions by Darryl in return for favors by the State. Untruthful informants testified falsely in 15% of the DNA exonerations. See *Informants*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Snitches->

From his trauma, Darryl has, by necessity, developed many skills that help him in the world. For example, he memorizes the faces in a room wherever he goes. Shortly after his release on Christmas Eve 2003, we began to speak at law schools, churches, and other places. During these first few months, Darryl noticed a tall white woman who appeared at every event. In the summer of 2004, Darryl and I were invited to a presentation in Raleigh, sponsored by the North Carolina Chief Justice's Actual Innocence Commission, promoting video recording of police interrogations. That same tall white lady was there, this time wearing an SBI jacket. She and Darryl made eye contact, and this time she spoke to him: "You recognize me don't you?" She explained that she had been assigned to follow him. This was one of those things that we thought might happen, as a way to gather "evidence" against Darryl as he pursued a pardon of innocence from the Governor. But it was Darryl's unique ability to notice and remember faces that led to the verification of this suspicion.

Darryl also has an uncanny ability to feel the tone of an audience, and to speak to what they need to hear. I have seen the adjustments he makes when speaking to such diverse groups as third graders, police officers, legislators, retired people, and—his passion—"homecomers," those who have been released from prison to return to the community. He uses these skills when advising homecomers in the Darryl Hunt Project's mentoring group,<sup>58</sup> when speaking to law students about evaluating claims of innocence, when explaining to legislators about the need for reforms to the criminal justice system, and to me when I'm lost in a case or even a personal crisis.

I was very surprised by the Darryl who came out of prison in 2003. He was still not angry, but had more of a long view of the world. He was not hyper-focused on the people who wrongfully convicted him, as, understandably, are many exonerees. Darryl could see around him—"sideways"—and understand the causes of recidivism as well as the causes of wrongful convictions. He dedicated himself to starting a re-entry program as well as to advocating for criminal justice reform. Since his release, his project has helped hundreds of homecomers, and Darryl and his case have been the inspiration for a number of reforms in North Carolina,

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Informants.php (last visited Mar. 12, 2012).

<sup>58</sup> See THE DARRYL HUNT PROJECT, <http://www.darrylhuntproject.org/> (last visited Mar. 12, 2012).

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including open file discovery,<sup>59</sup> lineup reforms,<sup>60</sup> the creation of the North Carolina Innocence Inquiry Review Commission,<sup>61</sup> and the Racial Justice Act.<sup>62</sup>

The last thing I would ever desire would be for Darryl to repeat his wrongful incarceration so that he could develop his unique skills. But it is incumbent upon us to appreciate the details and causes of his trauma so that we effectively utilize his story and his skills to inspire the eradication of the causes of wrongful convictions and the horrors of incarceration. We should also reflect on and come to an understanding of the effects of traumatic litigation on those of us who fight for the damned, especially for those wrongfully incarcerated or sentenced to be executed by the human system of justice. Prosecutors should also be aware of the dangers inherent in criminal litigation. Hence, I write this reflection.

#### VIII. ANGER AND MY POST LITIGATION STRESS DISORDERS

I was angry for the twenty years of Darryl's incarceration, and this had its effects on me, my family, and my law practice. I did not suffer anything close to the PTSD endured by Darryl Hunt over the years, but I now see the damage inflicted on my mind as an attorney caused by paddling upstream in the quagmire of state and federal post-conviction litigation. I am now getting my head above the choppy waters of my anger, enough to warn others who choose

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<sup>59</sup> N.C. GEN. STAT. §§ 15A-284.50–.53 (2011). “Open discovery” requires complete law enforcement files to be turned over to defense in all felony cases; the legislature was aware that three thousand pages of discovery were not provided in Hunt case and was concerned about numerous exculpatory witnesses not disclosed to the defense in the Alan Gell case. *See Legislative Activity—North Carolina*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/legislative-activity-north-carolina> (last visited Mar. 12, 2012).

<sup>60</sup> N.C. GEN. STAT. §§ 15A-284.50–15A-284.53 (2011). The “Eyewitness Identification Reform Act” requires double-blind, sequential lineups in accordance with latest scientific research about eyewitness identification studies. *Id.* Former North Carolina Chief Justice I. Beverly Lake, Jr. referred to Hunt as “the poster child” for misidentification.

<sup>61</sup> N.C. GEN. STAT. §§ 15A-1460–75 (2011). The “North Carolina Innocence Inquiry Commission” was the first such entity in the U.S. *See About Us*, N.C. INNOCENCE INQUIRY COMMI’N, <http://www.innocencecommission-nc.gov/about.html> (last visited Mar. 12, 2012). C.J. Lake used the fact that Hunt filed a dozen post-conviction motions before obtaining relief in courts as a reason for the legislature to create this commission.

<sup>62</sup> N.C. GEN. STAT. §§ 15A-2010–15A-2012 (2011). The “Racial Justice Act” allows those facing the death penalty or sentenced to death to move to set aside the death penalty in their case if it is shown that race was a significant factor in the decision to seek or impose the death penalty. *Id.* Two of the primary sponsors of the Racial Justice Act were State House Representatives Larry Womble and Earlene Parmon, who were original members of the Darryl Hunt Defense Committee and continued on that committee until Darryl was exonerated in 2004.

to follow this path. Over the decades of responding to the grave injustice of Darryl's wrongful conviction, I became hyper-focused on finding the real killer and winning Darryl's freedom. I developed "tunnel vision" as to other suspects, spending years gathering evidence against them, building strong cases. Had I been a prosecutor, I believe that I could have obtained convictions, but wrongful convictions, against these other men. I now see that while I was building cases, I was also not seeing clearly.

I began to see myself, over these decades, as a Sisyphus-type figure, constantly losing the battles, yet continuing to push the boulder up the mountain. Strangely, the continual losses not only fueled my anger and desire to free Darryl, but also bolstered my Sisyphean self-identity, as one who would always struggle to free Darryl. My ego at times became intertwined with freeing Darryl. There were not many summer vacations that I went on with my family that I did not take a box of files from Darryl's case to read late at night or early in the morning. In a sense, Darryl went on twenty years of family vacations with me, even though he was in prison. I also believe that I transferred my grief over not having "saved" my wife from cancer into "saving" Darryl. Hence, I was, much more emotional when I reacted to our repeated losses in court.

I must have projected this self-image to others. Some of my fellow criminal defense lawyers told me, after Darryl was released, that they thought I was "crazy" for being so obsessed with the case and of suffering from "Darryl Hunt Syndrome." The day after the Supreme Court of the United States denied review of Darryl's case, in October 2000, an older defense lawyer advised, "Alright, Don Quixote, you've done all you can. It's time to move on." An assistant district attorney once yelled at me that I had a "conspiracy fetish" because I did not trust that he was turning over all the exculpatory witness statements to me in a murder case. In that instance, I was right, as the evidence in court showed that he withheld a witness statement verifying my client's claim of self-defense.

To be clear, my anger over the injustices in Darryl's case was well-founded, as shown by the following.

#### *A. Racism*

The case was full of racism, as shown by the use of a Klansman as a main eyewitness, the investigative principle that all black men in Winston-Salem were suspects, the disparate treatment of black and white witnesses, the use of a white prison informant (who

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frequently used the word “nigger” in correspondence to the prosecutors and described a white teacher in the prison as “the white rose,” Klan jargon for a beautiful white woman), and the exclusion of blacks from the juries.

### *B. False Search Warrant Affidavit*

In September 1984, Detective Daulton made up a false scenario, claiming that “a citizen informant” who “is a long-time member of this community, is gainfully employed, and has no criminal record” came forward “as a matter of civic duty . . . but fears for his safety if his identity becomes known at this time.”<sup>63</sup> He said that the citizen was “not a paid informant and has not . . . ever given false information to any officer.”<sup>64</sup>

This citizen told me that at approximately 6:25 a.m. on August 10, 1984, he saw Ms. Sykes in the area where she was killed, and that he saw Darrell [sic] Eugene Hunt holding Ms. Sykes around the head and neck in an assaultive manner. This citizen has identified Hunt from a lineup as being the person he saw on August 10, 1984. He described Hunt as being dressed on August 10, 1984 in dark pants and a black shirt with a spider design on it.<sup>65</sup>

All of this was false. Detective Daulton later told me that this “citizen” was a composite of four witnesses (Murphy, Gray, Hooper, and Crawford). Rewards were paid or offered to three of them and three had criminal records. Murphy and Gray had each incorrectly identified the suspect as people who had ironclad alibis (either in jail or at work). William Hooper identified no one from photos or a lineup, and, at the second trial, said that the two individuals with Sykes were not Hunt or Mitchell. And, Darryl did not buy the “black shirt with the spider design” until more than ten days after the crime. This search warrant was a sign of the tangled web forming around Darryl’s prosecution.

### *C. Cover-up of Other Brown Crimes*

As we now know from the 2004 to 2007 city committee reviewing the case—the Sykes Administrative Review Committee (“SARC”)—the police covered up evidence that Willard Brown raped other

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<sup>63</sup> SARC REPORT, *supra* note 2, at 40.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

women in 1984–85. Within five days of the Sykes rape and murder, the police ordered the destruction of the physical evidence from another rape committed by Brown in the same location two months earlier.<sup>66</sup> The police went to great lengths to cover-up Regina Lane's identification of Willard Brown as her attacker on February 2, 1985, and became upset with her when she asked whether the man who raped her could also have killed Mrs. Sykes.<sup>67</sup> I did not learn until March, 2012, that someone anonymously called the police department's Crimestopper number to report their belief that Willard Brown was the Sykes and Lane attacker, and that was the reason a photo of Brown was shown to Ms. Lane in May, 1985, before the first Hunt trial.<sup>68</sup>

#### *D. D.A. Willingness to Seek Death in Weak Case*

In a February 6, 1985 letter to the police chief, District Attorney Tisdale wrote about his concerns about the case, stating, “[c]ontrary to what has been expressed publicly, we do not have a solid prosecution of any kind.”<sup>69</sup> Three months later, he was asking a jury to impose the death penalty in a case with that very evidence.

#### *E. Police Awareness that Brown's Blood Type Matched Sykes' Attacker*

The police were aware, in 1986, that Brown was a blood type O and, along with his identification as the February 1985 rapist identified by Regina Lane, the police and State had sufficient evidence to obtain a search warrant for DNA testing of Brown at any time between the late 1980s and 2003, when the SBI Lab was finally forced to conduct testing under threat of contempt.

#### *F. Cover-Up Regarding 1986 Identification of Brown as Sykes Attacker by Coleman*

The SARC Report also revealed publicly that when Kevey Coleman was first identified as a witness to the Sykes murder in May 1986, he identified a photo of Willard Brown “as looking most like one of the suspects he saw with Sykes on the morning of August

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<sup>66</sup> *Id.* at 48.

<sup>67</sup> *Id.* at 6, 18–21.

<sup>68</sup> Comments by Retired Srgt. Chuck Byrom, who assisted the SARC in reviewing the Sykes murder case, to my Wake Forest Innocence & Justice class, Mar. 7, 2012.

<sup>69</sup> Letter from Donald K. Tisdale to Chief J.E. Masten (Feb. 6, 1985) (on file with author).

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10, 1984. According to Coleman, the 1986 investigators told him that Brown was in jail at the time so Brown could not be the attacker.<sup>70</sup> Coleman was so certain of his identification that “he got into a verbal altercation with SBI investigators.”<sup>71</sup> The City Manager found Coleman very credible and was critical of the police and SBI investigators for making no notes about showing Brown’s photo to Coleman during this first interview.<sup>72</sup>

### *G. Misrepresentations Regarding DNA/PCR testing*

The FBI told the police and prosecutors in 1989 that PCR could possibly have solved the case, yet the special prosecutor chose not to test with PCR and continued to misrepresent the possibility of further DNA testing to the defense attorneys before the 1990 trial.

### *H. The State’s Evolving Theories of Guilt*

The State was willing to continue to evolve new theories of Darryl’s guilt to suit the ever-changing evidence, from the one-suspect theory at the 1985 trial, to the three-suspect theory at the 1990 trial, and, in response to exonerating DNA evidence, to the three-or-more suspect theory from 1994 until 2003.

### *I. Willingness of the Courts to Buy The State’s Evolving Justifications*

Incredibly, the state and federal courts continued to affirm Darryl’s conviction in spite of exonerating DNA evidence. Judge Morgan found that ejaculation was not legally necessary to prove rape, ignoring the fact that the rapist did ejaculate and left his DNA. The North Carolina Supreme Court (a four to three ruling) affirmed Judge Morgan’s ruling without even mentioning or discussing the DNA evidence in the majority’s opinion, as if it were written in advance of the DNA testing.<sup>73</sup> The Fourth Circuit Court

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<sup>70</sup> SARC REPORT, *supra* note 2, at 60.

<sup>71</sup> *Id.*

<sup>72</sup> See generally *id.* at 58–61 (describing the police department’s contacts between 1984 and 2005 with Kevey Coleman).

<sup>73</sup> State v. Hunt, 457 S.E.2d 276 (N.C. 1994). The exonerating DNA would not even have been part of the record without the dissent, written by Justice Frye, the only African-American judge on the Court:

Among the newly discovered evidence in this case is a PCR/DNA report that states: “Darryl Hunt is eliminated as a possible source of the genetic material detected in this sample.” Given the State’s theory that the murder occurred during the perpetration of

of Appeals accused us of belaboring the fact that the DNA cleared Hunt and the State's two other suspects.<sup>74</sup>

*J. Police Fabrication of 1983 Wilson Charges*

In November 1985, the Winston-Salem City Manager issued a scathing report about the Sykes case investigation, criticizing the lead detective in the case for giving "deceptive testimony" and lambasting the police chief and chain of command for ceding the police investigatory function in the case to the district attorney. In other words, the police department was given a black eye by its boss. In response, the police formed a special unit to look for old unsolved cases. They found that an older black man, Arthur Wilson, died outside an illegal drink house in 1983, and they gathered witnesses to say that Darryl Hunt and Sammy Mitchell were responsible and charged both of them with murder in April 1986. The real purpose was public relations, and the message was that if Mitchell and Hunt did not kill Deborah Sykes, then surely they killed Arthur Wilson, a man from "their" section of town. As it turns out, the man the State claimed was murdered in 1983, Arthur Wilson, was likely not murdered but died from hitting his head when he fell in the street because he was intoxicated.<sup>75</sup> Mitchell was tried first, with the first trial ending with a hung jury, and the second in a conviction.<sup>76</sup> Darryl was convicted in his first trial, but

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four felonies, including rape, and the fact that defendant's defense was alibi, the PCR/DNA report eliminating defendant as the source of the sperm taken from the victim is powerful evidence tending to weaken the State's entire case and strengthen defendant's defense.

*Id.* at 299–300 (Frye, J., dissenting).

<sup>74</sup> Hunt v. McDade, No. 98-6808, 2000 U.S. App. LEXIS 2849, at \*8 (4th Cir. Feb. 25, 2000).

The new evidence is simply not sufficiently exculpatory to warrant a new trial. Indeed, as the magistrate judge explained, the DNA results do nothing to discount a number of other possible scenarios reasonably implicating Hunt in the sexual assault: Hunt's sperm might have been present on a different, untested sample; Hunt raped Mrs. Sykes but did not ejaculate; or Hunt sodomized Mrs. Sykes. Moreover, the DNA results do not exonerate Hunt from committing the murder, from committing the other underlying crimes of kidnapping or robbery, or from aiding and abetting any of these crimes, including the sexual assault.

In an attempt to deflect attention from these inevitable conclusions, however, Hunt belabors the fact that the DNA testing failed to match any of the state's three primary suspects—himself, Mitchell, and Johnny Gray—to the sperm found in one of the fluid samples taken [sic] from Mrs. Sykes' body.

*Id.*

<sup>75</sup> Phoebe Zerwick, *One Crime, Two Verdicts: The Death of Arthur Wilson*, WINSTON-SALEM J., June 14, 2004.

<sup>76</sup> See State v. Mitchell, 364 S.E.2d 664, 664 (N.C. 1988) (denying petition for discretionary

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acquitted at a second trial.<sup>77</sup>

Anger, well-founded in the short run, may not be the best reaction in the long run. Just as my anger and fear over Pam's cancer made me hyper-focus on a cure instead of on healing, my anger over the conspiracies and callousness in Darryl's case caused me to be blinded to some of what I should have seen. I had been given many signs along the way to broaden my view, but I trudged on, righteously, passionately.

I should have taken my own advice to Darryl. I thought, as the attorney on the outside, that I had the freedom to be angry, to lash out at the police, the prosecutors, and the courts. I thought that Darryl, as the client, the prisoner who would be locked down, put in "the hole," if he showed anger, was the one who had the obligation to be calm, quiet, and silent. When Judge Morgan ruled against Darryl on November 10, 1994, saying that the DNA did not matter, I became angry. I wrote to Darryl, telling him of my anger, but advising him to be patient:

I think I broke my hand when I slammed it on the courthouse door as I left after my brief statement to the press. So, it will probably be a long time before I stop feeling this way. I went to the YMCA and ran one mile for each year of this case in the wind and rain. We will not give up, we will be successful, you will be released. As long as you are shackled, so are we. Remember what Moses said to Israel before the Red Sea was parted, "The Lord, Himself, will fight for you. You have only to keep still." *Exodus 14:14*.<sup>78</sup>

I could not imagine a more lonely ride than the one when they took Darryl back to prison on November 10, 1994, after Judge Morgan ruled against him, even though DNA evidence cleared him. Darryl was very depressed but he maintained his calmness and began to see a bigger picture. He wrote to me about what happened as soon as he returned to prison. A young African-American inmate from Winston-Salem came up to him and said, "I'm glad you're back." At first, Darryl thought this was "some kind of sick joke." Then he learned that the kid's mother had just died and he was going to commit suicide by prison guard by trying to jump the fence. Darryl was able to talk to him and calm him down. Darryl told me

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review).

<sup>77</sup> See *State v. Hunt*, 372 S.E.2d 744, 746 (N.C. Ct. App. 1988) (ordering a new trial for the defendant due to a faulty jury instruction).

<sup>78</sup> Letter from Mark Rabil to Darryl Hunt (Nov. 10, 1994) (on file with author).

that this answered the question of why Judge Morgan ruled against him: by losing, he returned to prison and saved the kid's life.

I felt that I, on the outside and as the attorney, had the freedom to be angry, and that Darryl, in the inside and as the client, did not. Darryl had already learned, as soon as he entered prison in 1985, that anger would destroy him from within. So he read voraciously, wrote his journals, and converted to Islam. He prayed five times a day. I, on the other hand, not only read, wrote in my journals, prayed, and studied Eastern religions and philosophies, but I also filed motions and briefs, made angry statements to the media, and let my anger drive me to find the "real killer." I should have taken my own advice, about being still, at least some of the time. Anger causes blindness. It drove me to expend a lot of energy on Darryl's case, but in the wrong direction at times, and, at the expense of my family.

Literally, when one is in a state of rage or anger, a form of fear, he goes into the "fight, flight, or freeze" automatic response: the heart rate increases, blood pressure rises.<sup>79</sup> At a heart rate over 175 there is, literally, a tunneling of vision.<sup>80</sup> One becomes intensely focused on the object generating fear, such as the rattlesnake on the path or the man you think is pointing at a gun at you.<sup>81</sup> This is a product of evolutionary biology.<sup>82</sup>

Tunneling of vision also occurs when one is hyper-focused on something even when in a calm state of mind. For example, as shown by the famous experiment designed by Professor Dan Simons, we miss the person in a gorilla costume who walks into the middle of the room while we count the number of passes of the basketball the students in the white shirts make to each other.<sup>83</sup> "Inattentive blindness" occurs to almost all of us on a daily basis, such as when we do not see a motorcycle approaching when we expect to see a car.<sup>84</sup> I believe that we as attorneys, and as humans in modern society, must learn to be mindful, to slow down and

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<sup>79</sup> See generally DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 297–300, app. C (1995) (describing the neurophysical reaction that occurs in a person's body when he or she is afraid). See also THE FOURTEENTH DALAI LAMA & HOWARD C. CUTLER, THE ART OF HAPPINESS IN A TROUBLED WORLD 55–58 (2009).

<sup>80</sup> See MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 224–29 (2005).

<sup>81</sup> GOLEMAN, *supra* note 79, at 298, app. C.

<sup>82</sup> *Id.* at 4–8.

<sup>83</sup> See CHRISTOPHER CHABRIS & DANIEL SIMONS, THE INVISIBLE GORILLA: AND OTHER WAYS OUR INTUITIONS DECEIVE US 5–8 (2010).

<sup>84</sup> *Id.* at 14–18.

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nonjudgmentally pay attention to things other than the objects of our desire, or of our anger. We must not hyper-focus on winning, or we run the risk of not seeing the facts, the actual “what happened,” just beyond the corner of our vision.<sup>85</sup>

One thing we must do is transform the energy of our anger into something productive. I tried to do this along the journey of this case by trying to solve the crime, to prove who the real culprit was. Unfortunately, I became over-focused on that goal. By becoming so engrossed in solving the crime, in finding a “better” suspect than Darryl Hunt, I missed evidence that I should have seen as to Willard Brown, the real killer. And, I built cases against three other men to try to show their guilt.

### IX. MISSED LEADS ABOUT WILLARD BROWN

We did everything we could have done in 1985 to try to gather information about the February 2, 1985 rape of Regina Lane, a crime also committed by Willard Brown. We now know that the police department intentionally covered up this information, not only from the defense, but also probably from the prosecution.<sup>86</sup> The prosecutors are not excused from their obligation to request the exculpatory information from the police, under Supreme Court case law.<sup>87</sup> That is, as soon as we requested the reports about the February 2, 1985 rape, the prosecutors should have asked the police to provide the information to them so that they could exercise their obligation to review the evidence in order to decide whether to disclose it to us.<sup>88</sup> The police and the prosecutors ignored their obligations.

As soon as I read about this February 2, 1985 rape in an article published the next day, I realized it was relevant to the Sykes case: it was another early morning sexual assault, a few blocks away from the Sykes murder, with a black male assailant and a white

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<sup>85</sup> See generally Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006) (discussing the problem of tunnel vision, cognitive bias, and proposed remedies).

<sup>86</sup> See generally SARC REPORT, *supra* note 2, at 18–22 (describing the victim’s account, the case’s evidence, and the police department’s investigation).

<sup>87</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); see also N.C. RULES OF PROF’L CONDUCT R. 3.8(d) (2011).

<sup>88</sup> Even if District Attorney Tisdale attempted to exercise his obligation to find out about the evidence of guilt of others by the two lengthy letters he wrote to the police chief in October 1984 and February 1985, it is not clear how the police responded to Tisdale. Detective Daulton testified at the 1985 trial that he destroyed the equivalent of a fifty gallon drum of notes. SARC REPORT, *supra* note 2, at 78.

female victim. Between February and May 1985, we spent many hours trying to solve that case. The problem was that the police did not charge Brown for that crime, even though the victim identified him from a photo lineup in May 1985 and later from an in-person lineup in April 1986.<sup>89</sup> The detectives became angry with Ms. Lane when she asked them whether the man who raped her could also have been the Sykes killer. They told her that they had the man from the Sykes case—Darryl Hunt—in custody and that asking such questions would only jeopardize their case.<sup>90</sup>

Larry Little, who was an alderman at the time, tried to get a copy of the police report, but it had been switched to a nonpublic file as soon as the brief summary appeared in the paper. When our investigator, Charles Poteat, tried to find out the victim's identity from her employer—she was kidnapped from the entryway to the Integon Insurance building—they told him that the police had instructed them not to talk about it. When we as the defense attorneys asked for documentation from the District Attorney, we were turned down and the court—in keeping with prevailing practice at the time—would not order them to turn over the information.<sup>91</sup>

I do not believe that there was more that we could have done before the first trial as to investigating the Regina Lane rape. Later, however, we should have asked for all investigative files on that case during the 1993 hearings before Judge Morgan. Part of the cover-up, we now know, was that the police department carefully avoided cross-referencing the Sykes and Lane cases, even though the same officers were working on both cases.<sup>92</sup> There is no

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<sup>89</sup> *Id.* at 20–21.

<sup>90</sup> See *The Regina Interview*, a supplement to the DVD set for *The Trials of Darryl Hunt*. See THE TRIALS OF DARRYL HUNT, *supra* note 1. I also base this on my own discussions with Regina Lane and her family since 2004.

<sup>91</sup> Without question, once we made the request, the prosecutors were required to ask the police department to produce the files to them so that they could review the documents and determine whether they were exculpatory. See *Brady*, 373 U.S. at 87; *Kyles*, 514 U.S. 419 at 435. The problem was that during the 1980s and even into the 2000s, the requirement to find and reveal exculpatory evidence was honored by the courts and prosecutors more in the breach than in the observance. The City Manager was very critical of the Winston-Salem Police Department in his 1985 Report for ceding control of the Sykes case investigation to the District Attorney. Thus, the obligation of the 1984–85 prosecutors was even higher because they were directing the continuing investigation from September 1984 and throughout the trial that ended in June 1985. Because of the Hunt case, and the exoneration and acquittal of Alan Gell, also in 2004, we now have “open file” discovery in all felony cases in North Carolina; thus, rather than delegate the determination of “exculpatory” to prosecutors, the “complete files” of law enforcement agencies must be provided to the defense. N.C. GEN. STAT. § 15A-903(a) (2011).

<sup>92</sup> In 2007, the City Manager concluded,

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explanation for this, other than to conclude that the lack of cross-referencing was done to prevent us from finding out about Willard Brown. If we had specifically asked for the Integon police files in 1993,<sup>93</sup> and if the police had complied with a court order to produce, then we would have seen that Ms. Lane identified Brown and that he was a type O (secretor), and DNA testing could have been sought any time between 1993 and 2003. I believe that I was so focused on the procedural aspects of dealing with the quagmire of the post-conviction process, and trying to build cases against my other suspects, that I forgot to pursue this evidence. Strangely, I also “trusted” that, if the police had evidence against a man for rape, as they had against Brown in the Integon case in 1985–86, then they would have charged him. I never suspected a decision to not charge someone to prevent weakening the case against Darryl Hunt.

#### X. MY OWN “PROSECUTORIAL” TUNNEL VISION AGAINST OTHER SUSPECTS

It was not difficult for prosecutors to convict Darryl Hunt twice of the murder of Mrs. Sykes, even with no physical evidence against him, and with severely impeached witnesses. The appellate courts signed off on those convictions without serious critical thought.<sup>94</sup> The ease with which cases can be built, even against innocent men,

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The official police reports for both the Sykes and Regina K. cases appear to have been written in a manner that disconnects the cases. Only by reading the case files together can the reader discover the relevance of Willard Brown to both cases. Yet, Detective Crump and other police personnel were actively working both cases simultaneously. SARC REPORT, *supra* note 2, at 93.

<sup>93</sup> At one point during the 1993 hearings, Judge Morgan asked the defense attorneys to meet with him *ex parte*, in chambers, to tell him our theories about other suspects and evidence of innocence that he should be looking for when he conducted his *in camera* review of the police and SBI reports. We did not specifically discuss the February 1985 Integon rape case with him. Apparently, when Brown was identified by DNA in December 2003, Judge Morgan became upset that the evidence had not been disclosed to him previously. He obtained a special commission from the Supreme Court to again review the sealed reports. This time, he only found one report dealing with an interview of Willard Brown, and that report made no references to the February 1985 rape, the identification of Brown by Regina Lane by photo and in-person lineup, or the 1986 blood type testing that showed Brown was a type O (secretor) and that that testing was done pursuant to a search warrant since “destroyed” in the “normal course of business.” Judge Morgan released that report. In January 2004, after Brown confessed, District Attorney Tom Keith gave me a copy of the Integon report, which was more than one hundred pages and was full of exculpatory information, and which had not been provided to Judge Morgan for his review in 1993–94.

<sup>94</sup> See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 202 (2011) (citations omitted). Garrett notes that in ten percent of the DNA exoneration cases that he reviewed, the appellate courts described the evidence against the (later proven innocent) defendant as “overwhelming.” *Id.*

scares me now. I saw this from my own experience, as I worked, over the decades on Darryl's case, to find the real killer. I felt this was the only way we would ever extricate Darryl. Unfortunately, I became overly focused as I pursued other men as the culprit. I spent years investigating and building cases against several other men. I thought the evidence against these other men was so strong that I believe that, if I had been a prosecutor, I could have gotten convictions against three men other than Brown for the murder of Deborah Sykes. That is, prior to the DNA match to and confession by Willard Brown, I believe I could have obtained convictions, but wrongful convictions. Two of those men are dead and one, even with his mental disabilities, lives freely in the community.

I developed cases against Darrell Murphy, Charles "Too Tall" Wall, and Johnny Gray. Even now, because of my years of focusing on other suspects, I have difficulty believing that Wall or Gray was not somehow involved in the murder of Deborah Sykes along with Willard Brown. I have come full circle, and sound like the prosecutors of Darryl Hunt throughout the decades, creating theories to defend beliefs no longer supported by the evidence. This is just how our brains seem to operate, to construct narratives to explain, remember, and warn of danger, then to have mechanisms in place to not forget or to not let go easily.<sup>95</sup> The main remedy is awareness of the tendency.

#### XI. THE CASE AGAINST DARRELL MURPHY (AUGUST 1995 TO SEPTEMBER 1998)

I investigated a case against Darrell Murphy from 1995 through 1998. It began on August 24, 1995 just after 5 p.m. The phone rang at my office. Normally I would not have picked up. "I'm trying to find Darryl Hunt's lawyer," a woman's voice said. The person would not give me her name and would only identify herself as "AC." She said, "The person who killed Deborah Sykes used to work at the *Journal* and committed suicide. He had done something real bad, and he was very bad. Darrell Murphy is his name." She said that Murphy was about five feet eleven inches tall, had hazel eyes, "was

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<sup>95</sup> See Mark Rabil, *Panzer Mind, False Statements: How the Sheriff Got Two Men to Say Beetle Borings Were Gunshot Wounds*, TRIAL BRIEFS 23, 23, 25–26 (Oct. 2011). This article discusses a 1993 murder case in which the detectives refused to give up their theory that the defendant shot and killed his cousin, even after the medical examiners told them that the apparent gunshot wounds were beetle borings and that the cause of death was alcohol intoxication. *Id.*

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a little darker than Sammy Mitchell and was about Mitchell's size. Murphy did drugs and drank. If you got him wound up, he could be mean. He also messed around with homosexuals and a couple of white girls." Then, she added, "He had a fixation on Deborah Sykes."

Over the next three years, Richard McGough and I continued to investigate the case against Darrell Murphy. The police and medical examiner reports showed that he died from a shotgun wound to the head through the mouth. There was no suicide note. The gun was not checked for prints. My mind created scenarios. Did Johnny Gray and Murphy commit the crime together? Did Gray kill Murphy to keep him quiet? Was Murphy feeling guilty, given that he killed himself on the night of October 31, 1984, the date of Darryl Hunt's preliminary hearing?

Murphy had a criminal record for robbery and assault. His ex-girlfriend and best friend told me that he could be violent to women. His best friend told me differing stories over the three years, but basically confirmed my suspicions that Murphy could have been the killer. It seemed that it was the best friend's wife who made the anonymous call to me about Murphy.

The only way to know for sure if Murphy was guilty was to conduct DNA testing. To avoid having to exhume the body, we searched for a long time and Larry Little finally found one of Murphy's sons. When I spoke with him, even he confirmed my suspicions by telling me that he and his mother could not rule out the possibility that Murphy was the killer. So the son agreed to DNA testing. In September 1998, Labcorp tested the son and ruled out his father (Murphy) as the source of the semen from the rape kit.

If Murphy had still been alive and DNA was not possible, I feel certain that an old-school prosecutor could have put pressure on Murphy's friend, find old pending charges and offer a deal, or threaten to charge him as an accomplice, or threaten the death penalty and then "encourage" him to "remember" confessions or admissions by Murphy. This is what District Attorney Tisdale tried to do when he had Darryl brought to his office in September 1984 by offering him freedom and no death penalty if Darryl would "say that Sam did it."

## XII. THE CASE AGAINST "TOO TALL" WALL (1984 TO 1995)

My investigation of a case against Darrell Murphy was short-

lived—only three years. My struggle to prove that Charles “Too Tall” Wall was involved in the murder lasted much longer—eleven years, from 1984 through 1995. I first noticed Too Tall downtown about the time I started practicing law in September 1980. He was an unmistakable black man in his mid-thirties, about six and a half feet tall. He always wore a big floppy hat. I still remember seeing him lumbering through the streets downtown, walking and talking as he looked ahead for a few steps, and then turning and talking to no one behind him as he continued to walk forward. To me, he seemed “crazy.” At first, I found it hard to consider Wall a suspect because he always wore that floppy hat, and none of the witnesses described someone with a large and distinguishable floppy hat.

Within a few weeks after I was appointed to the case, I had a phone call from a private investigator, Charles “Slick” Poteat. Slick told me that he already had evidence that Too Tall was probably the killer. Then, within a couple of months, Tom Seig, a senior columnist at the newspaper, started giving us information clandestinely. He had sources in the police department and in the district attorney’s office. Tom was the person who told us, for example, that eyewitness Thomas Murphy was a former preacher for the Ku Klux Klan. He was also convinced that Too Tall was the real killer based on the information he was receiving.

A major part of our first trial strategy in 1985 was that Too Tall was the killer. Thomas Murphy saw him fifty to one hundred feet away from Deborah Sykes as she was standing there with her attacker just before she died. Wall lived a block away from the murder. Several white women told me that he had followed them in the area where the murder occurred, making lewd comments or indecently exposing himself. He was charged with exposing himself to a woman downtown just the week before this, and was ordered to get mental treatment. He had also threatened another woman in the year before the crime with a knife with a six to eight inch blade. A neighbor of Murphy’s told me that she saw him at a local hospital where he went to see his psychiatrist. Wall told Larry Little that he slept late that day. Wall’s mother told Larry that he was “off his medication” in the summer of 1984. A white couple who lived across the field from the crime scene told me and Slick that they had seen Too Tall leaving the area of the crime just before seven in the morning, hollering about something. The woman told us that she saw blood on Wall’s clothing the afternoon of the murder. A thirteen-year-old boy in the neighborhood also told us that he saw blood on Wall in the afternoon. None of these witnesses, however,

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saw blood on Wall on the morning of the crime.

In the years following the first trial, we discovered a lot of other information that supported a case against Wall. A lot of this information was known by the police but never disclosed until the State was forced to reveal it in discovery years after the first trial. The most dramatic was a 1986 interview of a police officer involved in the Sykes investigation. On the day of the crime, she was called to a disturbance in nearby Hanes Park. The SBI interview of Officer Myers read: "Upon my arrival at Hanes Park, I saw 'Too Tall' in the street, hollering that he had killed the Sykes girl." A lot of other police reports revealed in 1993 supported a case against Wall.

Finally, in February 1995, Richard McGough recruited Imam Khalid Griggs (Darryl's future father-in-law) to help find Wall to get a sample for DNA testing. Richard and Khalid sat in Khalid's car on the side of the road in Happy Hill Gardens, near to where Wall lived with his mother. After just a few minutes, Too Tall came walking down the road smoking a cigarette. Too Tall threw his cigarette butt on the sidewalk, and it landed at Richard's foot. When Wall left, Richard scooped the cigarette butt into a bag and brought it to me. I sent the cigarette butt to Labcorp for DNA testing. In March 1995, the lab called to tell me that the DNA sample from the semen from the rape kit did not match our sample from Charles Wall.

I was disappointed that we cleared Wall. As someone with defense leanings in these cases, I thought Wall would be a "good" person to put this on because he was mentally ill and would not get the death penalty. I forgot that death rows, traditionally, have been occupied by other such men, those who are easy targets because of their mental disabilities or mental retardation—people like Too Tall Wall, Terry Thomas. But DNA testing now demonstrated that he was excluded as the source of the semen from the rape kit. It took DNA to silence me. It was tragic that DNA did not silence the State in their defense of their wrongful conviction of Darryl.

Even now, in 2012, I still wonder whether he was somehow involved in the crime, at least as a witness or as someone who may have tampered with the evidence after Brown left. I think that I still wonder because I spent so many years believing he was involved that neural networks wired together in my brain make it hard for me to presume Wall's innocence, even after DNA testing cleared him in 1995.

When I interviewed Willard Brown, along with the Public

Defender investigator who represented him, in prison on December 18, 2007, Brown stirred my lingering suspicions about Wall, once again. Brown told me that he alone was the one who killed Deborah Sykes. "That's right. I did it alone. I guess you would say, I killed that woman. There is no other way to say it." But he also said he did not move her body to the other side of the fence where it was found. He claimed that he left her in the bushes, where she could not be seen from the road, not in the field where she was found.

Brown also told me that while he had her pinned to the ground near the fence, he heard voices.

At this point, I heard Wall coming up the street. I can hear him talking. How do I know it was him? He stopped on the other side of the bushes just a few feet from us. I looked towards him. I could see his legs, and then I could see his face leaning over looking right at me through the bushes. I could not see his big floppy hat that he always wore. But I saw his face. It was Too Tall Wall. He said something to us. I don't remember what it was. He must have assumed it was just some people out there in the bushes like there always was.

My mind kept filling in the rest, seeing Wall come along after Brown, perhaps assault Mrs. Sykes, move her body. Of course, Brown did not say any of that, and he continued to say he acted alone. None of the eyewitnesses described the floppy hat that seemed to be permanently attached to Wall. No one saw blood on Wall on the morning of August 10, 1984.

I tell this story, about me and my suspicious brain patterns formed over decades of hyper-focusing on this case against Too Tall Wall, as a warning that we should always check our biases, no matter how well formed, and notice our propensities to want to solve a case simply for the sake of winning or for a resolution, or to simply preserve a settled narrative, as we proceed with the serious work of criminal justice.

### XIII. THE CASE AGAINST JOHNNY GRAY

Darrell Murphy and Too Tall Wall did not bring suspicion on themselves in the way that Johnny Gray did. The first words out of Gray's mouth were a lie. In the 911 call at 6:53 a.m. on August 10, 1984, he said his name was "Sammy Mitchell." His real name was Johnny McConnell, but he had a criminal record in that name. Gray, once he heard there was a \$10,000 reward, went to the police

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and falsely identified Terry Thomas as the killer. Thomas had the good fortune to be in jail on August 10, 1984, as shown by jail records. Otherwise, Gray would likely have put Thomas on death row.

I must acknowledge that I have a bias against someone who will lie for money, not even caring when the person he lied about faced the death penalty as a result. In my experience, most jurors are willing to convict a defendant more for lying than for committing the act with which they are charged. But this bias does not justify charging someone with, or accusing someone of, murder.

Gordon Jenkins, Larry Little, Slick Poteat, and I were all convinced, well before the first trial in 1985, that Gray had to have been involved in the murder of Deborah Sykes. It was hard for us to believe that Gray could have been near a crime and not have been part of it. This was his modus operandi. He frequently robbed people. It was consistent with his criminal record. Even the senior partner in our firm, Gaither Jenkins, a former judge, then in his mid-seventies, thought Gray was guilty. He told me of a "vision" he had of Gray throwing the bloody knife in a creek near the crime scene. Slick and I spent the next Saturday wading through Peters Creek and along its banks, searching for a knife for almost a mile, to no avail.

The first trial prosecutor, District Attorney Don Tisdale, believed that Gray was not telling the whole truth. I suspected that he thought Gray must have been involved in the crime. One of his assistants told me that, during trial preparation, Tisdale became so angry with Gray that he threw a chair at him. I know I shared that anger as I cross-examined him at the first trial. As Gray described the actions of the killer it seemed to me at the time that he was explaining to the jury how he killed Deborah Sykes.

After the first trial, we gathered a great deal of evidence about the guilt of Gray. His girlfriend, Lisa McBride, told me that Gray stabbed her in the shoulder with a knife and said, "I'll stab you like I did that Deborah lady!" His two best friends and partners in crime, Al Kelly and Willis Reynolds, told us that Gray admitted to them that he robbed, sexually assaulted, and killed Mrs. Sykes.

After the City Manager criticized the police department for their handling of the Sykes case in late 1985, the City asked the SBI to assist with a re-investigation of the crime. For most of 1986, two seasoned SBI agents and two police department detectives conducted a reinvestigation of the case.

In July 1986, SBI Agent Dan Stone told me and Gordon, "I now

have my doubts about Darryl being guilty. There is a good chance he did not kill Sykes.” Stone also said, “We tried to set Gray up, but he got wind of it.” He told us that the SBI wired Al Kelly so they could get a “confession” from Gray. However, as soon as he walked into Gray’s trailer, Kelly showed the wire to Gray and Lisa McBride. Stone was angry about this:

I wanted to shoot Kelly when it was over. The State had to spend all sorts of resources to set this up. We put Kelly in a hotel room the night before, guarded by SBI agents, so that he could not get drunk. We had agents and police officers waiting all around Gray’s trailer so they could go in and arrest Gray as soon as they got the word. And then Kelly had to go and blow the whole thing. There is no doubt that Gray was there and that he was involved and knows the whole truth.

By the time of the 1990 retrial of Darryl Hunt, the special prosecutors were convinced of Gray’s involvement and argued to the jury that he was involved in the crime. But rather than see Gray as an alternative lone suspect, they incorporated him into their intricate theory of guilt and argued that Hunt, Mitchell, and Gray acted together. Gray was never charged.

Despite the DNA that did not match him, I still have these lingering thoughts that Gray had to be involved. When Brown’s investigator and I visited him in prison in December 2007, we asked him about a statement he previously made to the investigator. At one point, after he was charged, he asked Brown whether Gray was involved in the Sykes murder. Brown responded, “Let the dead be dead.” Gray died of throat cancer in prison in 2001. At the time, he was serving a fifty-three year sentence for the murder of an older man he killed two blocks from the Sykes crime scene in 1986. It’s a long worm that never turns.

#### XIV. FAITH IN THE PROCESS, NOT IN THE SYSTEM

If one begins to have faith in the system, then he or she should probably not practice criminal defense work. Our role, under the Constitution, is to always question the people and the institutions who charge our clients. We, along with everyone else, are to presume the innocence of our client. Whether as prosecutor or defender, our role is to investigate with an open mind and litigate with the intention that we tell the true story, the real set of facts that constitute the “what happened” to the finders of fact. Along

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the way, we must be leery of our own biases, whether conscious or implicit. As to those whom we suspect, follow the principle, “Investigate to exonerate.”<sup>96</sup>

The persistence of everyone who worked on the defense team with me throughout the decades is what led to Darryl’s exoneration. Without our passion, our anger, our sacrifice, Darryl would still be incarcerated. We had faith in Darryl, a truly inspirational and charismatic figure, in each other, and in the process of continuing to trudge along the twenty-year path, full of quagmires, bad signs, poor lighting, and trap doors. Paradoxically, the anger and passion, while counterproductive at times, also put us in a position to free Darryl when all those coincidences converged at the end of 2003.

In our work in the criminal justice system, we should have faith in a mindful process that allows us to continue to look “sideways,” to see the truth of what happened, sometimes hidden in the shadows, to not set our goals and form our stories too soon, and be patient and persistent. These are lofty words and the goals are good. But, specifically, how does one mindfully practice criminal law? Here are my suggestions for an approach.<sup>97</sup>

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<sup>96</sup> Personal discussions with Ron McBride, Int’l Order of Chiefs of Police (2006–08) (containing his personal mantra and advice to police investigators regarding the means of avoiding wrongful convictions).

<sup>97</sup> I base my understanding of mindfulness and meditation practice on teachers of the insight meditation tradition, including Jack Kornfield, Joseph Goldstein, Sharon Salzberg, Donald Rothberg, Phillip Moffitt, and other teachers at Spirit Rock Meditation Center and The Insight Meditation Society. See *Teachers*, SPIRIT ROCK MEDIATION CENTER, <https://www.spiritrock.org/teachers> (last visited Mar. 13, 2012); *About Us*, INSIGHT MEDITATION SOCIETY, [http://www.dharma.org/ims/ai\\_factsfigures.html](http://www.dharma.org/ims/ai_factsfigures.html) (last visited Mar. 13, 2012). I believe that we, as practitioners in the criminal justice system, should engage in “contemplative practices,” such as insight meditation, in order to reduce the chances of tunnel vision and the other cognitive biases that plague us because of evolutionary biology. I believe that the remedy for the problems of the human brain and its tendency to engage in tunnel vision, or obsession, lies in contemplative practices. We are not going to change the way our brains have evolved, but we can train them to become more aware. See SHARON BEGLEY, TRAIN YOUR MIND, CHANGE YOUR BRAIN: HOW A NEW SCIENCE REVEALS OUR EXTRAORDINARY POTENTIAL TO TRANSFORM OURSELVES 6–9, 24 (2007) (noting the concept of neuroplasticity, or the brain’s ability to change structures and functions based on mental effort). Experiments by the neuroscientists Richard Davidson and Helen Slatger suggest that “attentional blink” is reduced by meditation. Heleen A. Slagter et al., *Theta Phase Synchrony and Conscious Target Perception: Impact of Intensive Mental Training*, 21 J. COGNITIVE NEUROSCIENCE 1536, 1536 (2008). “Attentional Blink” is when we do not see objects that we are looking for because of the energy expended in the process of focusing. *Id.* The subjects they tested before three months of meditation scored normally on tests in which they were asked to pick out two numbers in a series of letters that flash by on a computer screen; the non-meditators missed the second number, thus exhibiting attentional blink; the three month meditators exhibited no such blink. See David Biello, *Searching for God in the Brain*, SCI. AM. MIND, Oct./Nov. 2007, at 38, 45; see also RICHARD DAVIDSON & DANIEL GOLEMAN, TRAINING THE BRAIN: CULTIVATING EMOTIONAL SKILLS (2008). I believe that law enforcement officers, attorneys, and judges should be trained in meditation or contemplative practices in order to help them

First, form an intention. Generally, for a defense attorney, this means zealously representing a client within the bounds of the law. For a prosecutor, this generally means insuring that justice is done. In a capital case, the defense attorney should form an intention to be compassionate with the client, to understand his story. Learn and know the story of what happened in the crime itself, and get to know the stories of the victim and their family or loved ones. Many times our compassion and investigation will lead us to encourage a plea to prevent further suffering, and other times to fight at trial. In a post-conviction case in which the person appears likely to be innocent, form an intention to stay with, be present with, the client until all reasonable avenues are explored, being careful not to foreclose options too early. Just as an oncologist might give advice that certain situations are usually terminal, she still treats, cares for, and is compassionate for the patient. Even with an intention to be present with your client, do not lionize your client or demonize your opponent, as either will cloud your judgment.<sup>98</sup> Always look around, “sideways,” to see what you may be missing because of your own biases or goals, or because someone else is shining the light in the wrong direction.

Second, practice anchoring. Just as the meditator keeps coming back to his breath and allows random thoughts and stories to flow on their way, the criminal lawyer should focus on coming back to the “what happened,” the facts. Start with a timeline<sup>99</sup> of what happened, and keep asking questions until as many points on the line are filled in as possible. Or start with the documentary or

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relax, become more aware of the evidence before them, and see their own biases. Physicians have recognized the value of mindfulness and meditation practices for years. See, e.g., *What is Mindfulness-Based Stress Reduction?*, MINDFUL LIVING PROGRAMS, <http://www.mindfullivingprograms.com/whatMBSR.php> (last visited Mar. 13, 2012). Lawyers are gradually becoming aware of the usefulness and importance of contemplative practices. See Leonard L. Riskin, *Annual Saltman Lecture: Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289, 313 (2010); Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535, 537, 554 (2011). Some law enforcement officers have undergone mindfulness and meditation training with Thich Nhat Hanh. See Cheri Maples, *Co-Founder*, CTR. FOR MINDFULNESS & JUST., <http://www.mindfulnessandjustice.org/about/cheri-maples/> (last visited Mar. 13, 2012).

<sup>98</sup> Donald Rothberg suggests that we follow the advice of Michael Corlione, in *The Godfather, Part II*: “Don’t hate your enemy. It clouds your judgment.” Donald Rothberg, Address at Spirit Rock Meditation Center Retreat, Woodacre, California (June 2010); *THE GODFATHER, PART II* (Paramount Pictures 1974).

<sup>99</sup> See Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 148, 151 (2010). Sundby discusses jury deliberations in capital cases and how jurors frequently make a timeline to show when the defendant made his choices, both in life and to kill; thus it is important for the defense attorney to provide an accurate timeline to the jury. *Id.*

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recorded evidence of what happened, such as scientifically based forensic evidence. Maintain a healthy skepticism of nonscientific forensic evidence.<sup>100</sup> Keep coming back to the documented facts, rather than the stories or theories about the facts. Engage in “brainstorming” sessions with the defense team, and non-judgmentally take note of facts and stories in the case. If there is going to be a trial, present the facts and narratives to a focus group of people similar to the ultimate jury. Brainstorming and focus groups each help us eliminate our own biases about what happened in cases, in addition to seeing the biases of the fact-finders. Such group sessions help you see “sideways,” to see the truth lingering in the shadows. In post-conviction work, practice anchoring, but always understand the narratives told by the parties, at trial and on appeal, so that one sees the biases at play, or the filters that caused mistakes to be made.<sup>101</sup> Be prepared to change your findings and opinions about what happened as time goes on. “Never buy shoes in the morning.”

Third, practice not becoming attached to a specific result in the case. Have faith in this process, not in the system. Remember, “It’s a long worm that never turns.”

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<sup>100</sup> See COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 8–10 (2009); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 9–11 (2009); see also Mike Klinkosum, *State v. Taylor and the North Carolina State Bureau of Investigation Lab Scandal*, NEWS & THE CHAMPION (May 2011), <http://www.nacd.org/Champion.aspx?id=20606> (discussing problems forensic evidence poses when results of confirmatory tests are withheld, and only presumptive test results are introduced at trial).

<sup>101</sup> See Mark Rabil & Phoebe Zerwick, *A Case of Wrongful Convictions: A Lesson in Storytelling*, Address at The 2011 Applied Legal Storytelling Conference (July 10, 2011) (program available at [www.law.du.edu/index.php/storytelling-conference/program](http://www.law.du.edu/index.php/storytelling-conference/program)).