

THE FLIPSIDE INJUSTICE OF WRONGFUL CONVICTIONS: WHEN THE GUILTY GO FREE

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I. INTRODUCTION

As the rosters of identified wrongful convictions continue to swell,¹ attention naturally focuses on the fractured lives of the innocent men and women who have endured the pains of unwarranted stigmatization and punishment. Their compound sufferings² become all the more apparent as statistics that detail the incidence, causes, and consequences of miscarriages of justice

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¹ The Innocence Project's list of wrongful convictions, confined to cases involving post-conviction DNA-based exonerations, is over three hundred. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited May 23, 2013) (identifying 307 post-conviction exonerations based on DNA since 1989). The National Registry of Exonerations identifies 891 exonerations in the United States since 1989 and includes descriptive information about 873 individuals wrongfully convicted through March 1, 2012. *Exonerations in the United States, 1989–2012, Key Findings*, NAT'L REGISTRY EXONERATIONS 1 (May 20, 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_summary.pdf; see also *Exoneration Detail List*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited May 18, 2013) (providing detailed exoneration information on 1123 individuals, including the year of exoneration). Not included are an additional 1170 individuals whose convictions were overturned in "group exonerations" explained by police perjury or corruption. *Exonerations in the United States, 1989–2012, supra*, at 4. Although there is not complete accord about the definition and operationalization of such key concepts as "wrongful conviction," "exoneration," and "innocence," see, for example, Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 246–58 (2012), there can be no doubt that the number of factually innocent people who have been erroneously convicted of crimes far exceeds the number of known wrongful convictions and official exonerations. See *id.* at 222–25. The "tip of the iceberg" analogy is commonly used to describe the presumed relationship between known and actual wrongful convictions. See, e.g., Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 918 (2012); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 62 (2008); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1571.

² See Sandra D. Westervelt & Kimberly J. Cook, *Foreword*, 75 ALB. L. REV. 1223, 1223–24 (2012) (introducing the third-annual issue of *Miscarriages of Justice*, which focused on the aftermath when justice miscarries).

give way to identified individuals and glimpses of their life stories.³ Post-conviction challenges in cases in which the innocent have been adjudged guilty often trigger the steadfast opposition of prosecutors⁴ and are only resolved following years of sustained litigation championed by defense counsel on behalf of the unjustly convicted.⁵ These attributes combine to invite conceptualizing “the Innocence Movement”⁶ as defendant-oriented and adversarial, pitting law enforcement and prosecution interests against the defense in much the same spirit as the original trial.

The modest thesis of this article is that indulging an inflexible mindset of “us-against-them” in the context of miscarriages of

³ There is a common tendency for observers to feel more sympathetic toward “identified others” than abstract “unidentified persons,” often with consequences for social policy and the investment of resources. Mark Kelman, *Saving Lives, Saving from Death, Saving from Dying: Reflections on ‘Over-Valuing’ Identifiable Victims*, 11 YALE J. HEALTH POL’Y L. & ETHICS 51, 52–55 (2011). This tendency is illustrated by the “Baby Jessica” case, in which an extraordinary outpouring of public interest, effort, donations, and expenditures accompanied reports of a small child who fell into a backyard well and required rescue. *Id.* Meanwhile, countless other children in need of life necessities suffered in anonymity. *Id.* at 54–55; see Ronen Avraham, *Clinical Practice Guidelines: The Warped Incentives in the U.S. Health Care System*, 37 AM. J.L. & MED. 7, 12–13 (2011); Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 437–38 (2008).

⁴ See, e.g., DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 126–32 (2012) (discussing the various reactions by prosecutors to post-conviction innocence claims); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 86–87 (2000) (discussing the case of Robert Miller, who had been convicted of murder and sentenced to death in Oklahoma, and resistance of prosecutor to vacating his conviction notwithstanding exculpatory DNA results); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 408–19 (2011) (discussing prosecutorial denials of innocence in the context of DNA exonerations); Hilary S. Ritter, Note, *It’s the Prosecution’s Story, but They’re Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Cases*, 74 FORDHAM L. REV. 825, 834–36 (2005).

⁵ “With a few exceptions, exonerations take a long time. The overall average is 11.9 years from conviction to exoneration, 13.0 years from arrest.” Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, NAT’L REGISTRY EXONERATIONS 24 (June 2012),

http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf. Substantial amounts of time can be devoted to litigating post-conviction claims of innocence. See generally Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 240 & n.26 (2006) (describing how appeals can generally last through generations of students); Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 506–09 (2011) (describing the ease of conviction and the difficult process of exoneration); Giovanna Shay, *What We Can Learn About Appeals from Mr. Tillman’s Case: More Lessons from Another DNA Exoneration*, 77 U. OF CIN. L. REV. 1499, 1502–03 & 1503 n.19 (2009) (describing the case of James Calvin Tillman, a prisoner who was exonerated after eighteen years of incarceration).

⁶ See Marvin Zalman, *An Integrated Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468–77 (2011); Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1084 n.1 (2011).

justice is not only misguided but also counterproductive. Wrongful convictions entail profound social costs in addition to the hardships borne by the unfortunate individuals who are erroneously adjudged guilty. When innocents are convicted, the guilty go free.⁷ Offenders thus remain capable of committing new crimes and exposing untold numbers of additional citizens to continuing risk of victimization. Public confidence in the administration of the criminal law suffers when justice miscarries.⁸ At some point, as cases mount and the attendant glare of publicity intensifies, the perceived legitimacy of the justice system and the involved actors is jeopardized.⁹ Associated monetary costs, paid from public coffers, represent yet another tangible social consequence of wrongful convictions.¹⁰

Adherents of neither the “Crime Control” nor the “Due Process” models of justice¹¹ should harbor disagreement about these simple premises. With the exception of the actual offenders, everyone benefits, and no one loses when innocent parties are spared conviction and when the actual perpetrators of crimes are brought to justice.¹² Acknowledging this commonality of interests causes other, ideologically divisive issues to pale in contrast. Every case of

⁷ See *infra* Part III.

⁸ Ashley H. Wisneski, *That’s Just Not Right: Monetary Compensation for the Wrongly Convicted in Massachusetts*, 88 MASS. L. REV. 138, 150 (2004).

⁹ *Id.*

¹⁰ See, e.g., John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, BETTER GOV’T ASS’N (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_1.aspx [hereinafter Conroy & Warden, *Tax Dollars Wasted*].

¹¹ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 158–73 (1968) (describing the “Crime Control” and “Due Process” models of the criminal process in his influential book). The Crime Control model maintains a value orientation “that the repression of criminal conduct is by far the most important function to be performed by the criminal [justice] process.” *Id.* at 158. This model places a premium on efficiency, with reliance on police and prosecutors to use informal, administrative fact-finding procedures to make early separation of cases involving likely innocence and likely guilt. *Id.* at 158–63. A working presumption of guilt becomes operative for retained cases, and subsequent formal adjudicatory procedures are considered superfluous if not unwelcome. *Id.* at 160–63. In contrast, the Due Process model emphasizes “the primacy of the individual and the complementary concept of limitation on official power.” *Id.* at 165. Distrusting informal, nonadjudicative fact-finding procedures, it instead relies on formal judicial guilt-determination. *Id.* at 163–64. Although the Due Process model “does not rest on the idea that it is not socially desirable to repress crime,” it embraces values in addition to reliable fact determination and thus demands that “legal guilt” and not simply “factual guilt” must be established. *Id.* at 163, 166–67.

¹² See, e.g., John Eligon, *New State Office to Review Questionable Convictions*, N.Y. TIMES, Apr. 11, 2012, at A20 (describing a statement by New York Attorney General Eric Schneiderman following his decision to create a Conviction Review Bureau to investigate possible wrongful convictions) (“There is only one person who wins when the wrong person is convicted of a crime: the real perpetrator, who remains free to commit more crimes” (internal quotation marks omitted)).

wrongful conviction is also a case where the guilty party remains free.¹³ Taking this self-evident proposition to heart is a simple yet perhaps necessary step in helping overcome barriers to meaningful policy discussions and enacting long overdue reforms.

II. COMPOUNDING THE TRAGEDIES OF WRONGFUL CONVICTIONS: NEW CRIMES COMMITTED AND NEW VICTIMS CLAIMED BY THE TRUE PERPETRATORS

When the wrong person is convicted of a crime, the true offender remains at large, free to commit additional offenses.¹⁴ The actual perpetrators of crimes were identified in nearly half (149/307, or 48.5%) of the DNA-exoneration cases reported by the Innocence Project through February 2013.¹⁵ These true offenders are known to have committed at least 123 additional violent crimes, including 32 murders and 68 rapes, following the arrest of the eventual exonerees who were erroneously prosecuted and convicted.¹⁶ Had they been apprehended in a timely fashion, rather than the innocent persons accused in their place, their future victims would have been spared death, injury, and the related pernicious consequences of criminal violence.

An exhaustive analysis completed by the Better Government

¹³ See discussion *infra* Part II.

¹⁴ See *infra* notes 17–30 and accompanying text.

¹⁵ *Facts on Post-Conviction DNA Exonerations*, *supra* note 1.

¹⁶ E-mail from Emily West, Research Director, The Innocence Project, to author (Feb. 8, 2012, 04:19 EST) (on file with author). See also BARRY SCHECK & PETER NEUFELD, INNOCENCE PROJECT 250 EXONERATED: TOO MANY WRONGFULLY CONVICTED 46–51 (2010), available at http://www.innocenceproject.org/docs/InnocenceProject_250.pdf (“The true perpetrator was identified in 42% of the [first 250 DNA] exoneration cases. In 58% of the exoneration cases, the true perpetrator was never identified. If the true perpetrator had been originally convicted, instead of an innocent person, at least 72 violent crimes could have been prevented.”); *Know the Cases, Search the Profiles, Real Perpetrator Found*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=&perpetrator=Yes&compensation=&conviction=&x=32&y=2> (last visited May 18, 2013) (listing of real perpetrators found). In New York, the actual perpetrator was identified in ten of twenty-four exoneration cases. THE INNOCENCE PROJECT, LESSONS NOT LEARNED: NEW YORK STATE LEADS IN THE NUMBER OF WRONGFUL CONVICTIONS BUT LAGS IN POLICY REFORMS THAT CAN PREVENT THEM 15 (2009), available at http://www.innocenceproject.org/docs/NY_Report_2009.pdf. The Innocence Project noted:

According to law enforcement reports, five murders, seven rapes, two assaults and one robbery were committed by the actual perpetrators of crimes for which innocent people were convicted. Every one of those additional crimes was committed after the initial crime for which the wrong person was apprehended—meaning that each one of those crimes could have been prevented.

Id.

Association and the Center on Wrongful Convictions¹⁷ of eighty-five exonerations in Illinois between 1989 and 2010, documented the crimes committed by actual offenders while innocent parties were instead punished.¹⁸ “[W]hile 85 people were wrongfully incarcerated, the actual perpetrators were on a collective crime spree that included 14 murders, 11 sexual assaults, 10 kidnappings and at least 62 other felonies.”¹⁹ The study noted that the true criminals remained unknown in many of the exoneration cases, involving wrongful conviction for thirty-five murders, eleven rapes, and two rape-murders.²⁰ The ninety-seven offenses known to have claimed new victims thus undoubtedly comprised “just a fraction of the total number of crimes committed by the actual perpetrators.”²¹

Unfortunately, dire predictions regarding the incidence of repeat offending by criminals can be well-grounded. Although predicting future criminal conduct in individual cases is hazardous,²² violent criminals who remain at large constitute a palpable threat to public safety.²³ Not all will commit new crimes,²⁴ but criminologists

¹⁷ Conroy & Warden, *Tax Dollars Wasted*, *supra* note 10.

¹⁸ The Innocence Project lists thirty-one DNA-based exonerations in Illinois between 1989 and 2010. *Know the Cases, Search the Profiles, Jurisdiction, Illinois*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=IL&cause=&perpetrator=&compensation=&conviction=&x=23&y=1> (last visited May 18, 2013). There presumably is overlap between its national figures, and the Illinois study, which includes DNA-based as well as non-DNA-based exonerations.

¹⁹ Conroy & Warden, *Tax Dollars Wasted*, *supra* note 10.

²⁰ *Id.*

²¹ *Id.*

²² Not all criminals recidivate, and with the passage of time and changes in life circumstances most eventually desist from committing new offenses. *See, e.g.*, Robert Brame, Shawn D. Bushway & Raymond Paternoster, *Examining the Prevalence of Criminal Desistance*, 41 CRIMINOLOGY 423, 443 (2003); Megan C. Kurlychek, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns—Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 96 (2012). Eventual desistance is the norm even among violent offenders. Alex R. Piquero, Wesley G. Jennings & J.C. Barnes, *Violence in Criminal Careers: A Review of the Literature from a Developmental Life-Course Perspective*, 17 AGGRESSION & VIOLENT BEHAV. 171, 177 (2012).

²³ *See* Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 CRIME & JUST. 359, 463 (2003) (citations omitted).

²⁴ *See* Richard Berk, *Balancing the Costs of Forecasting Errors in Parole Decisions*, 74 ALB. L. REV. 1071, 1072 (2011) (discussing the problem of “false negatives” in the context of parole decisions, or the erroneous prediction that a prisoner will reoffend if released when, in fact, he would not); Albert J. Reiss, Jr., *How Serious Is Serious Crime?*, 35 VAND. L. REV. 541, 570 (1982) (citing MARK A. PETERSON, HARRIED B. BRAIKER & SUZANNE M. POLICH RAND, *DOING CRIME: A SURVEY OF CALIFORNIA PRISON INMATES* 24 (1980), *available at* <http://www.rand.org/content/dam/rand/pubs/reports/2005/R2200.pdf>) (reporting relatively low rates of “specialization,” or repeating commission of the same crime, among offenders with prior convictions for criminal homicide and forcible rape); Charles H. Rose III, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36

generally agree about the accuracy of the maxim that “a key predictor of future crime is past crime.”²⁵ Some hardcore, chronic offenders engage in numerous repeat acts of violence.²⁶ Recidivism rates among probationers²⁷ and previously incarcerated felons²⁸ are

N.M. L. REV. 341, 344 (2006) (presenting rates of known recidivism among offenders convicted of different types of crimes).

²⁵ Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 529 (2012).

²⁶ This tendency was documented long ago in a study of Philadelphia youths, where the researchers found that just 6% of the nearly 10,000 included in the sample, who represented approximately 18% of the delinquent subset, were responsible for committing more than half (52%) of the reported acts of delinquency. MARVIN E. WOLFGANG, ROBERT M. FIGLIO & THORSTEN SELLIN, *DELINQUENCY IN A BIRTH COHORT 88* (2d impression 1974). “The finding that a small subset of sample members is responsible for a majority of criminal activity” is supported by numerous other research studies. Piquero, Farrington, & Blumstein, *supra* note 23, at 463 (citations omitted).

²⁷ See *United States v. Knights*, 534 U.S. 112, 120 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) (“[T]he very assumption of the institution of probation’ is that the probationer ‘is more likely than the ordinary citizen to violate the law.’”). The recidivism rate of probationers is significantly higher than the general crime rate. See ROBYN L. COHEN, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, NCJ-149076, *PROBATION AND PAROLE VIOLATORS IN STATE PRISON*, 1991, at 3 (1995) (stating that in 1991, 23% of state prisoners were probation violators); PATRICK A. LANGAN & MARK A. CUNNIFF, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, NCJ 131477, *RECIDIVISM OF FELONS ON PROBATION*, 1986–89, at 1, 6 (1992) (reporting that 43% of 79,000 felons placed on probation in 17 states were rearrested for a felony within three years while still on probation); see also Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1391–95, app. A at 1418, app. B at 1419 (2008) (presenting recidivism rates by offense and punishment type); Stuart S. Yeh, *Cost-Benefit Analysis of Reducing Crime Through Electronic Monitoring of Parolees and Probationers*, 38 J. CRIM. JUST. 1090, 1090 (2010) (citations omitted) (“An estimated 1,382,012 violent crimes were committed nationwide in 2008. One-third of those crimes were committed by individuals previously convicted of crimes but eventually released into the community on parole or probation . . .”).

²⁸ See *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (O’Connor, J., plurality opinion) (upholding California’s “three-strikes” legislation against a challenge that the sentencing statute, as applied, violated a repeat offender’s Eighth Amendment right to be free from cruel and unusual punishment). The Court noted that

Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one “serious” new crime within three years of their release. . . . Approximately 73 percent of the property offenders released in 1994 were arrested again within three years, compared to approximately 61 percent of the violent offenders, 62 percent of the public-order offenders, and 66 percent of the drug offenders.

In 1996, when the *Sacramento Bee* studied 233 three strikes offenders in California, it found that they had an aggregate of 1,165 prior felony convictions, an average of 5 apiece. The prior convictions included 322 robberies and 262 burglaries. About 84 percent of the 233 three strikes offenders had been convicted of at least one violent crime. In all, they were responsible for 17 homicides, 7 attempted slayings, and 91 sexual assaults and child molestations. The *Sacramento Bee* concluded, based on its investigation, that “[i]n the vast majority of the cases, regardless of the third strike, the [three strikes] law is snaring [the] long-term habitual offenders with multiple felony

high.²⁹ It seems plausible that the true offenders who elude detection in wrongful conviction cases are just as likely to have committed new crimes as the ones who eventually are identified and linked to the original offense.³⁰

As revealing as the statistics are that measure the new crimes committed by the guilty who remain at large in the aftermath of wrongful convictions, they are no match for the raw intensity of the underlying case narratives.³¹ Accounts from a wealth of cases that

convictions . . .”
Id. at 26 (alterations in original) (quoting Andy Furillo, *Most Offenders Have Long Criminal Histories*, SACRAMENTO BEE, Mar. 31, 1996, at A1) (citing PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, NCJ 193427 RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002)). See also Michael Barrett, *Don't Let a Good Economic Crisis Go to Waste: An Opportunity for Wholesale Corrections Reform*, 2011 J. INST. JUST. & INT'L STUD. 15, 18–19 (2011) (“[I]n most states, more than 50% of inmates are returned within two to three years following their release. A study of former inmates released from state prisons in 1994 found that 67% committed at least one new crime within the following three years.”) (citing LANGAN & LEVIN, *supra*, at 1); Francis T. Cullen, Cheryl Lero Jonson & John E. Eck, *The Accountable Prison*, 28 J. CONTEMP. CRIM. JUST. 77, 78–80 (2012); Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 120 (2009) (citing LANGAN & LEVIN, *supra*, at 1); Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State-Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 591–93 (2009).

²⁹ See COHEN, *supra* note 27, at 1–3, 6; LANGAN & CUNNIFF, *supra* note 27, at 1, 6; LANGAN & LEVIN, *supra* note 28, at 1.

³⁰ “In each of these innocence cases, a criminal investigation into a serious violent crime was shut down prematurely when authorities prosecuted the wrong person.” THE JUSTICE PROJECT, CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED 1, 3 (2009), available at <http://www.deathpenaltyinfo.org/documents/convicting-the-innocent.pdf> (discussing thirty-nine wrongful conviction cases in Texas that resulted in exoneration since 1994 and observing that “[t]he crimes that are committed in the time between a wrongful conviction and the identification of the true perpetrator are an immeasurable cost to the community”); see also Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 79 (2008) (“Every failure to convict the guilty means additional crimes undeterred and bad guys who, when left to their own devices, will almost certainly commit additional crimes.”).

³¹ While the additional emotional power that distinguishes narratives from descriptive statistics can promote insight, it can also cloud perspectives. Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 ALB. L. REV. 1209, 1275 (2011) (“Surely we can do better to manage miscarriages of justice than to rely on sensational media accounts of innocent people released from death row following the discovery of exculpatory DNA evidence, and on equally sensational accounts of dangerous people committing heinous crimes following breakdowns in mechanisms for bringing them to justice in prior cases. These ‘breaking news’ stories are typically followed by political grandstanding that has produced draconian laws and contributed immeasurably to injustices and, more measurably, to billions of dollars of wasted resources that could have been applied more productively elsewhere.”); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 145, 186–87 (2011) (footnote omitted) (“Narratives, more so than isolated facts, have the power to mentally transport the audience, temporarily altering their normal emotional and cognitive reactions to the information presented. By partly neutralizing the recipients’ critical evaluation, the storyteller makes possible the acceptance of accounts that might otherwise have been rejected. . . . Still, there is a danger that factual inferences will be swamped by the narrative force of a case . . .”).

resulted in wrongful convictions could be presented. Twenty illustrative ones are offered below. They are not necessarily representative of all cases in which new crimes are known to have been committed by the perpetrators who originally cheated justice. The cases originated in multiple jurisdictions and arose in connection with wrongful convictions that were produced by diverse errors, attributable to a host of different actors and circumstances. All share the harsh consequences of a new round of victimizations being committed by the true offenders while innocent defendants instead suffered prosecution and punishment.

Mark Christie

Viola Manville, a seventy-four-year-old woman who regularly enjoyed hiking the countryside in Hilton, New York, on the outskirts of Rochester, was killed during the morning of November 29, 1988.³² She had been badly beaten and shot with pellets from a BB gun.³³ Her body was left alongside railroad tracks, in the general vicinity of where a man had tried to rape her some three years earlier.³⁴ That man, Glen Sterling, remained in prison following his conviction for the rape attempt.³⁵ Glen Sterling's brother, Frank, was among the many people interviewed by sheriff's detectives during the homicide investigation.³⁶ Frank Sterling had no prior criminal record and no reputation for violence.³⁷ Although no physical evidence linked him to the crime, the authorities apparently reasoned that he may have had a motive to kill Ms. Manville in retaliation for his brother's conviction and punishment.³⁸ Sterling accounted for his whereabouts on the day of the murder, explaining that he had been working as a school bus monitor during the morning, returned home, walked to a grocery store to make a purchase, and watched cartoons on television in the afternoon.³⁹ His alibi was confirmed and neither he nor anyone else was arrested in the ensuing weeks and months.⁴⁰

³² Robert Kolker, *"I Did It": Why Do People Confess to Crimes They Didn't Commit?*, N.Y. MAG., Oct. 11, 2010, at 22, 24.

³³ Gary Craig, *Misssteps Kept Man in Prison*, DEMOCRAT & CHRON. (Rochester, N.Y.), May 9, 2010, at 1A; Kolker, *supra* note 32, at 24.

³⁴ Kolker, *supra* note 32, at 24.

³⁵ Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

³⁶ Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

³⁷ Kolker, *supra* note 32, at 24.

³⁸ *Id.*

³⁹ Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

⁴⁰ Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

More than two and one-half years later, in July 1991, detectives again visited Frank Sterling at his home.⁴¹ He had just returned from a truck-driving job that had consumed the better part of two days.⁴² Although tired, he agreed to a polygraph examination, and accompanied the detectives to the sheriff's office in Rochester.⁴³ During the pre-examination session, the polygraph technician falsely told Sterling that his brother Glen had bragged to other prisoners that Frank had killed Ms. Manville.⁴⁴ After the examination, Sterling was advised that he was being deceitful when he denied the killing.⁴⁵ As midnight approached, another interrogator took over the questioning.⁴⁶ He got Sterling to admit that he was angry enough about his brother's incarceration to have killed Manville, but Sterling continued to deny that he had done so.⁴⁷ He asked to be hypnotized to prove that he was telling the truth.⁴⁸ The investigators responded by holding his hands and assisting him with relaxation exercises.⁴⁹ They told him that "we were here for him, we understood [and] we felt he should tell the truth to get it off his chest."⁵⁰ Roughly eight hours into the interrogation session, Sterling admitted killing Ms. Manville.⁵¹ Shortly after five o'clock in the morning, a twenty-minute video-recording preserved his detailed confession.⁵²

Sterling repudiated his confession shortly after making it, but his recantation was not believed.⁵³ With his incriminating admission serving as the primary evidence of his guilt, Sterling was convicted of murder following trial in September 1992.⁵⁴ Just days later, several townspeople alerted the police that nineteen year-old Mark Christie was bragging that he had "just gotten away with

⁴¹ Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

⁴² Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

⁴³ Kolker, *supra* note 32, at 24.

⁴⁴ Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

⁴⁵ Craig, *supra* note 33.

⁴⁶ Kolker, *supra* note 32, at 24.

⁴⁷ *Id.* at 25.

⁴⁸ Craig, *supra* note 33; Kolker, *supra* note 32, at 25.

⁴⁹ Craig, *supra* note 33; Kolker, *supra* note 32, at 25. *See also* People v. Sterling, 619 N.Y.S.2d 448, 449 (App. Div. 4th Dep't 1994), *appeal denied*, 650 N.E.2d 1339 (N.Y. 1995) (affirming trial court's refusal to suppress Sterling's statements to the police and concluding that evidence supported the finding that "the state [Sterling] achieved by use of a relaxation technique" did not constitute hypnosis).

⁵⁰ Kolker, *supra* note 32, at 25.

⁵¹ *See* Craig, *supra* note 33; Kolker, *supra* note 32, at 24, 25.

⁵² Craig, *supra* note 33; Kolker, *supra* note 32, at 25.

⁵³ Kolker, *supra* note 32, at 26; *see* People v. Sterling, 787 N.Y.S.2d 846, 854 (County Ct. Monroe County 2004), *aff'd*, 827 N.Y.S.2d 920 (App. Div. 4th Dep't 2007).

⁵⁴ Craig, *supra* note 33; Kolker, *supra* note 32, at 25; *see Sterling*, 787 N.Y.S.2d at 847.

murder.”⁵⁵ Christie was among the individuals questioned by the police during their 1988 investigation of the killing.⁵⁶ Then sixteen, Christie maintained that he had gone to school at mid-morning on the day of the murder.⁵⁷ Although school records indicated that he did not attend class until 1:20 that afternoon, investigators did not pursue him as a suspect.⁵⁸ Police interrogated Christie again in December 1992, following his reported boastings about the murder.⁵⁹ He claimed that he had only been “kidding around” when he made those statements.⁶⁰ The results of an initial polygraph exam, in which he denied the killing, were deemed “incomplete” owing to Christie’s erratic breathing and excessive movement.⁶¹ He passed a second exam, administered the next day.⁶² The judge in Frank Sterling’s murder trial concluded that Christie’s purported admissions were not believable, and imposed a sentence of twenty-five years to life in prison on Sterling on December 23, 1992.⁶³

In 1994, Mark Christie strangled four-year-old Kali Ann Poulton after luring her into his apartment.⁶⁴ He then disposed of her body in a water coolant tank at his workplace.⁶⁵ Later, he participated in searches for the child, whose disappearance caused widespread alarm and grief throughout the greater Rochester community.⁶⁶ The killing remained unsolved until 1996, when Christie blurted an admission during an argument with his wife that he had killed Kali.⁶⁷ His wife called the police.⁶⁸ Christie confessed to investigators, who subsequently uncovered the child’s body.⁶⁹ Christie pleaded guilty to second-degree murder for the crime in 1997 and was sentenced to prison for twenty-five years to life.⁷⁰

⁵⁵ Kolker, *supra* note 32, at 25.

⁵⁶ *Rochester Man to be Freed 18 Years After Wrongful Murder Conviction*, INNOCENCE PROJECT (Apr. 28, 2010), http://www.innocenceproject.org/Content/Rochester_Man_To_Be_Freed_18_Years_After_Wrongful_Murder_Conviction_DNA_and_Confession_Lead_to_Actual_Perpetrator.php.

⁵⁷ Craig, *supra* note 33.

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ Amy Mayron et al., *Kali’s Tragedy: Arrest Made; Body Found*, DEMOCRAT & CHRON. (Rochester, N.Y.), Aug. 10, 1996, at 1A.

⁶¹ Craig, *supra* note 33.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Ex-Guard Pleads Guilty to Killing 4-Year-Old*, N.Y. TIMES, Oct. 16, 1997, at B5.

⁶⁵ Craig, *supra* note 33; *Ex-Guard Pleads Guilty to Killing 4-Year-Old*, *supra* note 64.

⁶⁶ *Ex-Guard Pleads Guilty to Killing 4-Year-Old*, *supra* note 64, at B5.

⁶⁷ Craig, *supra* note 33.

⁶⁸ *Id.*

⁶⁹ Mayron et al., *supra* note 60.

⁷⁰ *Ex-Guard Pleads Guilty to Killing 4-Year-Old*, *supra* note 64, at B5.

Christie's admission and conviction with respect to Kali's death inspired a new series of challenges to Sterling's conviction, which renewed the allegation that Christie was responsible for murdering Ms. Manville. Beginning in 1996 and over the next several years, Sterling filed a series of motions to vacate his conviction, all of which were denied.⁷¹ In late 2008, "touch DNA"—testing on skin cells left on the clothing that Ms. Manville had worn when murdered—implicated Christie in the killing.⁷² In early 2010, after being interviewed in prison by an Innocence Project attorney and an interrogation expert, Christie confessed to murdering Ms. Manville.⁷³ Frank Sterling's conviction was vacated and he was released from prison in April 2010, after spending eighteen years incarcerated for a crime that he did not commit.⁷⁴

Christie pleaded guilty to murdering Ms. Manville in October 2011.⁷⁵ He was sentenced to twenty years to life in prison, to be served consecutively with the sentence imposed for his murder of Kali Ann Poulton.⁷⁶ At the sentencing hearing, one of Ms. Manville's grandsons observed that "[n]ot only did [Christie] murder my grandmother, he also took the life of a child so it's unforgivable."⁷⁷ Kali Ann Poulton's mother wiped at tears while reflecting that her daughter would still be alive if the investigation into Ms. Manville's murder had resulted in Christie's arrest and conviction, instead of Frank Sterling's.⁷⁸ "Of course it has crossed my mind. What if? . . . But unfortunately it is what it is. We can't go backward."⁷⁹

⁷¹ *People v. Sterling*, 787 N.Y.S.2d 846, 850–51 (County Ct. Monroe County 2004), *aff'd*, 827 N.Y.S.2d 920 (App. Div. 4th Dep't 2007) (noting that a prior denial of a request to vacate Sterling's conviction had been affirmed by the Appellate Division, Fourth Department and leave to appeal was denied by the Court of Appeals); Kolker, *supra* note 32, at 26–27.

⁷² Kolker, *supra* note 32, at 27.

⁷³ *Id.* at 27, 89.

⁷⁴ *Id.* at 89, 90; *Rochester Man to be Freed 18 Years After Wrongful Murder Conviction*, *supra* note 56.

⁷⁵ Sean Carroll, *Mark Christie Gets Another 20 Years-to-Life*, 13 WHAM NEWS (updated Oct. 28, 2011, 6:28 PM), <http://www.13wham.com/news/local/story/Christie-Faces-Friday-Sentencing/458XQ9sUk0SreGbiszSqew.csp>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Ben Dobbin, *NY Child Killer Gets 20-to-Life for '88 Slaying*, DESERET NEWS (Oct. 28, 2011, 1:10 PM), <http://www.deseretnews.com/article/700192455/NY-child-killer-gets-20-to-life-for-88-slaying.html>.

⁷⁹ *Id.* (internal quotation marks omitted).

Walter Cruise

In 2002, Walter Cruise pleaded guilty in Tucson, Arizona to sodomizing a ten-year-old boy named David; a crime he had committed in October 1983 after he abducted the child from a carnival attended by David and his mother after they had left church.⁸⁰ He was sentenced to twenty-four years in prison.⁸¹ Cruise had twice before been convicted for sexually abusing children, crimes he committed in Texas prior to his 1983 offense.⁸² He had committed later offenses, as well, including burglary, and he had not yet completed serving a prison sentence in Texas for delivering cocaine when he entered his 2002 guilty plea in Arizona.⁸³ During the nineteen-year gap between Cruise's Arizona crime and his guilty plea and conviction, another man stood wrongfully convicted and served several years in prison for kidnapping and sodomizing the child Cruise had victimized.⁸⁴ That man was Larry Youngblood, who was exonerated in 2000 after DNA tests excluded him as the source of semen left during the child's assault.⁸⁵ The following year, the DNA profile from the crime scene was linked to Cruise, identifying him as the perpetrator.⁸⁶

Ironically, Youngblood will forever be associated with a landmark United States Supreme Court decision that reinstated his conviction and imposed a significant burden on criminal defendants who attempt to substantiate claims of innocence. In *Arizona v. Youngblood*,⁸⁷ the Court ruled that to establish a Due Process violation, a defendant must demonstrate that the police acted in bad faith when they destroyed or failed to preserve potentially

⁸⁰ David L. Teibel, *Man Gets 24 Years in '83 Child-Sex Case*, TUCSON CITIZEN, Aug. 20, 2002, <http://tucsoncitizen.com/morgue2/tag/criminal-procedure/page/61>; see *State v. Youngblood*, 734 P.2d 592, 592 (Ariz. App. 1986), *rev'd*, 488 U.S. 51 (1988); Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 277 (2008); Tim O'Brien, *Reasonable Doubt and DNA*, WASH. POST, Sept. 7, 2000, at A25.

⁸¹ Bay, *supra* note 80, at 277; Teibel, *supra* note 80.

⁸² Bay, *supra* note 80, at 277.

⁸³ Teibel, *supra* note 80. Walter Cruise's criminal history is available through the Office of the Harris County, Texas District Clerk. See *Search Our Records and Documents*, HARRIS COUNTY DISTRICT CLERK, <http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx> [hereinafter *Search Records*] (To search, click on the "Criminal" tab and then search "Cruise, Walter" under "Defendant").

⁸⁴ Bay, *supra* note 80, at 243–44.

⁸⁵ *Id.* at 276; Barbara Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. TIMES, Aug. 11, 2000, at A12.

⁸⁶ *Know the Cases: Larry Youngblood*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Larry_Youngblood.php (last visited May 18, 2013).

⁸⁷ *Arizona v. Youngblood*, 488 U.S. 51 (1988).

exculpatory evidence.⁸⁸ Their negligent destruction of evidence, even if it might have substantiated the defendant's innocence, is not a constitutional violation.⁸⁹

During the investigation that preceded Youngblood's conviction, the police had taken possession of the t-shirt and underwear that David had been wearing when he was sodomized.⁹⁰ Both items of clothing had semen stains from the assault but the police neglected to refrigerate them.⁹¹ The semen on them thus degraded to the point that the samples could not be tested to reveal whether the assailant was a secretor⁹² and, if so, what his blood type was—tests that potentially could have excluded Youngblood as the donor.⁹³ The young victim identified Youngblood—whose distinctive physical characteristics included having only one good eye and walking with a limp⁹⁴—as his assailant.⁹⁵ Based largely on that identification,

⁸⁸ *Id.* at 58.

⁸⁹ *Id.* “The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.” *Id.* at 56 n.* (citation omitted). Chief Justice Rehnquist's majority opinion explained:

we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. . . . [R]equiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. at 57–58. Establishing bad faith in this context has proven difficult. See Susan Greene & Miles Moffeit, *Trashing the Truth Destruction of Evidence*, DENVER POST, July 22, 2007, at A1.

⁹⁰ *Youngblood*, 488 U.S. at 53.

⁹¹ *Id.* at 53, 54.

⁹² *Id.* at 54. “Secretors are persons whose bodily fluids—saliva or semen, for example—carry ‘markers’ that identify their blood types.” David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 520 n.273 (1992). Approximately 75%–80% of the population are secretors. Bay, *supra* note 80, at 279–80. For the remaining percentage of non-secretors, blood typing is not revealed through other bodily fluids. See *id.*

⁹³ Youngblood was a secretor with type A blood. *State v. Youngblood*, 734 P.2d 592, 596 (Ariz. App. 1986), *rev'd*, 488 U.S. 51 (1988).

⁹⁴ *Id.* at 593. See also O'Brien, *supra* note 80 (recounting the victim's description of his abductor).

⁹⁵ *Youngblood*, 734 P.2d at 594.

Nine days after the assault, a police detective came to David's school, took a taped statement from him, told him they had arrested the man who raped him, and asked him to pick the assailant out of a photographic lineup. Three of the photographs had the left eye whited out, and three had the right eye whited out. David's optometrist testified at trial that David had an astigmatism and “was instructed to wear glasses whenever he was in school [or] doing close work, [or watching] T.V.” He was not wearing glasses the night of the incident nor when he first viewed the photographic lineup. After looking at the pictures by holding them very close to his face, David picked Youngblood as his

and without additional information to consider regarding the source of the semen deposits, a jury convicted Youngblood at his 1985 trial.⁹⁶ He was sentenced to ten and one-half years in prison.⁹⁷

Youngblood was exonerated fifteen years later, when improvements in DNA testing technology permitted analysis of the small amount of semen retrieved from the sexual assault kit that had been preserved after the young victim received hospital treatment in October 1983.⁹⁸ Although Walter Cruise's new crimes were not as serious as those committed by the true perpetrators in many other wrongful conviction cases,⁹⁹ a wave of harms in addition to Youngblood's unjustified imprisonment rippled from his sexual assault of David.¹⁰⁰ Some were amplified by the original miscarriage of justice.¹⁰¹ Youngblood, who had struggled with schizophrenia since before his conviction,¹⁰² was arrested for assault in Tucson in 2003, following his release from prison.¹⁰³ He died from a drug overdose in 2007.¹⁰⁴

At Cruise's 2002 sentencing hearing following his guilty plea to the sexual assault, David—then twenty-nine years old—and members of his family gave emotional testimony about their experiences.¹⁰⁵ David described how he “was raped repeatedly, brutally. I was 10 years old . . . [i]t was bad. He should have killed me. . . . He should be incarcerated like an animal.”¹⁰⁶ One of David's sisters lamented that while Cruise escaped responsibility for the violation, she had “spent most of [her] life and wasted most

assailant, saying he was “pretty sure.” Later, David identified another man in the lineup as the possible assailant.

Id. (alterations in original).

⁹⁶ See Gavin Frost, *Arizona v. Youngblood: Adherence to a Bad Faith Threshold Test Before Recognizing a Deprivation of Due Process*, 34 S.D. L. REV. 407, 408 (1989).

⁹⁷ *Youngblood*, 734 P.2d at 592. Youngblood served almost the entirety of that sentence, although he was in and out of prison on different occasions owing to the reversal and reinstatement of his conviction and for violating his parole because of his failure to notify the authorities about a change of address as was required under the state's sex offender registration law. Bay, *supra* note 80, at 276; Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 777–78.

⁹⁸ Bay, *supra* note 80, at 276.

⁹⁹ See *supra* Part II.

¹⁰⁰ See *infra* notes 103–04 and accompanying text.

¹⁰¹ See *infra* notes 103–04 and accompanying text.

¹⁰² Bay, *supra* note 80, at 250; see *State v. Youngblood*, 790 P.2d 759, 765 n.2 (Ariz. Ct. App. 1989), *vacated*, 844 P.2d 1152 (Ariz. 1993).

¹⁰³ Bay, *supra* note 80, at 278.

¹⁰⁴ *Id.*

¹⁰⁵ Teibel, *supra* note 83; see Bay, *supra* note 80, at 277.

¹⁰⁶ Teibel, *supra* note 83.

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of [her] life hating Larry Youngblood.”¹⁰⁷ Another sister testified that the family had “never been the same” after David was assaulted.¹⁰⁸ “This is something we will deal with forever.”¹⁰⁹

Her statement was partly grounded in past events and proved to be partly prophetic. Following his victimization, David grew increasingly troubled.¹¹⁰ Before the assault, his mother recalled, David had been a “very sweet” little boy.¹¹¹ Afterwards, his mother said “I saw a tremendous change in my boy. I saw a lot of aggression and anger.”¹¹² David abused drugs and alcohol.¹¹³ He was sentenced to prison on two separate occasions for aggravated assaults committed against former girlfriends.¹¹⁴ In 2004, two years after Cruise was convicted and sentenced for sodomizing him, an intoxicated David walked into the path of an oncoming train in Tucson and was killed.¹¹⁵

Steven Cunningham

Fifteen-year-old Angela Correa left her home in Peekskill, New York on the afternoon of November 15, 1989.¹¹⁶ She failed to return and her family reported her missing the following day.¹¹⁷ Her body was discovered in a wooded area on November 17.¹¹⁸ She had been beaten and strangled.¹¹⁹ Vaginal injuries and the presence of seminal fluid and spermatozoa suggested that she had been sexually assaulted.¹²⁰ Sixteen-year-old Jeffrey Deskovic, a high school classmate variously described as a “loner,” naive, and psychologically troubled,¹²¹ exhibited unusual interest in the ensuing police investigation.¹²² He made his own inspection of the crime scene, sketched diagrams of it, and volunteered theories of

¹⁰⁷ Bay, *supra* note 80, at 277; Teibel, *supra* note 83.

¹⁰⁸ Teibel, *supra* note 83.

¹⁰⁹ *Id.*

¹¹⁰ Bay, *supra* note 80, at 277.

¹¹¹ *Id.*

¹¹² Mark Kimble, *The Accused Man Leaves Prison; Victim Enters*, TUCSON CITIZEN (Aug. 24, 2000), <http://tucsoncitizen.com/morgue2/tag/mark-kimble/page/38>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Bay, *supra* note 80, at 278.

¹¹⁶ LESLIE CROCKER SNYDER ET AL, REPORT ON THE CONVICTION OF JEFFREY DESKOVIC 1 (2007), available at <http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *Id.* at 2.

¹²¹ *See id.* at 11.

¹²² *See id.* at 19.

how the offense was committed to the police.¹²³ In January 1990, at the conclusion of an eight-hour interrogation session that left him “lying under a desk in a fetal position, sobbing uncontrollably,”¹²⁴ Deskovic confessed to the murder.¹²⁵ The interrogation session was not recorded.¹²⁶ Deskovic’s admissions included details “that the prosecution insisted could only have been known to the real perpetrator.”¹²⁷ He was indicted for murder and rape.¹²⁸

Just days after the indictment was returned, an FBI laboratory report was issued, revealing that DNA testing had excluded Deskovic as the source of the semen discovered in Ms. Correa’s body.¹²⁹ The case against Deskovic nevertheless proceeded to trial in January 1991.¹³⁰ The prosecution offered various explanations of the source of the semen, suggesting that Deskovic may have had an accomplice who raped Ms. Correa, or that the young victim may have engaged in consensual sexual intercourse shortly before being murdered.¹³¹ Although no physical evidence linked Deskovic to the crime, his incriminating admission—which defense counsel alternatively maintained was never made, was involuntary, or was false (the product of “his own ‘fertile imagination’”)¹³²—proved decisive. The jury convicted him of murder and rape.¹³³ At the

¹²³ *Id.* at 2; *People v. Deskovic*, 607 N.Y.S.2d 957, 958 (App. Div. 2d Dep’t 1994).

¹²⁴ SNYDER ET AL., *supra* note 116, at 15.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 17.

¹²⁸ *See id.* at 20; *Deskovic*, 607 N.Y.S.2d at 957.

¹²⁹ SNYDER ET AL., *supra* note 116, at 2, 20.

¹³⁰ *Know the Cases: Jeff Deskovic*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Jeff_Deskovic.php (last visited May 18, 2013); *see* SNYDER ET AL., *supra* note 116, at 3.

¹³¹ SNYDER ET AL., *supra* note 116, at 21–23. At the conclusion of the trial evidence, the trial judge “opined that there was no record support for the existence of an accomplice and the prosecutor withdrew his request to argue the accomplice theory in summation. Nevertheless, this argument already had been placed before the jury.” *Id.* at 22 (footnotes omitted). Moreover,

there was simply no evidence that, at the time of her death, Correa was involved in a consensual sexual relationship with anyone. . . .

In the final analysis, the prosecution’s “consensual partner” theory was both scientifically dubious and unsupported by the evidence. Like the “unapprehended accomplice” scenario, it could only have served to confuse the jury.

Id. at 23.

¹³² *Id.* at 2, 25.

¹³³ *Id.* at 3. “Deskovic’s January 25th statement was far and away the most important evidence at the trial. Without it, the State had no case against him. He would never have been prosecuted for killing Correa. He would never have been convicted.” *Id.* at 14. The court opinion upholding Deskovic’s conviction on appeal concluded that “[t]here was overwhelming evidence of the defendant’s guilt in the form of the defendant’s own multiple inculpatory statements.” *Deskovic*, 607 N.Y.S.2d at 958.

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hearing before he was sentenced to fifteen years to life imprisonment, Deskovic, then seventeen years old, told the trial judge: “I didn’t do anything. I’ve already had a year of my life taken from me for something I didn’t do, and I’m about to lose more time and I didn’t do anything.”¹³⁴

While in prison, Deskovic made repeated efforts to have the DNA profile obtained from Ms. Correa’s body entered into state and federal databases, hoping to find a match with the profile of a known offender.¹³⁵ Prosecutors rebuffed those attempts until Innocence Project attorneys became involved and a newly elected district attorney consented to the request.¹³⁶ In September 2006, when the profile was entered into the DNA database, it produced a “hit.”¹³⁷ The crime scene DNA matched the DNA profile of Steven Cunningham, who was then serving a twenty-year to life prison sentence for murder.¹³⁸ Deskovic was released from prison.¹³⁹ He was thirty-three years old and “had been incarcerated [for] half [of] his life for a crime he did not commit.”¹⁴⁰ In November 2006, the indictment charging him with the crimes against Ms. Correa was dismissed on the ground that he was actually innocent.¹⁴¹

Steven Cunningham initially denied involvement in Angela Correa’s death.¹⁴² When confronted with the DNA results, he confessed, pleaded guilty to her murder, and was sentenced to an additional twenty years to life in prison.¹⁴³ At the time he entered his guilty plea, he was imprisoned for the 1993 murder of Patricia Morrison of Peekskill.¹⁴⁴ Ms. Morrison, his girlfriend’s sister, was a

¹³⁴ SNYDER, *supra* note 116, at 3 (footnote omitted).

¹³⁵ *Id.* at 4, 31–32.

¹³⁶ *Id.* at 4, 31; *Know the Cases: Jeff Deskovic*, *supra* note 130.

¹³⁷ SNYDER, *supra* note 116, at 31.

¹³⁸ Jonathan Bandler, *Prisoner Confesses to 1989 Slaying*, J. NEWS (Westchester County, N.Y.), Oct. 6, 2006, at 2B; Robert N. Moles, *DNA Reports—New York: Steven Cunningham Convicted, Jeffrey Deskovic Released*, <http://www.netk.net.au/DNA/DNA4.asp> (last visited May 18, 2013).

¹³⁹ Bandler, *supra* note 138, at 2B.

¹⁴⁰ SNYDER, *supra* note 116, at 4; *see also id.* at 31 (mentioning that Deskovic was wrongfully incarcerated for nearly seventeen years).

¹⁴¹ *Id.* at 4. *See also* John. M. Leventhal, *A Survey of Federal and State Courts’ Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(g-1)?*, 76 ALB. L. REV. 1453 (2013), for an in-depth analysis of the various jurisdictional treatments of actual innocence, including that of the State of New York.

¹⁴² Fernanda Santos, *Inmate Enters Guilty Plea in ’89 Killing*, N.Y. TIMES, Mar. 15, 2007, at B5.

¹⁴³ *Id.*; *Inmate Gets 20 More Years for 2nd Killing*, N.Y. TIMES, May 3, 2007, at B6.

¹⁴⁴ Bandler, *supra* note 138, at 2B. *See* SNYDER, *supra* note 116, at 31

teacher and the mother of three young children.¹⁴⁵ He strangled her more than three years after murdering Ms. Correa.¹⁴⁶ In 2006, Cunningham described himself as “a different man . . . than the ‘monster’ who was overcome by cocaine addiction” when he killed his victims.¹⁴⁷ Ms. Morrison’s mother was not moved. “It’s too late now to say he’s a different man,” she said after his sentencing.¹⁴⁸ If Cunningham had not originally escaped prosecution for Ms. Correa’s murder, “maybe [Patricia would] still be with us; it gets me upset just thinking about it.”¹⁴⁹ An attorney from the Innocence Project later echoed this sentiment: “Patricia Morrison was murdered in 1993 by her sister’s boyfriend, Steven Cunningham. Unfortunately, this tragedy might have been prevented—but for the wrongful conviction of an innocent man”¹⁵⁰

Leon Davis

A rash of sexual assaults committed against women in Richmond, Virginia, and closely neighboring Henrico County, began in January 1984.¹⁵¹ On February 5, while on his way to a store to purchase groceries, eighteen-year-old Thomas Haynesworth was arrested when one of the assault victims saw him, recognized him as her assailant, and notified a police officer.¹⁵² After Haynesworth was taken into custody, victims in other cases identified him as their assailant as well.¹⁵³ Although Haynesworth professed innocence, he was convicted in separate trials of raping a Richmond woman on

¹⁴⁵ Bandler, *supra* note 138, at 2B.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Stephen Saloom, Op-Ed., *Prevent Wrongful Convictions*, TIMES UNION (Albany, N.Y.), May 19, 2011, at A15. See also Marisa Lascala, *An Innocent Man*, WESTCHESTER MAG. (Apr. 18, 2007), <http://www.westchestermagazine.com/Westchester-Magazine/May-2007/In-the-News> (“Patricia Morrison’s murder took place in 1993—four years after Correa’s murder—adding more names to the list of victims of the Deskovic case.”).

¹⁵¹ Frank Green & Reed Williams, *DNA Raises Questions in '84 Rape*, RICHMOND TIMES-DISPATCH, Mar. 19, 2009, at A1 [hereinafter Green & Williams, *DNA Raises Questions*].

¹⁵² Press Release, Brian J. Gottstein, Office of the Attorney Gen., Statement of Attorney General Ken Cuccinelli on Thomas Haynesworth’s State Compensation for Wrongful Incarceration (Apr. 5, 2012), available at http://www.ag.virginia.gov/Media%20and%20News%20Releases/News_Releases/Cuccinelli/040512_Haynesworth.html [hereinafter Ken Cuccinelli Statement]; see *Know the Cases: Thomas Haynesworth*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Thomas_Haynesworth.php (last visited May 18, 2013) [hereinafter *Know the Cases: Thomas Haynesworth*];

¹⁵³ *Know the Cases: Thomas Haynesworth*, *supra* note 152.

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January 3, 1984, of abducting, raping and sodomizing a Henrico County woman on January 30, and of the abduction and attempted robbery of a Richmond woman who had thwarted a sexual assault on February 1.¹⁵⁴ He was acquitted in another trial of sodomizing a Richmond woman who was assaulted on January 21.¹⁵⁵ Another set of charges against him was *nolle prosequed*.¹⁵⁶ His prison sentences totaled seventy-four years.¹⁵⁷

Although Haynesworth was taken into custody in early February 1984, the assaults did not abate.¹⁵⁸ The *modus operandi* in the continuing wave of crimes was similar.¹⁵⁹ The assailant typically threatened his victims with a large, serrated knife and often identified himself as “the Black Ninja.”¹⁶⁰ Police issued a warning that “the Black Ninja rapist” was suspected of attacking a dozen women in Richmond and Henrico County beginning in April 1984.¹⁶¹ The attacks continued through mid-December 1984, when Leon Davis finally was arrested.¹⁶² Davis was found guilty of committing a string of sexual assaults over that several month period and was sentenced to seven terms of life imprisonment.¹⁶³

Davis and Haynesworth lived in the same neighborhood.¹⁶⁴ They were not friends but they knew one another.¹⁶⁵ Although Haynesworth, at 5’6”, was four inches shorter, the two men resembled one another.¹⁶⁶ They shared the same blood type.¹⁶⁷ Haynesworth maintained that he knew from the outset, and that he had told his attorney and the police, that Davis was responsible for

¹⁵⁴ Green & Williams, *DNA Raises Questions*, *supra* note 151.

¹⁵⁵ *Id.*

¹⁵⁶ Haynesworth v. Commonwealth, 717 S.E.2d 817, 819 (Va. Ct. App. 2011) (Elder, J., dissenting).

¹⁵⁷ Green & Williams, *DNA Raises Questions*, *supra* note 151.

¹⁵⁸ *Know the Cases: Thomas Haynesworth*, *supra* note 152.

¹⁵⁹ *Id.*

¹⁶⁰ Frank Green, *Law Officials Work to Reduce Chances for Misidentification*, RICHMOND TIMES-DISPATCH (Mar. 20, 2011, 1:00 A.M.), <http://www2.timesdispatch.com/news/2011/mar/20/tmain01-witnessvictim-id-still-an-issue-ar-915795>.

¹⁶¹ Frank Green, *Prisoner Asks Va. High Court to Clear Him in 1984 Rape*, RICHMOND TIMES-DISPATCH, May 10, 2009, at B1, available at 2009 WLNR 9569499 [hereinafter Green, *1984 Rape*].

¹⁶² *Know the Cases: Thomas Haynesworth*, *supra* note 152.

¹⁶³ Ken Cuccinelli Statement, *supra* note 152.

¹⁶⁴ Green, *1984 Rape*, *supra* note 161.

¹⁶⁵ *See id.*

¹⁶⁶ *See* Haynesworth v. Commonwealth, 717 S.E.2d 817, 820 n.4 (Va. Ct. App. 2011) (Elder, J., dissenting) (including a victim statement that her assailant was 5’8 ½” or slightly taller).

¹⁶⁷ Maria Glod, *‘He’s Home’: Man Freed After 27 Years in Prison*, WASH. POST, Mar. 22, 2011, at B1.

the crimes for which Haynesworth was convicted.¹⁶⁸ Although he sought help from various sources, none was provided and he languished in prison for twenty-five years.¹⁶⁹ Finally, in 2009, Haynesworth was notified that as part of a systematic review of rape convictions returned in Virginia in the 1970s and 1980s, the State Department of Forensic Science had determined through DNA testing that he had been excluded as the source of the semen preserved from the January 3, 1984 rape for which he had been convicted.¹⁷⁰ Instead, the DNA from that crime matched Leon Davis.¹⁷¹

The immediate problem that Haynesworth faced was that no biological evidence remained for testing for the other two sets of crimes for which he had been convicted.¹⁷² The Virginia Supreme Court voided the January 3 rape conviction upon being presented with the DNA results,¹⁷³ but Haynesworth remained incarcerated for the other crimes.¹⁷⁴ At the urging of Innocence Project attorneys and with the consent of Richmond's Commonwealth Attorney, a court ordered evidence from the trial that resulted in Haynesworth's acquittal on the January 21, 1984 sodomy charge to be tested.¹⁷⁵ That test also produced a match with Leon Davis.¹⁷⁶ Based on those results, Haynesworth applied for writs of actual innocence in an attempt to vacate his convictions for the January 30 and February 1, 1984 offenses.¹⁷⁷ The Virginia Attorney General's Office and the local prosecutors supported Haynesworth's request.¹⁷⁸

In December 2011, in a 6–4 decision, the Virginia Court of Appeals issued the writs and vacated Haynesworth's remaining

¹⁶⁸ Frank Green & Reed Williams, *DNA Points to Different Man in Rape: 'Black Ninja' Implicated in 1984 Richmond Attack; Another Was Convicted*, RICHMOND TIMES-DISPATCH, Mar. 24, 2009, at A1 [hereinafter Green & Williams, *DNA Points to Different Man*].

¹⁶⁹ Maria Glod & Anita Kumar, *Haynesworth is Exonerated*, WASH. POST, Dec. 7, 2011, at B7.

¹⁷⁰ Green & Williams, *DNA Raises Questions*, *supra* note 151.

¹⁷¹ Green & Williams, *DNA Points to Different Man*, *supra* note 168.

¹⁷² *Haynesworth v. Commonwealth*, 717 S.E.2d 817, 818 (Va. Ct. App. 2011) (Elder, J., dissenting).

¹⁷³ *Id.* at 819.

¹⁷⁴ Green & Williams, *DNA Points to Different Man*, *supra* note 168; *see Haynesworth*, 717 S.E.2d at 818.

¹⁷⁵ Glod & Kumar, *supra* note 169.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* *See* Leventhal, *supra* note 141, at 1513 (describing the State of Virginia's statutory scheme for the handling of claims of actual innocence).

¹⁷⁸ Glod, *supra* note 167; John Schwartz, *After Decades in Prison, Cleared of Rape but Lacking Full Exoneration*, N.Y. TIMES, Sept. 25, 2011, at 22;.

convictions.¹⁷⁹ Released on parole earlier that year while the case was pending, Haynesworth thus was fully exonerated.¹⁸⁰ He had spent twenty-seven years in prison for crimes he did not commit.¹⁸¹ In the eleven months between Haynesworth's February 1984 arrest and his own arrest in December 1984, Leon Davis, the "Black Ninja" rapist, had continued to terrorize the Richmond area and sexually assaulted as many as a dozen additional victims.¹⁸²

Aaron Doxie, III

Two women were raped and sodomized at knifepoint on the night of August 14, 1981 in Norfolk, Virginia.¹⁸³ The rapes were separated by only forty-five minutes and occurred in the same neighborhood.¹⁸⁴ The victims gave similar descriptions of their respective assailants.¹⁸⁵ Norfolk police concluded that Arthur Whitfield fit the descriptions even though Whitfield's appearance differed from the suspect's described characteristics in significant respects.¹⁸⁶ The police suspected Whitfield of committing a burglary that same night in the general vicinity of the rapes and thus included his photograph in an array presented to one of the rape victims.¹⁸⁷ The victim "selected Whitfield's photograph . . . [indicating] that she was 95 percent sure he was the man who raped her."¹⁸⁸ The next day, the victims from both rapes, who happened to know one another, drove together to the police station in anticipation of viewing a lineup.¹⁸⁹ They discussed what they had endured during their ordeals, including the description of their assailants.¹⁹⁰ They then independently observed lineups.¹⁹¹ Each identified Whitfield as her rapist.¹⁹²

¹⁷⁹ Haynesworth v. Commonwealth, 717 S.E.2d 817, 817 (Va. Ct. App. 2011) (Elder, J., dissenting); Glod & Kumar, *supra* note 169.

¹⁸⁰ Glod & Kumar, *supra* note 169.

¹⁸¹ *Id.* Haynesworth subsequently was awarded just over \$1 million in compensation for his wrongful incarceration. Ken Cuccinelli Statement, *supra* note 152.

¹⁸² Green & Williams, *DNA Points to Different Man*, *supra* note 168.

¹⁸³ JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 123 (2008).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 123, 124.

¹⁸⁷ *Id.* at 123.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See id.* at 123, 124.

¹⁹¹ *Id.* at 123.

¹⁹² *Id.*

Whitfield denied the charges.¹⁹³ He maintained that he was at a party on the night of the rapes, a story that four family members and friends confirmed.¹⁹⁴ Separate trials were ordered for the two attacks.¹⁹⁵ Nevertheless, at the first scheduled trial, the judge allowed both rape victims to testify, one in her capacity as the victim named in the indictment, and the other to rebut the testimony of Whitfield's alibi witnesses.¹⁹⁶ The jury found Whitfield guilty and sentenced him to forty-five years in prison.¹⁹⁷ On the heels of this verdict, and knowing that both victims again would be allowed to testify in the trial scheduled for the second rape, Whitfield pleaded guilty to the other rape charge.¹⁹⁸ He received an eighteen year sentence, to be served consecutively with the earlier forty-five year sentence.¹⁹⁹

On December 6, 1981, less than four months after the rapes for which Whitfield was convicted had occurred, another Norfolk woman was raped and sodomized at knifepoint by a man who broke into her apartment.²⁰⁰ The woman, who was white, described her assailant, who was black, to the police and then examined hundreds of photos in a fruitless attempt to identify the man.²⁰¹ Roughly six weeks later, in the corridor of the hospital where she worked, the rape victim noticed a maintenance man who she felt certain was her assailant.²⁰² The man was Julius Ruffin, who not only had two prominent gold front teeth, which were not mentioned in the woman's earlier description of her rapist, but also was considerably taller, heavier, and had a lighter complexion than the man she had described.²⁰³ The victim subsequently picked Ruffin out of a lineup.²⁰⁴ He was arrested and charged with the crimes.²⁰⁵

¹⁹³ *Id.* at 124.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Geoff Dutton, *High Cost of Freedom: Despite Innocence, He's Labeled a Sex Offender*, COLUMBUS DISPATCH (Sept. 9, 2011, 4:50 PM), <http://www.dispatch.com/content/stories/local/2008/01/30/dna4.html> (quoting Whitfield as saying that he was aware that he did not "have a leg to stand on" when he made the decision to plead guilty); see GOULD, *supra* note 183, at 124.

¹⁹⁹ GOULD, *supra* note 183, at 124.

²⁰⁰ *Id.* at 106.

²⁰¹ *Id.*

²⁰² *Id.* at 107.

²⁰³ *Id.* at 106, 107.

²⁰⁴ *Id.* at 107.

²⁰⁵ *Id.*

Ruffin's first two trials ended in hung juries.²⁰⁶ The juries were racially mixed and in each trial the white jurors had voted to convict while the black jurors had voted not guilty.²⁰⁷ At Ruffin's third trial, the prosecutor used peremptory challenges to excuse four prospective black jurors.²⁰⁸ The resulting all-white jury heard the evidence (the testimony of both the victim and a police officer differed in respects from testimony they had offered at the earlier trials) and deliberated for only seven minutes before returning with a guilty verdict.²⁰⁹ Ruffin was sentenced to five terms of life imprisonment.²¹⁰ He had maintained his innocence throughout the proceedings and continued to do so after he was incarcerated and became parole-eligible.²¹¹

While Arthur Whitfield and Julius Ruffin were serving sentences for what appeared to be unrelated offenses, their lives, the lives of the women they had been convicted of raping and sodomizing, and the lives of still other sexual assault victims would become discernibly intertwined with the criminal career of Aaron Doxie, III. In October 1981—sandwiched in between the August rapes for which Whitfield was convicted and the December rape resulting in Ruffin's conviction—Doxie received a suspended ten-year prison sentence for the attempted rape of an eleven-year-old girl in Norfolk.²¹² In March 1982, he was convicted of assault.²¹³ In September 1983, following his release from jail, he was charged with committing rape after making a nighttime entry into a woman's residence with a knife.²¹⁴ As in Ruffin's case, Doxie's first two trials ended with hung juries.²¹⁵ Additionally, as in Ruffin's case, the jury at Doxie's third trial, in March 1984, convicted him.²¹⁶ Doxie was sentenced to three terms of life imprisonment.²¹⁷

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Julius Ruffin*, MID-ATL. INNOCENCE PROJECT, <http://www.exonerate.org/other-local-victories/julius-ruffin> (last visited May 18, 2013).

²¹⁰ Tim McGlone, *Free, Finally. Persistence Pays Off with Proof of Innocence, but Justice Falls Short*, VIRGINIAN-PILOT, Feb. 9, 2004, at A1.

²¹¹ GOULD, *supra* note 183, at 108–09.

²¹² Tim McGlone, *The Wrong Man*, VIRGINIAN-PILOT, Feb. 9, 2004, at A1.

²¹³ *Id.*

²¹⁴ See *Doxie v. Commonwealth*, No. 0063 84, 1986 WL 400450, at *1 (Va. Ct. App. Aug. 26, 1986) (“On September 7, 1983, the grand jury returned indictments against Doxie for rape, sodomy, abduction and burglary.”).

²¹⁵ McGlone, *supra* note 212.

²¹⁶ *Id.*

²¹⁷ *Doxie v. Clarke*, No. 2:10CV379, 2011 WL 1930666, at *1 (E.D. Va. Apr. 22, 2011); Timothy McGlone, *Governor Grants Pardon to Man Wrongly Convicted of 1981 Rape*,

Fortuitously, biological evidence from both Whitfield's and Ruffin's convictions was preserved in the records kept by Mary Jane Burton, a Virginia crime laboratory analyst who was employed in the era before the forensic use of DNA testing was anticipated.²¹⁸ Each man took advantage of a statute enacted in Virginia in 2001 authorizing them to apply for post-conviction DNA testing of evidence.²¹⁹ When the evidence in their cases was tested, each was excluded as the source of the preserved semen.²²⁰ Remarkably, the DNA profiles from the rapes for which both Whitfield and Ruffin had been wrongfully convicted matched the profile of the same man: Aaron Doxie, III.²²¹ Ruffin was released on parole in February 2003, having served more than twenty years in prison.²²² He was issued a full pardon by Governor Mark Warner the following month.²²³ Whitfield was paroled in August 2004.²²⁴ He had spent twenty-two years in prison.²²⁵ He was pardoned by Governor Timothy Kaine in 2009.²²⁶

Aaron Doxie, III was not prosecuted for the crimes to which his

VIRGINIAN-PILOT, Mar. 20, 2003, at A1. Doxie's prior criminal history is described somewhat differently in a presentation prepared by Virginia Deputy Secretary of Public Safety Clyde Cristman, who identifies prior convictions for two counts of burglary, contributing to the delinquency of a minor, and attempted rape. CLYDE CRISTMAN, DNA, EARL AND MARY JANE: THE VIRGINIA EXPERIENCE 40 (n.d.).

²¹⁸ See Kristen Gelineau, *She Taped Their Innocence Inside Her Crime Lab Files*, L.A. TIMES (Oct. 9, 2005), <http://articles.latimes.com/2005/oct/09/news/adna-saved9>.

²¹⁹ See GOULD, *supra* note 183, at 108. See also Act of May 2, 2001, ch. 873, § 1, 2001 Va. Acts 1621, 1621 (describing the application procedure for post-conviction DNA testing of evidence); Leventhal, *supra* note 141, at 1513 (describing the State of Virginia's statutory scheme for writs of actual innocence, and Virginia court treatment of similar claims).

²²⁰ GOULD, *supra* note 183, at 108, 125.

²²¹ *Id.*

²²² *Julius Ruffin*, *supra* note 209.

²²³ *Id.*

²²⁴ *Arthur Whitfield*, MID-ATLANTIC INNOCENCE PROJECT, <http://www.exonerate.org/other-local-victories/arthur-lee-whitfield> (last visited May 18, 2013).

²²⁵ *Id.*

²²⁶ *Id.* Whitfield's pardon came years after his release from prison. Candace Rondeaux, *Freed Man Still Fighting to Clear Name*, WASH. POST (June 5, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/04/AR2006060400939.html>.

The victim of one of the rapes for which he was convicted continued to insist that, notwithstanding the results of the DNA testing—which she maintained may have resulted from a mix-up in evidence samples—she was certain that Whitfield was the man who had raped her. *Id.* In addition, the Virginia Supreme Court had refused to issue Whitfield a writ of actual innocence, concluding that he was ineligible because he had been paroled and was no longer incarcerated. Michelle Washington, *State Court Dismisses Man's Request for Ruling of Innocence*, VIRGINIAN-PILOT, Nov. 3, 2005, at B1; Rondeaux, *supra*. See also Leventhal, *supra* note 141, at 1513 ("Court will grant petition for post-conviction DNA testing if petitioner proves that he is convicted of a felony, currently incarcerated, and the evidence is material so that no reasonable trier of fact could have found proof of guilt beyond a reasonable doubt.").

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DNA profile was linked and for which Ruffin and Whitfield were wrongly convicted.²²⁷ The Norfolk Commonwealth's Attorney cited chain of custody problems with the semen samples and the unavailability of critical witnesses.²²⁸ As Professor Jon Gould has observed: "[h]ad Doxie been caught at the time of the first rapes [i.e., those for which Whitfield was convicted], the victim in Ruffin's case might have been spared."²²⁹ The same might be said about the victim of the sexual assault for which Doxie was ultimately convicted, and about Whitfield and Ruffin, each of whom endured decades of wrongful incarceration.²³⁰

Howard Dupree Grissom

In November 2001, an intruder wearing a ski mask and a blue hooded sweatshirt and armed with a baseball bat entered a Las Vegas, Nevada home occupied by a woman and her two daughters.²³¹ He demanded money, then forced the woman and her children into the family's car and ordered the woman to drive to a bank to withdraw more funds.²³² The woman's husband returned home, finding it in disarray and his wife, children, and the car missing.²³³ He went searching for them and encountered his wife driving, with the masked intruder still in the vehicle.²³⁴ The man ran and the family immediately notified the police, providing a general description of the robber and the clothes he was wearing.²³⁵

²²⁷ Jerry Markon, *Inmate Will Not Be Tried in 1981 Norfolk Rapes*, WASH. POST, Dec. 11, 2004, at B1.

²²⁸ *Id.*; Michelle Washington, *DNA From 3 Rapes Points to 1 Man*, VIRGINIAN-PILOT, Dec. 8, 2004, at B1; Michelle Washington, *Evidence Problems Cancel Man's Rape Charges*, VIRGINIAN-PILOT, Jan. 6, 2004, at B3. One of the victims in the cases resulting in Whitfield's convictions also remained adamant that Whitfield was the man who had raped her. Rondeaux, *supra* note 226.

²²⁹ GOULD, *supra* note 183, at 109. When confronted with the DNA evidence, Doxie denied having committed the crimes for which Ruffin was convicted. See Michelle Washington, *Hearing Could Re-implicate Man Freed by DNA*, VIRGINIAN-PILOT, Feb. 16, 2005, at B2. "A DNA analysis from the State Division of Forensic Science included in the court records [in the case pertaining to Julius Ruffin's wrongful conviction] said the chance the biological evidence came from someone other than Doxie is one in more than 6 billion." Michelle Washington, *Attorney Seeks Independent DNA Tests*, VIRGINIAN-PILOT, Aug. 6, 2003, at B4.

²³⁰ See *supra* notes 222, 225 and accompanying text.

²³¹ Jackie Valley, *Metro Reviewing DNA Cases After Error Led to Wrongful Conviction*, LAS VEGAS SUN (July 7, 2011, 10:10 AM), <http://www.lasvegassun.com/news/2011/jul/07/dna-lab-switch-led-wrongful-conviction-man-who-ser> [hereinafter Valley, *Metro Reviewing DNA Cases*].

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

A short while later, the police spotted two young men—eighteen-year-old Dwayne Jackson and his cousin, fifteen-year-old Howard Dupree Grissom—riding bicycles near the family's home.²³⁶ The youths led the police to a nearby parked car, inside of which were a ski mask and a blue hooded sweatshirt matching the description of the intruder's clothing.²³⁷

Jackson and Grissom both denied involvement in the crime.²³⁸ Each young man provided the police with a DNA sample.²³⁹ The samples were sent to the Metropolitan Police Department Crime Laboratory, stored in separate vials, and later were compared to DNA retrieved from the blue hooded sweatshirt.²⁴⁰ The profile from the sweatshirt matched the DNA in Jackson's vial.²⁴¹ Jackson was charged with three counts of kidnapping, burglary, and robbery, crimes that could have resulted in his incarceration for life upon conviction.²⁴² He entered a guilty plea to a single count of robbery in exchange for the remaining charges being dropped.²⁴³ He was imprisoned until 2006.²⁴⁴

Although it was not apparent at the time, Jackson's guilty plea resulted in his wrongful conviction. His DNA sample and Grissom's had inadvertently been mislabeled at the police crime lab.²⁴⁵ The DNA from the blue hooded sweatshirt belonged to Grissom, whose DNA had erroneously been placed in the vial marked as Jackson's.²⁴⁶ The mistake was not discovered until October 2010 when law enforcement authorities in California entered Grissom's

²³⁶ *Id.*; Lawrence Mower & Doug McMurdo, *Las Vegas Police Reveal DNA Error Put Wrong Man in Prison*, LAS VEGAS REV.-J. (July 7, 2011, 10:22 AM), <http://www.lvrj.com/news/dna-related-error-led-to-wrongful-conviction-in-2001-case-125160484.html>.

²³⁷ Mower & McMurdo, *supra* note 236.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Hans Sherrer, *Dwayne Jackson Cleared of Robbery After Discovery the Crime Lab Switched DNA Samples*, JUST. DENIED (July 8, 2011, 3:17 PM), <http://justicedenied.org/wordpress/archives/1309>.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Brian Haynes, *Committee OKs \$1.5 Million Settlement For Wrongly Imprisoned Man*, LAS VEGAS REV.-J. (July 25, 2011, 10:16 AM), <http://www.lvrj.com/news/committee-oks-1-5-million-settlement-for-wrongly-imprisoned-man-126122823.html>.

²⁴⁶ Mower & McMurdo, *supra* note 236. A crime lab technician apparently placed the DNA sample that police had obtained from Jackson in a vial marked with Grissom's name, and vice-versa. Haynes, *supra* note 245; Mower & McMurdo, *supra* note 236. When the mistake came to light in 2011, Clark County (Las Vegas) Sheriff Doug Gillespie candidly acknowledged it: "[w]e sent an innocent man to prison," he was quoted as saying. Mower & McMurdo, *supra* note 236. "To say this error is regrettable would be an understatement." *Id.*; Valley, *Metro Reviewing DNA Cases*, *supra* note 231.

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DNA profile into the Combined DNA Index System (CODIS),²⁴⁷ learned that it matched the profile associated with the 2001 Las Vegas crimes for which Jackson had been held responsible, and notified their counterparts in Nevada.²⁴⁸ Grissom had been arrested in Moreno Valley, California in July 2010 for abducting a woman from her apartment, and then raping, robbing, and repeatedly stabbing her.²⁴⁹ He subsequently was convicted of attempted manslaughter and sentenced to forty-one years to life in prison.²⁵⁰ The DNA sample taken following his conviction produced the “hit” that revealed the mix-up that led to Jackson’s erroneous conviction.²⁵¹ Jackson subsequently was exonerated and was awarded \$1.5 million in compensation for his wrongful conviction and incarceration.²⁵²

The mistake could have been discovered earlier. In 2008, Grissom began serving a two to five year prison sentence in Nevada upon being convicted on robbery and conspiracy charges.²⁵³ As state law required, DNA was collected from him at that time.²⁵⁴ The swab with his DNA was sent to the Metropolitan Police Department’s crime lab in Las Vegas, but the DNA profile was not entered into CODIS to be checked against the known offender database.²⁵⁵ Instead, under the unorthodox policy then in effect in the police department, Grissom’s profile was entered into a DNA database that only included “open” cases, which had not resulted in a conviction.²⁵⁶ Thus, Grissom’s profile was never compared against the profile linked to Jackson’s 2002 conviction, as the California officials had done in discovering the error.²⁵⁷

Had Grissom’s DNA profile been entered into CODIS by the Las

²⁴⁷ See generally Lab. Servs., *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FBI, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited May 18, 2013) (explaining the operation of the nation’s criminal DNA databases).

²⁴⁸ Rebecca Clifford-Cruz, *Wrongfully Convicted: A Look at 5 Cases*, LAS VEGAS SUN (July 29, 2011, 2:00 AM) <http://www.lasvegassun.com/news/2011/jul/29/wrongfully-convicted/>; Mower & McMurdo, *supra* note 236; Sherrer, *supra* note 242.

²⁴⁹ Clifford-Cruz, *supra* note 248; Mower & McMurdo, *supra* note 236.

²⁵⁰ Mower & McMurdo, *supra* note 236; see Haynes, *supra* note 245.

²⁵¹ Mower & McMurdo, *supra* note 236.

²⁵² Haynes, *supra* note 245; Jackie Valley, *Man Wrongfully Convicted After a DNA Mix-up Awarded \$1.5 Million*, LAS VEGAS SUN (July 25, 2011, 10:05 AM) <http://www.lasvegassun.com/news/2011/jul/25/man-wrongly-convicted-after-dna-mix--awarded-15-mi> [hereinafter Valley, *Man Wrongfully Convicted*].

²⁵³ Clifford-Cruz, *supra* note 248.

²⁵⁴ See Mower & McMurdo, *supra* note 236.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

Vegas police and this broader search conducted in 2008, Jackson would not have been spared his wrongful conviction and incarceration. Nevertheless, had the error been caught in this more timely fashion, Grissom presumably would have been held accountable for the kidnappings and robbery that had been attributed to Jackson. He almost certainly would not have been paroled and been able to migrate to California in 2010,²⁵⁸ where he continued his violent criminal victimization.²⁵⁹

Clifton Hall

In November 1985, Byron Halsey was living with his girlfriend Margaret Urquhart and her eight-year-old son and seven-year-old daughter in a Plainfield, New Jersey rooming house.²⁶⁰ Halsey was with the children on the evening of November 14 while Urquhart was at work.²⁶¹ He left the children alone after he accepted a ride from his next-door neighbor, Clifton Hall, and attended a party across town.²⁶² Halsey remained at the gathering, drinking heavily, while Hall departed.²⁶³ When Halsey returned to the rooming house later that night, the children were nowhere to be found.²⁶⁴ He telephoned Urquhart, notified others about the children's disappearance, and began looking for them.²⁶⁵ The children's bodies were found the next morning in the basement of the rooming house.²⁶⁶ They had been slain in horrific fashion. Four nails²⁶⁷ had been hammered through the boy's skull, piercing his brain, and his face had been slashed with a pair of scissors.²⁶⁸ The girl had been strangled, and her underwear stuffed into her mouth.²⁶⁹ Both

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Know the Cases: Byron Halsey*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Byron_Halsey.php (last visited May 18, 2013).

²⁶¹ *See id.*

²⁶² *See id.* (noting that he was dropped off "with friends").

²⁶³ Julie O'Connor, *Exonerated After 22 Years in Prison, Man Files Federal Civil Rights Suit*, N.J.COM BLOG (May 24, 2009, 10:00 AM), http://blog.nj.com/ledgerupdates_impact/print.html?entry=/2009/05/the_man_who_spent_mor

e.html.

²⁶⁴ *Know the Cases: Byron Halsey*, *supra* note 260.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ O'Connor, *supra* note 263.

²⁶⁸ Austin Fenner et al., *'Wrong Man' Free After 19 Yrs.—& Real 'Killer' Was Star Witness*, N.Y. POST (May 16, 2007), http://www.nypost.com/p/news/regional/item_gGegKp53z65FfbJNfOXKyM.

²⁶⁹ *Id.*

children were sexually assaulted.²⁷⁰

The police initially considered both Halsey and Hall to be suspects.²⁷¹ Questioned by the police for thirty hours,²⁷² Halsey, a man with a sixth-grade education and serious learning disabilities,²⁷³ made incriminating admissions that alternated between “gibberish”²⁷⁴ and details that presumably could have been known only by the actual perpetrator.²⁷⁵ He also failed a polygraph exam.²⁷⁶ He was charged with capital murder and sexual assault and brought to trial in 1988.²⁷⁷ Clifton Hall testified as a prosecution witness.²⁷⁸ The jury found Halsey guilty of two counts of non-capital murder, sexual assault, and child abuse.²⁷⁹ He was sentenced to two terms of life imprisonment without parole eligibility for sixty years.²⁸⁰ In 2000, while affirming a lower court ruling that had denied Halsey’s request for access to evidence so he could submit it to post-conviction DNA testing, a New Jersey appellate court described the evidence of Halsey’s guilt as “overwhelming.”²⁸¹

Halsey subsequently gained access to the crime scene evidence.²⁸² DNA testing completed in 2007 excluded him as the source of the semen connected to the children’s sexual assaults and also excluded him as the source of saliva retrieved from cigarette butts near their bodies.²⁸³ The crime scene profiles instead matched Clifton Hall,

²⁷⁰ State v. Halsey, 748 A.2d 634, 637 (N.J. Super. Ct. App. Div. 2000); *Know the Cases: Byron Halsey*, *supra* note 260; Julie O’Connor, *Innocent Man Sues for Years Spent in Prison*, STAR-LEDGER (Newark, N.J.), May 24, 2009, at 23.

²⁷¹ *Know the Cases: Byron Halsey*, *supra* note 260.

²⁷² Press Release, Innocence Project, Byron Halsey is Fully Exonerated in New Jersey after DNA Proves His Innocence in 1985 Child Rapes and Murders (July 9, 2007) [hereinafter Halsey Press Release].

²⁷³ Tina Kelley, *New Jersey Drops Charges for Man Imprisoned 19 Years*, N.Y. TIMES, July 10, 2007, at B03; Halsey Press Release, *supra* note 272.

²⁷⁴ See Halsey, 748 A.2d at 636; Halsey Press Release, *supra* note 272.

²⁷⁵ See Brandon Garrett, *The Substance of False Confessions*, 62 STANFORD L. REV. 1051, 1088–89 (2010) (discussing the interrogation of Halsey and his “guesses” as to the manner in which the murder and rape of the children was conducted).

²⁷⁶ Halsey, 748 A.2d at 635.

²⁷⁷ *Know the Cases: Byron Halsey*, *supra* note 260.

²⁷⁸ *Id.*; Fenner et al., *supra* note 268.

²⁷⁹ *Know the Cases: Byron Halsey*, *supra* note 260.

²⁸⁰ Halsey, 748 A.2d at 636.

²⁸¹ *Id.* at 636.

²⁸² Symposium, *Panel III—Legislative Moratorium and the New Jersey Death Penalty Study Commission*, 33 SETON HALL LEGIS. J. 137, 150 n.42 (2008). Legislation became effective in New Jersey in 2002 that authorized prisoners under qualifying circumstances to have access to evidence for post-conviction DNA testing. Leventhal, *supra* note 141, at 1503; N.J.S.A. § 2A:84A-32a (2012); see Symposium, *supra*, at 150 n.42.

²⁸³ Halsey Press Release, *supra* note 272.

whose DNA was on file pursuant to his conviction for three “savage” sexual assaults carried out in 1991 and 1992.²⁸⁴

In June 1991, [Hall] grabbed an 18-year-old woman from behind on a street and, holding a knife to her throat, orally, vaginally, and anally raped her for up to three hours. Three months later, he abducted a 19-year-old woman and took her to a building where he repeatedly and violently raped her vaginally and anally for two hours. Several months after that, he punched and attempted to rape a 26-year-old woman as she walked toward a train station²⁸⁵

Hall would not have remained at liberty to commit those crimes had the police investigation and prosecution of Halsey not misfired and resulted in Halsey’s wrongful conviction.

Byron Halsey was released from prison in May 2007.²⁸⁶ He was formally exonerated two months later when prosecutors dismissed the charges against him.²⁸⁷ He had been incarcerated since 1985.²⁸⁸ Clifton Hall was indicted in November 2007 for the crimes for which Halsey had been wrongfully convicted.²⁸⁹ Hall died of kidney failure in 2009, at age 52, before he could be brought to trial and while still imprisoned for the sexual assaults he had committed in 1991 and 1992.²⁹⁰ The prosecutor preparing for Hall’s trial was quoted as saying, “Clifton cheated justice He never spent a day in state’s prison for the atrocious murders he committed. He never had to pay for robbing 22 years from Byron Halsey—an innocent man who sat in jail for crimes he did not commit.”²⁹¹

Andrew Harris

Eva Gail Patterson was raped and murdered in her home in rural

²⁸⁴ Fenner et al., *supra* note 268.

²⁸⁵ Halsey Press Release, *supra* note 272.

²⁸⁶ *Id.*

²⁸⁷ *Id.*; Kelley, *supra* note 273; see also Tina Kelley, *DNA in Murders Frees Inmate After 19 Years*, N.Y. TIMES, May 16, 2007, at B1 (“[Prosecutors] said that the DNA evidence pointed instead to Cliff Hall, a neighbor who testified against Mr. Halsey at his 1988 trial and who [was] currently in prison for three sexual assaults.”).

²⁸⁸ Halsey Press Release, *supra* note 272.

²⁸⁹ See Claire Heininger, *Convicted Rapist Charged in Plainfield Children’s Slayings*, NJ.COM (Nov. 19, 2007), http://www.nj.com/news/index.ssf/2007/11/six_months_after_publicly_admi.html.

²⁹⁰ *Clifton Hall—Plainfield Man Facing 1985 Double Murder Charge Dies in Jail*, ALTERNATIVE PRESS (Aug. 24, 2010), <http://thealternativepress.com/articles/clifton-hall-plainfield-man-facing-1985-double>.

²⁹¹ *Id.*

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Eatonville, Mississippi on the night of May 4, 1979.²⁹² The state supreme court opinion that affirmed Larry Ruffin's conviction for those crimes following his 1980 trial remarked that "[t]he physical facts demonstrate as ghastly a murder as can be envisioned. A harmless young housewife was raped in her home, and her throat slashed from ear-to-ear in the presence of her two little terrified children."²⁹³ The prosecution had sought the death penalty but Ruffin was sentenced to life imprisonment when the jury was unable to reach a unanimous penalty verdict at his trial.²⁹⁴

Ruffin's conviction was supported by his May 30 and June 12 confessions to the police.²⁹⁵ The confessions, which Ruffin later retracted, were inconsistent in respects, although in both statements he purported to have raped and murdered Mrs. Patterson while acting alone.²⁹⁶ Mrs. Patterson's four-year-old son, Luke, witnessed the crime and although he could not identify his mother's killer, similarly reported a lone assailant: "[a] Black man tried to hurt my mommy."²⁹⁷

Contrary statements were given to the police roughly a year and one-half after the crime by Bobby Ray Dixon and Phillip Bivens, both of whom pleaded guilty to Mrs. Patterson's murder in exchange for life sentences and testified for the prosecution at Ruffin's trial.²⁹⁸ From the witness stand and in videotaped statements to the police, each described how the three men had jointly entered Patterson's home and participated in the crime.²⁹⁹ Dixon, who had been kicked in the head by a horse as a child and admitted at Ruffin's trial to being a "hard learner" and that "I don't have the right mind,"³⁰⁰ offered particularly confusing testimony, which culminated with a retraction. He ultimately told the jury "he did not see Ruffin on the night of [the murder], that he did not go in the house, was not even there, and that he had never seen Mrs. Patterson before."³⁰¹ Bivens's testimony was less equivocal. However, he recanted that

²⁹² See *Ruffin v. State*, 447 So. 2d 113, 114–15 (Miss. 1984).

²⁹³ *Id.* at 115.

²⁹⁴ Campbell Robertson, *30 Years Later, Freedom in a Case With Tragedy for All Involved*, N.Y. TIMES, Sept. 17, 2010, at A12.

²⁹⁵ *Ruffin*, 447 So. 2d at 115.

²⁹⁶ Robertson, *supra* note 294, at A12.

²⁹⁷ *Ruffin*, 447 So. 2d at 114 (internal quotation marks omitted); see also Robertson, *supra* note 294, at A12 ("The 4-year-old, Luke, told the police that a single man, 'a bad boy,' had killed his mother.").

²⁹⁸ *Id.* at 115, 117.

²⁹⁹ *Id.*

³⁰⁰ Robertson, *supra* note 294, at A12.

³⁰¹ *Ruffin*, 447 So. 2d, at 117.

testimony in a sworn affidavit submitted less than a month after Ruffin's conviction.³⁰² Like Dixon, Bivens claimed to have been threatened with the death penalty if he would not cooperate with the authorities.³⁰³

Ruffin, Dixon, and Bivens entered Mississippi's prison system in 1980.³⁰⁴ Thirty years later, DNA testing excluded each of them as the source of the semen preserved as evidence in Mrs. Patterson's rape and murder.³⁰⁵ The DNA profile instead matched Andrew Harris, who lived just up the road from the Pattersons at the time of Mrs. Patterson's rape and murder.³⁰⁶ Harris was convicted of an unrelated rape committed in the same county in 1981.³⁰⁷ When the DNA testing was completed in 2010, he remained in service of the sentence of life imprisonment imposed for that offense.³⁰⁸

Harris was indicted in December 2010 for Mrs. Patterson's 1979 murder,³⁰⁹ a crime that, incredibly, spawned the false confessions and wrongful convictions of three other men and resulted in their decades-long incarceration.³¹⁰ Forrest County Circuit Judge Robert Helfrich vacated Bobby Ray Dixon's and Phillip Bivens's guilty pleas at a hearing conducted in September 2010.³¹¹ He noted, "[t]he

³⁰² *Exonerees Profiles: Phillip Bivens*, INNOCENCE PROJECT OF NEW ORLEANS, <http://www.ip-no.org/exonoree-profile/phillip-bivens> (last visited May 18, 2013).

³⁰³ *Id.*

³⁰⁴ *See id.*

³⁰⁵ *Id.* The testing apparently was prompted when a corrections officer contacted the Innocence Project on behalf of Phillip Bivens. Robertson, *supra* note 294, at A12.

³⁰⁶ *Id.*

³⁰⁷ Associated Press, *Man Dies Weeks After Being Cleared in 1979 Killing*, KATC.COM (Nov. 9, 2010), available at <http://www.katc.com/news/man-dies-weeks-after-being-cleared-in-1979-killing>; *Man Dies Weeks After Being Cleared in 1979 Killing*, *supra* note 307; Ontario Richardson, *Suspect Appears in Forrest County Court on 1979 Rape and Murder Charges*, WDAM.COM (Apr. 19, 2011), available at <http://www.wdam.com/story/14473126/suspect-appears-in-forrest-county-court-on-1979-rape-and-murder-charges?redirected=true>; *see Exoneree Profiles*, *supra* note 302.

³⁰⁸ Robertson, *supra* note 294, at A12; *Man Dies Weeks After Being Cleared in 1979 Killing*, *supra* note 307; Richardson, *supra* note 307. *See Harris v. State*, 435 So. 2d 689 (Miss. 1983) (affirming the conviction), *cert. denied*, 464 U.S. 1049 (1984).

³⁰⁹ *Exoneree Profiles*, *supra* note 302. Harris's murder trial was scheduled to begin in October 2012. *Trial Set for 1979 Murder, Rape Case*, MISS. LINK (Aug. 7, 2012), available at <http://themismissippilink.com/2012/08/07/trial-set-for-1979-murder-rape-case>.

³¹⁰ *Trial Set for 1979 Murder, Rape Case*, *supra* note 309.

³¹¹ Associated Press, *DNA Testing Frees 2 Men After 30 Years*, WASH. TIMES (Sept. 16, 2010), available at <http://www.washingtontimes.com/news/2010/sep/16/dna-testing-frees-2-men-after-30-years/print>; *see also* Robertson, *supra* note 293 (describing the scene in the courtroom as Bivens and Dixon were exonerated by a judge). Dixon and Bivens were formally exonerated in December 2010, when a grand jury was asked to consider their cases and declined to indict them. Associated Press, *Forrest Co. Grand Jury Clears Men in Old Murder*, PICAYUNE ITEM (Dec. 16, 2010), available at <http://picayuneitem.com/statenews/x1707767623/Forrest-Co-grand-jury-clears-men-in-old-murder/print>; *Exonerees Profiles: Phillip Bivens*, *supra* note 302.

common thread in this case is tragedy.”³¹² Dixon, critically ill from lung and brain cancer,³¹³ died less than three months later.³¹⁴ He outlived Larry Ruffin, who suffered a heart attack and died in 2002, while still incarcerated on his wrongful conviction.³¹⁵ Bivens, age fifty-nine when released from prison,³¹⁶ had spent more than half of his life incarcerated for a crime he did not commit.³¹⁷ Details are unavailable regarding the victim of Andrew Harris’s 1981 rape, which occurred two years after Eva Gail Patterson’s rape and murder, and the year after Ruffin, Bivens, and Dixon were wrongfully convicted.³¹⁸

Andrew Hawthorne

On October 20, 2002, a man riding a bicycle in Houston, Texas offered an eight-year-old boy ten dollars if the boy would help him clean up some trash.³¹⁹ The child left his six-year-old playmate³²⁰ and accompanied the man to a vacant house, where he was sodomized at knifepoint.³²¹ Concerned citizens later encountered the hysterical boy running down a neighborhood street and took

³¹² *DNA Testing Frees 2 Men After 30 Years*, *supra* note 311.

³¹³ *Id.*; *Exoneree Profiles: Bobby Ray Dixon*, INNOCENCE PROJECT OF NEW ORLEANS, <http://www.ip-no.org/exoneree-profile/bobby-ray-dixon> (last visited May 18, 2013).

³¹⁴ *Exoneree Profiles: Bobby Ray Dixon*, *supra* note 313; *Forest Co. Grand Jury Clears Men in Old Murder*, *supra* note 311.

³¹⁵ Robertson, *supra* note 294, at A12; *Exoneree Profiles: Bobby Ray Dixon*, *supra* note 313; *Found Guilty in 1979, Larry Ruffin Exonerated by DNA After His Death*, DEATH PENALTY NEWS (Feb. 22, 2011), <http://deathpenaltynews.blogspot.com/2011/02/found-guilty-in-1979-slaying-larry.html> [hereinafter *Found Guilty*]; *Know the Cases: Larry Ruffin*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Larry_Ruffin.php (last visited May 18, 2013). Ruffin was formally exonerated posthumously, in February 2011. *Exoneree Profiles: Bobby Ray Dixon*, *supra* note 313; *Found Guilty*, *supra*.

³¹⁶ Robertson, *supra* note 294, at A12.

³¹⁷ *See id.*

³¹⁸ In 2011, former Mississippi Supreme Court Justice James L. Robertson offered several insights about Ruffin’s wrongful conviction and the limited role that appellate courts have in reviewing cases where factual innocence, rather than procedural error, is at issue. James L. Robertson, *A Life Sentence Served by an Innocent Man*, CAPITAL AREA BAR ASS’N 8–11 (2011), www.caba.ms/newsletters/caba-newsletter-june2011.pdf; *see also* Leventhal, *supra* note 141, at 1500 (describing the State of Mississippi’s post-conviction statutory relief for a defendant). Robertson was not on the three-judge panel that heard Larry Ruffin’s appeal, but he concurred in the opinion affirming Ruffin’s conviction. *Ruffin v. State*, 447 So. 2d 113, 120 (Miss. 1984).

³¹⁹ PATRICIA R. LYKOS & HAROLD L. HURTT, RACHELL REPORT 1–2 (n.d.), *available at* http://www.kennedy-law.biz/files/Rachell_Report.pdf; Lise Olsen, et al., *Houstonian Cleared by DNA Lies Low as He Starts New Life*, HOUS. CHRON. (Dec. 13, 2008), <http://www.chron.com/news/houston-texas/article/Houstonian-cleared-by-DNA-lies-low-as-he-starts-1612828.php>.

³²⁰ LYKOS & HURTT, *supra* note 319, at 1.

³²¹ Olsen et al., *supra* note 319.

him to his mother, where the child reported only that he had been abducted by a man who tried to kill him.³²² The police were called and took statements from the boy and his six-year-old friend, including a general description of the man on the bicycle as being about thirty years old and black.³²³ The next morning, the boy's mother saw Richardo Rachell walking in a nearby street.³²⁴ Rachell, forty-five years old, was severely disfigured; he had lost nearly half his face to a shotgun blast years earlier, and was known locally as "Scary Man."³²⁵ Believing that Rachell might be her son's assailant, the mother retrieved her child from home, drove him to the location where Rachell was walking, and asked the boy if Rachell was the man who had attacked him.³²⁶ When her son replied that he was, the mother called the police.³²⁷

The police arrived and placed Rachell inside of a patrol car.³²⁸ In response to an officer's question, the boy reaffirmed that Rachell was his assailant and then disclosed for the first time that his pants had been pulled down by the man who had attacked him.³²⁹ A subsequent examination confirmed that the child had been sexually assaulted.³³⁰ Both a rape kit and the underwear that the boy had worn on the day of the attack preserved seminal fluid evidencing the sexual assault.³³¹ The rape kit and underwear were delivered to the Houston Police Department's property room and an officer completed a report on October 22 requesting that they be analyzed by the Houston Crime Lab.³³² Rachell was arrested on October 24, 2002.³³³ Protesting his innocence, he voluntarily provided a DNA sample to the police, which also was secured in the police department's property room.³³⁴

The Houston Crime Lab was then in disarray, leading to its eventual closure in December 2002.³³⁵ No one—not the police, nor

³²² LYKOS & HURTT, *supra* note 319, at 1.

³²³ *Id.*

³²⁴ *Id.* at 1–2.

³²⁵ Olsen et al., *supra* note 319.

³²⁶ LYKOS & HURTT, *supra* note 319, at 1–2.

³²⁷ *Id.* at 2.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *See id.* at 2–3.

³³¹ *Id.* at 3.

³³² *Id.*

³³³ *Id.*

³³⁴ *Rachell v. State*, No. 11-03-00192-CR, 2004 WL 2244200, at *1 (Tex. Ct. App. Sept. 30, 2004); LYKOS & HURTT, *supra* note 319, at 3.

³³⁵ MICHAEL R. BROMWICH, FINAL REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 4, 8, 20 (2007),

Harris County prosecutors, and not Rachell's own attorney—followed up on testing any of the DNA evidence in the case.³³⁶ Meanwhile, sexual assaults against boys committed by a man riding a bicycle continued in the same vicinity in the wake of Rachell's arrest.³³⁷ An eight-year-old was victimized in November 2002, followed by an assault on another eight-year-old five weeks later, and one committed against a ten-year-old in October 2003.³³⁸ Based largely on the eyewitness identification testimony of the eight-year-old victim and his six-year-old companion, Rachell was convicted in June 2003 of the October 20, 2002 assault and was sentenced to forty years in prison.³³⁹

While he was incarcerated, Rachell's mother sent him news stories reporting the string of similar assaults committed in his old neighborhood.³⁴⁰ Identifying the pattern that apparently had eluded others, Rachell sent the clippings to his lawyer, urging him in vain to investigate.³⁴¹ While Rachell was imprisoned, in November 2003, Andrew Hawthorne, a registered sex offender who lived less than two miles from Rachell in Houston, and whose DNA profile was already on file from a prior conviction, was arrested for sexually assaulting a boy.³⁴² Hawthorne later was charged with three separate assaults.³⁴³ In all cases, he rode a bicycle and offered the boys money to help him with odd jobs.³⁴⁴ Hawthorne pleaded guilty in April 2004 to the three crimes and was sentenced to sixty years imprisonment.³⁴⁵

Although officers involved in Hawthorne's arrest also had investigated the crime for which Rachell was convicted, they made no connection between the offenses.³⁴⁶ In contrast, Rachell did. He wrote one of those officers in September 2007, claiming that Hawthorne was the true perpetrator in the case resulting in his own

available at <http://www.hpdlabinvestigation.org>; see LYKOS & HURTT, *supra* note 319, at 3, 8; Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 187 (2007).

³³⁶ LYKOS & HURTT, *supra* note 319, at 4, 8, 9.

³³⁷ *Id.* at 6–7.

³³⁸ Roma Khanna & Carolyn Feibel, *Unanswered Questions: Attacks on Kids Continued After Rachell Jailed*, HOUS. CHRON., Dec. 18, 2008, at A1.

³³⁹ LYKOS & HURTT, *supra* note 319, at 5.

³⁴⁰ Olsen et al., *supra* note 317.

³⁴¹ *Id.*; *Railroaded: A Chain of Legal Outrages Victimized Ricardo Rachell*, HOUS. CHRON., Dec. 28, 2008, at 2.

³⁴² Khanna & Feibel, *supra* note 338, at A1.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ LYKOS & HURTT, *supra* note 319, at 7; Khanna & Feibel, *supra* note 338, at A1.

³⁴⁶ Khanna & Feibel, *supra* note 338, at A1.

wrongful conviction.³⁴⁷ Rachell had earlier filed a *pro se* petition for post-conviction DNA testing in the case.³⁴⁸ Following further lapses, including the failure of the attorney appointed to assist him on the post-conviction petition to file the motion necessary to secure DNA testing, an assistant district attorney arranged to have the testing conducted.³⁴⁹ A report issued in October 2008 excluded Rachell as the source of the semen in the case resulting in his conviction.³⁵⁰ Two months later, Hawthorne's DNA profile was determined to be a match.³⁵¹

Rachell was released from prison in December 2008 and he was formally exonerated the following month.³⁵² Andrew Hawthorne confessed to committing the crime for which Rachell had been convicted, pleaded guilty to the offense, and was sentenced to sixty years imprisonment, to be served concurrently with his previously imposed sixty-year term.³⁵³ If the DNA evidence from the boy's underwear or the rape kit had been analyzed in October 2002 or shortly thereafter, Rachell would have been excluded as its source, and Hawthorne, whose DNA profile was on file because of his previous sexual assault conviction,³⁵⁴ would have been identified as the perpetrator. With timely testing of the evidence, in addition to Rachell not suffering the hardships of his wrongful conviction, including almost six years of incarceration,³⁵⁵ one or more of the multiple children who Hawthorne subsequently victimized would have been spared. The report, prepared by the Harris County District Attorney and the Chief of Houston's Police Department, conceded that these compound tragedies were "the result of a series of unfortunate events, blunders and omissions. There was a cascading, system-wide breakdown."³⁵⁶

³⁴⁷ LYKOS & HURTT, *supra* note 319, at 5.

³⁴⁸ *Id.* at 6.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Ex parte* Rachell, No. AP-76068, 2009 WL 81471, at *1 (Tex. Crim. App. Jan. 14, 2009); *Know the Cases: Ricardo Rachell*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ricardo_Rachell.php (last visited May 18, 2013).

³⁵³ LYKOS & HURTT, *supra* note 319, at 7; Brian Rogers & Roma Khanna, *Offender Gets 60 Years in Crime That Sent Innocent to Jail*, HOUS. CHRON., (June 4, 2009), <http://www.chron.com/news/houston-texas/article/Offender-gets-60-years-in-crime-that-sent-1731822.php>.

³⁵⁴ *See Know the Cases: Ricardo Rachell*, *supra* note 352.

³⁵⁵ *See id.*

³⁵⁶ LYKOS & HURTT, *supra* note 319, at 8.

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Justin Albert Johnson

Three-year-old Courtney Smith lived with her mother and two young sisters in rural Noxubee County, Mississippi.³⁵⁷ Sometime during the wee hours of September 15, 1990, she was snatched from her bed.³⁵⁸ Two days later, her body was discovered in a nearby pond.³⁵⁹ Courtney's five-year-old sister Ashley, who was sleeping with her, told a sheriff's department investigator that Levon Brooks, her mother's former boyfriend, was the man who had taken Courtney.³⁶⁰ An autopsy performed by Dr. Stephen Hayne revealed that Courtney had been sexually assaulted and drowned.³⁶¹ Dr. Hayne noticed abrasions on the deceased child's wrists that resembled human bite marks.³⁶² Dr. Michael West, a dentist from Hattiesburg who had testified as an expert forensic odontologist for the prosecution in numerous cases, examined the marks.³⁶³ He opined at Brooks's January 1992 murder trial that Brooks's upper teeth were their source.³⁶⁴ Brooks was convicted of the child's abduction, sexual assault, and murder.³⁶⁵ Although the prosecution sought the death penalty, the jury sentenced Brooks to life imprisonment without the possibility of parole.³⁶⁶

³⁵⁷ See *Brooks v. State*, 748 So. 2d 736, 737–38 (Miss. 1999).

³⁵⁸ *Id.* at 738.

³⁵⁹ *Id.* at 737–38.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 738.

³⁶² *Id.*

³⁶³ *Id.*; Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 453 (1997); Peter Neufeld, *Keynote Address*, 37 SW. U. L. REV. 1051, 1052 (2008).

³⁶⁴ *Know the Cases: Kennedy Brewer*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Kennedy_Brewer.php (last visited May 18, 2013) (commenting on Dr. West's testimony in Levon Brooks's case); see *Brooks*, 748 So. 2d at 738.

³⁶⁵ Application for Leave to File Motion for Post-Conviction Relief Based on Newly Obtained Evidence Demonstrating Innocence at 2, *Brooks v. Mississippi*, No. 5937 (Feb. 8, 2008) [hereinafter *Application for Leave*].

³⁶⁶ See *Brooks*, 748 So. 2d, at 738; *Application for Leave*, *supra* note 365, at 2; *Know the Cases: Kennedy Brewer*, *supra* note 364. Ironically, as it turned out, the Mississippi Supreme Court used Brooks's appeal to rule: “[w]e now take the opportunity to state affirmatively that bite-mark identification evidence is admissible in Mississippi.” *Brooks*, 748 So. 2d, at 739. Justice McCrae issued a vigorous dissent. *Id.* at 747–50 (McCrae, J., dissenting). A portion of his dissenting opinion singled out Dr. West's expert testimony. *Id.* at 748. Justice McCrae noted that: “[t]his is not the first time that Dr. West has been able to boldly go where no expert has gone before.” *Id.* at 748. He observed that Brooks's case “went to trial . . . several years before West began to encounter difficulties with the [American Academy of Forensic Sciences, the American Board of Forensic Odontologists, and the International Association of Identification] and, thus, this evidence, which casts serious doubts as to West's credibility, was not before the jury.” *Id.* at 750. In addition, “[i]t is also worth mentioning that West seems to have difficulty in keeping up with evidence. In the instant case, he lost the not only

Gloria Jackson lived with her three young children in Noxubee County, approximately three miles from where Courtney Smith had resided with her family.³⁶⁷ Jackson returned to her house shortly after midnight on May 3, 1992, where her boyfriend, Kennedy Brewer, was staying with the children.³⁶⁸ Three-year-old Christine Jackson customarily slept on a pallet in the single bedroom used by the entire family, and Gloria Jackson watched as Brewer appeared to place her on the pallet in the darkened room.³⁶⁹ When Jackson arose at about 7:30 in the morning, Christine was nowhere to be found.³⁷⁰ A search began.³⁷¹ Two days later, Christine's body was discovered in a creek behind the house.³⁷² She had been strangled and sexually assaulted.³⁷³

As he did in Courtney Smith's case, Dr. Hayne performed the autopsy.³⁷⁴ His doing so was not unusual. Although he lacked the qualifications to be the State Medical Examiner, Dr. Hayne conducted most of Mississippi's autopsies.³⁷⁵ He reportedly performed 1500 or more a year,³⁷⁶ thus vastly exceeding the National Association of Medical Examiners' recommended maximum annual case load of 250.³⁷⁷ And as he did in Courtney

the mold [sic] to Brooks's lower teeth but also the mold of another suspect's teeth." *Id.* "Furthermore, West's opinion that 'it could be no one else but Levon Brooks that bit this girl's arm' was rendered despite the fact that the wound was comprised of a mere two indentations. . . . Even West admitted that the typical bite mark consists of indentations made by six teeth." *Id.* He concluded that "[t]his Court's apparent willingness to allow West to testify to anything and everything so long as the defense is permitted to cross-examine him may be expedient for prosecutors but it is harmful to the criminal justice system." *Id.* (footnote omitted). Commentators have also criticized Dr. West's forensic analyses and testimony. See Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying Daubert Isn't the Only Problem*, 43 TULSA L. REV. 285, 356–59 (2007); Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 FORDHAM L. REV. 1493, 1501–06 (2007); Giannelli, *supra* note 363, at 453–57. Although the Mississippi Attorney General at one time purported to be investigating cases in which Dr. West had testified, the investigation apparently never fully materialized and was halted. Valena Elizabeth Beety, *The Death Penalty: Ethics and Economics in Mississippi*, 81 MISS. L.J. 1437, 1469 (2012).

³⁶⁷ *Brewer v. State*, 725 So. 2d 106, 112 (Miss. 1998); Application for Leave, *supra* note 365, at 2.

³⁶⁸ *Brewer*, 725 So. 2d at 112.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 113.

³⁷¹ *Id.*

³⁷² *Id.* at 114.

³⁷³ *Id.* at 115; Application for Leave, *supra* note 365, at 2; Neufeld, *supra* note 363, at 1051.

³⁷⁴ *Brewer*, 725 So. 2d at 115; see *supra* note 361 and accompanying text.

³⁷⁵ Neufeld, *supra* note 363, at 1052.

³⁷⁶ *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, FORENSIC EXAMINER, Summer 2008, at 79, 80.

³⁷⁷ Neufeld, *supra* note 363, at 1057; *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, *supra* note 376, at 79, 80.

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Smith's case, Dr. Hayne asked Dr. Michael West to examine marks on Christine Jackson's body that he believed could have been caused by human bites.³⁷⁸ Dr. West concluded that the wounds indeed were human bite marks.³⁷⁹ After comparing the marks to the dental impressions of four suspects, Dr. West opined that five of the nineteen marks could be matched to Kennedy Brewer's upper teeth.³⁸⁰ Based on evidence that the Mississippi Supreme Court conceded was "circumstantial,"³⁸¹ but grounded prominently in "the bite mark evidence,"³⁸² Brewer was convicted of Christine Jackson's rape and murder at his 1995 trial.³⁸³ He was sentenced to death.³⁸⁴

In 2001, DNA testing excluded Kennedy Brewer as the source of the semen that had been preserved from the sexual assault kit from Christine Jackson's victimization.³⁸⁵ The Mississippi Supreme Court ordered an evidentiary hearing,³⁸⁶ and in 2002, the trial court vacated Brewer's conviction and death sentence.³⁸⁷ Although the prosecutor had originally argued that Brewer had committed the rape and murder alone, his theory for the prospective retrial shifted to Brewer having acted in concert with the actual rapist.³⁸⁸ Brewer languished in the county jail for five years awaiting a retrial that never occurred.³⁸⁹ In 2007, at the urging of Innocence Project attorneys, the DNA profile from the sexual assault kit was compared to DNA samples provided by others who had once been under investigation in the case.³⁹⁰ The profile matched one of the original suspects, Justin Albert Johnson.³⁹¹

Johnson lived less than a quarter mile from the Jacksons' residence in 1992 and was awaiting trial for home invasion, and an

³⁷⁸ *Brewer*, 725 So. 2d at 115; see *supra* note 363 and accompanying text.

³⁷⁹ *Brewer*, 725 So. 2d at 116.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 134.

³⁸² *Id.* The court's opinion noted that "[s]emen was detected on the child's vaginal slide. No conclusions could be drawn from this semen, however, because there were only five spermatozoa." *Id.* at 115.

³⁸³ *Id.* at 112.

³⁸⁴ *Id.* at 117, 135; Neufeld, *supra* note 363, at 1053.

³⁸⁵ Neufeld, *supra* note 363, at 1053.

³⁸⁶ *Brewer v. State*, 819 So. 2d 1169, 1174 (Miss. 2002).

³⁸⁷ See Application for Leave, *supra* note 365, at 3.

³⁸⁸ Shaila Dewan, *Despite DNA Result, Prosecutor Retries a '92 Rape-Murder Case*, N.Y. TIMES, Sept. 6, 2007, at A1; *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, *supra* note 376, at 79–80.

³⁸⁹ Shaila Dewan, *New Suspect is Arrested in Mississippi Killings in Which 2 Men Were Convicted*, N.Y. TIMES, Feb. 8, 2008, at A11.

³⁹⁰ Application for Leave, *supra* note 365, at 3; Neufeld, *supra* note 363, at 1053.

³⁹¹ Neufeld, *supra* note 363, at 1053; *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, *supra* note 376, at 80.

attempted sexual assault, when Christine was raped and murdered.³⁹² In 1990, when Courtney Smith was abducted, raped, and murdered under “eerily similar”³⁹³ circumstances, Johnson’s former wife and his son lived next door to the Smiths.³⁹⁴ Johnson had been considered an early suspect in both of the children’s murders.³⁹⁵ When law enforcement officials interviewed him following the DNA match in Christine Jackson’s case, he made a videotaped confession to raping and murdering both of the three-year-old girls.³⁹⁶ Kennedy Brewer was formally exonerated in February 2008, having been incarcerated for more than fifteen years including seven years on Mississippi’s death row.³⁹⁷ The following month, the charges against Levon Brooks in Courtney Smith’s rape and murder were dismissed and he was officially exonerated.³⁹⁸ Brooks had spent nearly eighteen years behind bars.³⁹⁹ Johnson ultimately pleaded guilty to the crimes in both cases and was sentenced to consecutive terms of life imprisonment.⁴⁰⁰

Justin Albert Johnson not only was responsible for raping and murdering three-year-old Courtney Smith in September 1990, but also for raping and murdering three-year-old Christine Jackson a year and a half later.⁴⁰¹ His crimes caused two men, Levon Brooks and Kennedy Brewer, to be wrongfully convicted and spend more than a combined three decades incarcerated, including seven years for Brewer under sentence of death.⁴⁰² The cases were investigated by the same sheriff’s deputy, prosecuted by the same district attorney, and involved the same forensic experts, Dr. Stephen

³⁹² Motion for Post-Conviction Relief at 3, *Brooks v. State*, 748 So. 2d 736 (Miss. 1999) (No. 5937) [hereinafter *Brooks Motion*].

³⁹³ Dewan, *supra* note 389, at A11.

³⁹⁴ Brooks Motion, *supra* note 392, at 2.

³⁹⁵ Press Release, Innocence Project, Two Innocent Men Cleared Today in Separate Murder Cases in Mississippi, 15 Years After Wrongful Convictions (Feb. 15, 2008), available at http://www.innocenceproject.org/Content/Two_Innocent_Men_Cleared_Today_in_Separate_Murder_Cases_in_Mississippi_15_Years_after_Wrongful_Convictions.php [hereinafter Press Release, Two Innocent Men].

³⁹⁶ Brooks Motion, *supra* note 392, at 4.

³⁹⁷ See Valena Elizabeth Beety, *The Death Penalty: Ethics and Economics in Mississippi*, 81 MISS. L.J. 1437, 1467, 1468 (2012).

³⁹⁸ *Id.*

³⁹⁹ Brooks Motion, *supra* note 392, at 1.

⁴⁰⁰ Beety, *supra* note 397, at 1468; see Carmen K. Sisson, *Noxubee Man Gets Life Sentence for Rape, Murder*, COLUMBUS DISPATCH (Feb. 10, 2012, 10:19 PM), <http://www.cdispatch.com/news/article.asp?aid=15589>.

⁴⁰¹ Beety, *supra* note 397, at 1468.

⁴⁰² *Id.* at 1466–68.

Haynes and Dr. Michael West.⁴⁰³ Yet no one perceived the connection between the cases until shortly before DNA testing in Brewer's case was initiated at the behest of Innocence Project attorneys.⁴⁰⁴

Following the revelations in the cases, the prosecutor maintained that "[n]obody wants to convict the wrong guy."⁴⁰⁵ Kennedy Brewer offered: "[t]hey need to get the truth before they lock up the wrong somebody. It doesn't feel good to be called a rapist and murderer."⁴⁰⁶ Dr. West protested that in Brewer's case, "I never testified he killed [Christine Jackson]. I never testified he raped her."⁴⁰⁷ Vanessa Potkin, an attorney for the Innocence Project, lamented that if the authorities "had properly investigated the first murder, the second little girl wouldn't have been killed."⁴⁰⁸

Earl Mann

Judy Johnson, sixty-two years old, was savagely attacked, vaginally and anally raped, and murdered in her home in Barberton, Ohio, a small town near Akron, sometime between 2:30 and 5:30 on the morning of June 7, 1998.⁴⁰⁹ Johnson's six-year-old granddaughter, Brooke Sutton,⁴¹⁰ was spending the night with her.⁴¹¹ Brooke was also badly beaten and sexually assaulted, and was left unconscious.⁴¹² On awakening shortly after 6:30, she tried unsuccessfully to contact a neighbor by telephone.⁴¹³ She then walked two doors down from the small house where she and her grandmother had been victimized, to the apartment of Tonia Brasiel, the mother of three young daughters who were Brooke's

⁴⁰³ Press Release, Two Innocent Men, *supra* note 395.

⁴⁰⁴ *Id.*; *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, *supra* note 376, at 79.

⁴⁰⁵ Steve Mills, *DNA Voids Murder Conviction*, CHI. TRIB., Feb. 16, 2008, at 4.

⁴⁰⁶ Associated Press, *2 Men Freed in Child Death Bite-Mark Cases*, MSNBC.COM (Feb. 29, 2008), http://www.msnbc.msn.com/id/23411936/ns/us_news-crime_and_courts/t/men-freed-child-death-bite-mark-cases/#.UARAg5G8iJs.

⁴⁰⁷ Ronni Mott, *The Nightmare is Over: Levon Brooks Finally Free*, JACKSON FREE PRESS (Mar. 13, 2008, 6:08 PM), <http://www.jacksonfreepress.com/news/2008/mar/13/the-nightmare-is-over-levon-brooks-finally-free>.

⁴⁰⁸ Dewan, *supra* note 389, at A11.

⁴⁰⁹ *See* State v. Elkins, C.A. No. 19684, 2000 WL 1420285, at *2, *3 (Ohio Ct. App. Sept. 27, 2000).

⁴¹⁰ Laura A. Bischoff & Mary McCarty, *Murder, Then Rush to Judgment*, DAYTON DAILY NEWS, Aug. 6, 2006, at A8 [hereinafter Bischoff & McCarty, Aug. 6, 2006], available at 2006 WLNR 13658074.

⁴¹¹ *Elkins*, 2000 WL 1420285, at *2.

⁴¹² *Id.*

⁴¹³ *Id.*

frequent playmates.⁴¹⁴ Brasiel answered the door and the bloodied child hysterically told her that her grandmother was dead and that her Uncle Clarence—Clarence Elkins—had killed her.⁴¹⁵ Brooke remained outside of the apartment for a half-hour or more before Brasiel emerged with her daughters in tow.⁴¹⁶ Brasiel then drove the children to Brooke's parents' house, where Brooke recounted what had happened.⁴¹⁷ Her father rushed to Johnson's house, confirmed that she was dead, and called the police.⁴¹⁸

Later that morning, a sheriff's department SWAT team descended on Clarence Elkins's mobile home in Magnolia, a forty minute drive from Barberton, handcuffed Elkins at gunpoint, and transported him to Barberton for questioning.⁴¹⁹ Elkins responded freely to the interrogating officers' questions and consented to having his fingernails scraped.⁴²⁰ He maintained that he knew nothing about the crimes and had nothing to hide.⁴²¹ He explained that he had been with acquaintances at various bars throughout the night of June 6 and the early morning of June 7, returned home at 2:40 a.m., and then went to sleep.⁴²² His wife, Melinda, confirmed his account and several witnesses later corroborated his whereabouts during that time frame.⁴²³ Other officers searched the Elkins' mobile home and Judy Johnson's home for evidence, finding nothing consistent with Elkins's involvement.⁴²⁴ Pubic and head hairs were retrieved from Ms. Johnson's rectum and from Brooke's nightgown.⁴²⁵ Subsequent DNA analyses excluded Elkins as the source of the hairs.⁴²⁶

In addition to the DNA exclusions, testimony at Elkins's June

⁴¹⁴ Bischoff & McCarty, Aug. 6, 2006, *supra* note 410, at A8.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Elkins*, 2000 WL 1420285, at *2; *Elkins v. Summit Cnty., Ohio*, No. 5:06-CV-3004, 2009 WL 1150114, at *4 (N.D. Ohio Apr. 28, 2009), *aff'd*, 615 F.3d 671 (6th Cir. 2010); JIM PETRO & NANCY PETRO, FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT 10 (2010); Bischoff & McCarty, Aug. 6, 2006, *supra* note 410, at A8.

⁴¹⁸ *Elkins*, 2000 WL 1420285, at *2; PETRO & PETRO, *supra* note 417, at 10.

⁴¹⁹ PETRO & PETRO, *supra* note 417, at 5–7; *see Elkins*, 615 F.3d at 674; Bischoff & McCarty, Aug. 6, 2006, *supra* note 410, at A8.

⁴²⁰ PETRO & PETRO, *supra* note 417, at 7.

⁴²¹ *Id.*

⁴²² *Elkins*, 2000 WL 1420285, at *4.

⁴²³ *Elkins*, 2000 WL 1420285, at *4; *see Elkins*, 615 F.3d at 674; *Elkins*, 2009 WL 1150114, at *1.

⁴²⁴ PETRO & PETRO, *supra* note 417, at 7, 11.

⁴²⁵ *Elkins*, 615 F.3d at 674; *Elkins*, 2009 WL 1150114, at *1; PETRO & PETRO, *supra* note 417, at 7.

⁴²⁶ *Elkins*, 615 F.3d at 674; *Elkins*, 2009 WL 1150114, at *1; PETRO & PETRO, *supra* note 417, at 7, 11.

1999 trial revealed that after Brooke came home from the hospital where she was treated for her injuries, the child acknowledged to a family friend that she thought that the man who had attacked her and her grandmother sounded like her Uncle Clarence, although she did not know for sure.⁴²⁷ Brooke nevertheless reaffirmed several times that Clarence Elkins was responsible for the attacks and her identification testimony was the crucial evidence against him.⁴²⁸ Elkins, who had no prior criminal record, testified at his trial and presented numerous alibi witnesses.⁴²⁹ The jury acquitted him of the capital charge of aggravated murder, but convicted him of murder, attempted aggravated murder, and three counts of rape.⁴³⁰ The multiple, consecutive prison sentences imposed by the judge made Elkins ineligible for parole for fifty-five years, or until 2054.⁴³¹ At his sentencing hearing, Elkins declared, “I am an innocent man.”⁴³²

Melinda Elkins believed in her husband’s innocence. She hired a private investigator, raised funds, and relentlessly sought to prove that his conviction was erroneous.⁴³³ In May 2002, Brooke Sutton, then ten years old, recanted her identification testimony.⁴³⁴ The following December, the judge who had presided over Clarence Elkins’s trial, denied Elkins’s motion for a new trial based on the recantation, concluding that “the child-victim told the truth originally and her change of mind [was] the result of influence from her family and others who have an interest in the success of [Defendant’s] [p]etition.”⁴³⁵ Undaunted, Melinda Elkins continued investigating individuals on the list of suspects that she had compiled.⁴³⁶ One of those suspects was Earl Mann.⁴³⁷

Earl Mann was the boyfriend of Tonia Brasiel—the woman who lived two doors away from Judy Johnson’s house—and from whom

⁴²⁷ PETRO & PETRO, *supra* note 417, at 10, 11.

⁴²⁸ See *Elkins*, 2000 WL 1420285, at *3–5.

⁴²⁹ PETRO & PETRO, *supra* note 417, at 9, 11.

⁴³⁰ *Elkins*, 2000 WL 1420285, at *1; see PETRO & PETRO, *supra* note 417, at 8.

⁴³¹ Laura A. Bischoff & Mary McCarty, ‘My God, This Thing Is Horrifying’, DAYTON DAILY NEWS, Aug. 7, 2006, at A6 [hereinafter Bischoff & McCarty, Aug. 7, 2006], available at 2006 WLNR 13707807.

⁴³² *Id.*

⁴³³ See *id.*; PETRO & PETRO, *supra* note 417, at 14. The investigator was Martin Yant, a former journalist and author of PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED (1991). See PETRO & PETRO, *supra* note 417, at 14.

⁴³⁴ See Bischoff & McCarty, Aug. 7, 2006, *supra* note 431, at A6.

⁴³⁵ State v. Elkins, No. 21380, 2003 WL 22015409, at *3 (Ohio Ct. App. Aug. 27, 2003) (alterations in original); McCarty & Bischoff, Aug. 7, 2006, *supra* note 431, at A6.

⁴³⁶ Bischoff & McCarty, Aug. 7, 2006, *supra* note 431, at A6.

⁴³⁷ *Id.*

Brooke Sutton had sought help on the morning of the crimes.⁴³⁸ Mann also was the father of Brasiel's three daughters, who were Brooke's playmates.⁴³⁹ Melinda read a newspaper story in 2002 that reported that Mann had pleaded guilty to raping three young children (who proved to be his daughters) but had received a sentence of only seven years in prison because prosecutors had mishandled the indictment in his case.⁴⁴⁰ This information was enough for Melinda to include Mann on her suspect list.⁴⁴¹ Several years later, the Elkinses learned that when a Barberton police officer had arrested Mann on strong-arm robbery charges on January 5, 1999—roughly six months before Clarence Elkins's trial—a drunken Mann asked the officer, “[w]hy don't you charge me with the Judy Johnson murder?”⁴⁴² Mann's statement was memorialized but apparently was never shared with prosecutors or with Elkins's defense attorney.⁴⁴³

Melinda Elkins enlisted the help of the Ohio Innocence Project at the University of Cincinnati School of Law in 2004.⁴⁴⁴ In June 2005, the Elkinses learned that Mann and Clarence Elkins happened to be incarcerated in the same correctional facility.⁴⁴⁵ Clarence surreptitiously managed to retrieve a cigarette butt that Mann had discarded.⁴⁴⁶ He mailed it to his lawyer so that Mann's DNA profile could be obtained and compared to biological evidence from Judy Johnson's rape-murder, and Brooke Sutton's rape.⁴⁴⁷ The analysis produced a match.⁴⁴⁸ Notwithstanding these dramatic developments, Elkins's attorneys encountered continuing resistance

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ See *Elkins v. Summit Cnty., Ohio*, 615 F.3d 671, 674 n.4 (6th Cir. 2010); PETRO & PETRO, *supra* note 411 at 19.

⁴⁴¹ Bischoff & McCarty, Aug. 7, 2006, *supra* note 431, at A6.

⁴⁴² *Elkins*, 615 F.3d at 673.

⁴⁴³ See *id.* at 673–74. A federal civil suit based on this allegation, filed by the Elkinses against the Barberton police, subsequently resulted in a settlement that awarded the Elkinses more than \$5 million. Charita Goshay, *Anatomy of an Aftermath: Movie Being Planned about Melinda Elkins Dawson*, CANTONREP.COM (June 13, 2012, 9:09 PM), <http://www.cantonrep.com/news/x836128535/Anatomy-of-an-aftermath-Movie-being-planned-about-Melinda-Elkins-Dawson>; Shane Hoover, *Elkins, Family Settle Federal Lawsuit Over Imprisonment*, CANTONREP.COM (Nov. 17, 2010, 10:40 AM), <http://www.cantonrep.com/news/x684374778/Elkins-family-settle-federal-lawsuit-over-7-years-imprisonment>.

⁴⁴⁴ Mark A. Godsey, *False Justice and the “True” Prosecutor: A Memoir, a Tribute, and Commentary*, 9 OHIO ST. J. CRIM. L. 789, 791 (2012).

⁴⁴⁵ *Id.* at 793.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

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from the prosecutor's office responsible for Clarence Elkins's conviction as they attempted to win his freedom.⁴⁴⁹ They eventually prevailed, relying in part on pressure applied on the prosecutors by Ohio Attorney General Jim Petro.⁴⁵⁰ On December 15, 2005, all charges against Clarence Elkins were dismissed and he was released from prison after seven years of incarceration.⁴⁵¹

On August 18, 2008, Earl Mann pleaded guilty to the aggravated murder and rape of Judy Johnson and to the attempted murder and rape of Brooke Sutton.⁴⁵² He was sentenced to fifty-five years to life in prison.⁴⁵³ At the time, Mann remained in the service of the seven-year sentence imposed for raping his own daughters; crimes committed while Clarence Elkins had been arrested, wrongfully convicted, and incarcerated in his stead.⁴⁵⁴ On accepting Mann's guilty pleas, the sentencing judge told Mann that "[t]here seems to be a depth of depravity in you that is beyond understanding You are not fit to be in society with the rest of us, and you will not be."⁴⁵⁵

Dennis McGruder

Beginning in 1989, a man who came to be known as the "Beauty Shop Rapist" committed a series of armed robberies and sexual assaults in Chicago's south side.⁴⁵⁶ The *modus operandi* in the crimes was similar.⁴⁵⁷ In most cases, the man would enter a beauty parlor with a pistol, rob the patrons of their valuables, order the women to disrobe, and then sodomize or rape one of them.⁴⁵⁸ The police prepared and distributed a composite sketch of the suspect

⁴⁴⁹ *See id.*

⁴⁵⁰ *Id.* at 797.

⁴⁵¹ *Id.*; see McCarty & Bischoff, *supra* note 440; see also PETRO & PETRO, *supra* note 417, at 43–49 ("Prosecutor Walsh had reversed her position and filed a motion to dismiss all charges against Clarence Elkins. The judge granted the motion and ordered his immediate release.")

⁴⁵² Shane Hoover, *Guilty Pleas Clear Carroll Resident Clarence Elkins of Murder, Rape*, TIMES-REPORTER (Phila.) (Aug. 19, 2008, 3:14 PM), <http://www.timesreporter.com/news/x1543320711/Guilty-pleas-clear-Carroll-resident-Clarence-Elkins-of-murder-rape>.

⁴⁵³ *Id.*

⁴⁵⁴ See Regina Brett, *Dogged Fight to Correct a Wrong: Summit Prosecutor Became Determined to Convict Real Killer*, CLEVELAND PLAIN DEALER, Aug. 24, 2008, at A1.

⁴⁵⁵ Hoover, *supra* note 452.

⁴⁵⁶ *Eyewitness Identification: A Policy Review*, JUST. PROJECT 12, http://www.psychology.iastate.edu/~glwells/The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf (last visited May 18, 2013).

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

based on witnesses' descriptions.⁴⁵⁹ They arrested John Willis, Jr. on September 14, 1990, after receiving a tip from an anonymous caller.⁴⁶⁰ Willis, a man with a fourth grade education who described himself as a "career tire thief and gambler," insisted that he was innocent.⁴⁶¹ Several of the crime victims and witnesses nevertheless identified him as the perpetrator in both photo arrays and line-ups and he was charged in five of the cases.⁴⁶²

While Willis remained in custody, similar crimes occurred in the same vicinity, including one robbery-rape committed in a beauty parlor and four others in taverns.⁴⁶³ Dennis McGruder was arrested for those offenses in April 1992, subsequently pleaded guilty to them, and was sentenced to forty years imprisonment.⁴⁶⁴ Meanwhile, Willis was brought to trial in February 1992 on a first set of charges⁴⁶⁵ in which the victim, who had been orally sodomized, spat her assailant's ejaculate into a toilet tissue wrapper.⁴⁶⁶ Dr. Pamela Fish of the Illinois State Police Crime Laboratory testified at Willis's trial and wrote in a typewritten report that a serology exam comparing Willis's blood type to the semen and sperm sample preserved in the wrapper was "inconclusive," meaning that Willis could not be excluded as a potential source.⁴⁶⁷ With multiple witnesses identifying him as the perpetrator, Willis was convicted of armed robbery and the sexual assault and he was sentenced to forty-five years in prison.⁴⁶⁸ He was tried on a second set of charges in November 1993, again was convicted, and he received a prison sentence totaling one hundred years.⁴⁶⁹

Not until 1997, in response to Willis's request for post-conviction DNA testing of the evidence preserved from his initial trial, did Fish's handwritten report of the serology exam conducted in that case surface.⁴⁷⁰ This handwritten report had not been made

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ Steve Mills et al., *When Labs Falter, Defendants Pay*, CHI. TRIB., Oct. 20, 2004, at 1.

⁴⁶² See *Eyewitness Identification: A Policy Review*, *supra* note 456, at 12, 13 (noting that the defendant was sentenced in two cases and the other three cases with which he was charged were dropped).

⁴⁶³ *Id.* at 13.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Know the Cases: John Willis*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/John_Willis.php (last visited May 18, 2013).

⁴⁶⁷ Mills et al., *supra* note 461, at 1.

⁴⁶⁸ *Eyewitness Identification: A Policy Review*, *supra* note 456, at 13.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*; Mills et al., *supra* note 461, at 1.

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available to the defense prior to Willis's trial, yet it noted that Willis was a secretor with type B blood, while the crime scene sample belonged to someone with type A blood.⁴⁷¹ Fish's explanation for her assessment in her typed report and in her trial testimony that the comparison was "inconclusive" apparently concerned irregularities with control procedures.⁴⁷² In that event, according to her supervisor, the test at a minimum should have been conducted anew rather than resulting in a report that the comparison was inconclusive.⁴⁷³ In September 1998, a microscopic slide containing a minute sample of the perpetrator's ejaculate in the case was located and subjected to DNA testing.⁴⁷⁴ The analysis produced a match with Dennis McGruder.⁴⁷⁵

Willis was released from prison in February 1999.⁴⁷⁶ He was officially exonerated the following month when the charges resulting in his wrongful convictions and more than eight years of incarceration were dismissed.⁴⁷⁷ He was awarded \$2.5 million in settlement of a claims filed against city and county officials.⁴⁷⁸ McGruder, already in prison for committing five new crimes after Willis's arrest, later admitted his guilt in two of the offenses for which Willis had been wrongly convicted.⁴⁷⁹ Ironically, Willis had attempted during his 1993 trial, involving the second set of charges against him, to show that McGruder had been arrested for committing similar crimes and that McGruder physically resembled him.⁴⁸⁰ The trial judge had refused to allow that evidence to be admitted.⁴⁸¹

Eddie Lee Mosley

Eddie Lee Mosley has been variously described as "the worst

⁴⁷¹ Mills et al., *supra* note 461, at 1; see *Eyewitness Identification: A Policy Review*, *supra* note 456, at 13.

⁴⁷² Mills et al., *supra* note 461, at 1.

⁴⁷³ *Id.* See also Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 402 (2004) (stating that so far, seven convictions in which Fish had provided misleading testimony, have been overturned).

⁴⁷⁴ *Eyewitness Identification: A Policy Review*, *supra* note 456, at 13–14.

⁴⁷⁵ *Id.* at 14.

⁴⁷⁶ *Id.*

⁴⁷⁷ Maurice Possley, *Prisoner to Go Free as DNA Clears Him in Beauty Shop Rape*, CHI. TRIB., Feb. 24, 1999, at 1.

⁴⁷⁸ Dan Mihalopoulos, *\$2.5 Million Deal in Rape Case Suit*, CHI. TRIB., Mar. 9, 2004, at 3; Mills et al., *supra* note 461.

⁴⁷⁹ *Know the Cases: John Willis*, *supra* note 466.

⁴⁸⁰ *Eyewitness Identification: A Policy Review*, *supra* note 456, at 13.

⁴⁸¹ *Id.*

serial killer and rapist in Broward County, [Florida] history,”⁴⁸² and as “the most prolific serial killer in Florida history”⁴⁸³ and “in U.S. history.”⁴⁸⁴ He has been called “a one-man crime wave”⁴⁸⁵ whose reign of terror was “bigger than [John Wayne] Gacy. Bigger than [Ted] Bundy.”⁴⁸⁶ A court-appointed psychiatrist once characterized Mosley as “a shark who simply feeds on possible victims to satisfy his basic sexual needs.”⁴⁸⁷ Mosley is believed to have committed as many as sixty rapes⁴⁸⁸ and nineteen killings⁴⁸⁹ in Fort Lauderdale (Broward County) and Miami, Florida during the 1970s and 1980s.⁴⁹⁰

At least ten of his victims were killed after Jerry Frank Townsend, a twenty-two-year-old man suffering from mental retardation, was arrested in September 1979.⁴⁹¹ Townsend falsely confessed to several of the rapes and murders that Mosley had committed, and was convicted and sentenced to prison for life.⁴⁹² He spent twenty-two years in prison before he was exonerated by DNA analysis that linked Mosley to the crimes.⁴⁹³ Townsend eventually received more than \$4 million in settlement of lawsuits filed on his

⁴⁸² Bob Norman, *A Devilish Deal*, BROWARD-PALM BEACH NEWTIMES (May 17, 2001), <http://www.browardpalmbeach.com/2001-05-17/news/a-devilish-deal>.

⁴⁸³ Jonathon King, *Remembering the Dead: Obsessed with Justice*, BROWARD BULLDOG (Nov. 20, 2009), <http://www.browardbulldog.org/2009/11/remembering-the-dead-obsessed-with-justice>.

⁴⁸⁴ Jonathan Simon, *Recovering the Craft of Policing: Wrongful Convictions, the War on Crime, and the Problem of Security*, in WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 115, 125 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

⁴⁸⁵ See Barry Scheck, *Did Frank Lee Smith Die in Vain?*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/smith/ofra/scheck.html> (last visited May 18, 2013) (describing the PBS documentary *Frontline: Requiem for Frank Lee Smith*).

⁴⁸⁶ King, *supra* note 483 (quoting retired Fort Lauderdale Police Department Detective Doug Evans) (internal quotation marks omitted).

⁴⁸⁷ *Id.* (quoting unidentified court-appointed psychiatrist) (internal quotation marks omitted).

⁴⁸⁸ Scheck, *supra* note 485.

⁴⁸⁹ King, *supra* note 483.

⁴⁹⁰ See generally *id.* (describing the aftermath left by Mosely in the Fort Lauderdale and Miami area); Scheck, *supra* note 485 (same).

⁴⁹¹ See *Know the Cases: Jerry Frank Townsend*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Jerry_Frank_Townsend.php (last visited May 18, 2013); Simon, *supra* note 484, at 134 (stating that the arrest took place on September 1979); King, *supra* note 483.

⁴⁹² *Townsend v. State*, 420 So. 2d 615, 616–17 (Fla. Dist. Ct. App. 1982), *petition for rev. denied*, 430 So. 2d 452 (Fla. 1983); *Know the Cases: Jerry Frank Townsend*, *supra* note 491.

⁴⁹³ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 989 (2004); Dan Christensen, *Anatomy of a Frame-Up*, BROWARD BULLDOG (Oct. 29, 2009), <http://www.browardbulldog.org/2009/10/anatomy-of-a-frame-up>; *Know the Cases: Jerry Frank Townsend*, *supra* note 491; *Ten Who Would Not Have Died*, BROWARD BULLDOG (Oct. 29, 2009), <http://www.browardbulldog.org/2009/10/ten-who-might-not-have-died>.

behalf against Broward County and the City of Miami.⁴⁹⁴

Mosley claimed responsibility for at least one of his victims after Frank Lee Smith was convicted of raping and murdering eight-year-old Shandra Whitehead in 1985 in Fort Lauderdale; crimes for which Smith was sentenced to death.⁴⁹⁵ Although Smith did not match the description given of the man who was spotted at or near the child's home on the night she was killed, two witnesses later identified Smith as being near the crime scene after viewing a photo array and at his trial.⁴⁹⁶ Smith had twice before been convicted of criminal homicide.⁴⁹⁷ He also allegedly made a damaging admission to the police.⁴⁹⁸ One of the trial witnesses would later recant her identification testimony and swear that the man she had seen was Eddie Lee Mosley, who was the murdered child's cousin.⁴⁹⁹ The court, hearing Smith's post-conviction petition for a new trial based on the recantation, denied relief.⁵⁰⁰ Smith died of cancer in January 2000, while still under sentence of death for the crime.⁵⁰¹ He earlier had come within eight days of his scheduled execution before the Florida Supreme Court granted a stay.⁵⁰² A posthumous DNA analysis exonerated Smith, who had maintained his innocence from the time of his arrest until his death.⁵⁰³ The same analysis identified Mosley as the child's assailant.⁵⁰⁴

⁴⁹⁴ Christensen, *supra* note 493. The Broward County Sherriff's Office paid out \$2 million, while the city of Miami agreed to pay out \$2.2 million, bringing the total settlement to \$4.4 million. *See id.*

⁴⁹⁵ Smith v. Dugger, 565 So. 2d 1293, 1294 (Fla. 1990).

⁴⁹⁶ *Id.* at 1295–96.

⁴⁹⁷ Smith v. State, 515 So. 2d 182, 184 (Fla. 1987), *cert. denied*, 485 U.S. 971 (1988).

⁴⁹⁸ *Id.* at 183, 184; Drizin & Leo, *supra* note 493, at 991.

⁴⁹⁹ *Smith*, 565 So. 2d at 1296.

⁵⁰⁰ *See* Townsend v. State, 420 So. 2d 615, 618 (Fla. Dist. Ct. App. 1982), *petition for rev. denied*, 430 So. 2d 452 (Fla. 1983).

⁵⁰¹ *Know the Cases: Frank Lee Smith*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Frank_Lee_Smith.php (last visited May 18, 2013).

⁵⁰² Sydney P. Freedberg, *He Didn't Do It*, ST. PETERSBURG TIMES (Jan. 7, 2001), http://www.sptimes.com/News/010701/news_pf/State/He_didn_t_do_it_.shtml.

⁵⁰³ *Id.*

⁵⁰⁴ Drizin & Leo, *supra* note 493, at 991; Barry Scheck, *Innocence, Race, and the Death Penalty*, 50 HOW. L.J. 445, 458–59 (2007) (remarks of Barry Scheck); Symposium, *The Death Penalty, Religion, & the Law: Is Our Legal System's Implementation of Capital Punishment Consistent with Judaism or Christianity?*, 4 RUTGERS J. L. & RELIGION 1, 13–18 (2002) (remarks of Professor Barry Scheck); *Know the Cases: Frank Lee Smith*, *supra* note 501; *see* Sydney P. Freedberg, *DNA Clears Inmate Too Late*, ST. PETERSBURG TIMES (Dec. 15, 2000), http://www.sptimes.com/News/121500/news_pf/State/DNA_clears_inmate_too.shtml; Freedberg, *supra* note 491; Bob Norman, *Captain of Deceit*, BROWARD-PALM BEACH NEW TIMES (July 26, 2001), <http://www.browardpalmbeach.com/content/printVersion/132425>; Bob Norman, *The Captain of Deceit Strikes Again*, BROWARD-PALM BEACH NEW TIMES (Aug. 15, 2002), <http://www.browardpalmbeach.com/2002-08-15/news/the-captain-of-deceit-strikes-again>.

Mosley lived in the same impoverished Fort Lauderdale neighborhood where almost all of the women and girls had been raped and murdered under similar circumstances.⁵⁰⁵ He was well known to law enforcement authorities.⁵⁰⁶ Detective Doug Evans of the Fort Lauderdale Police Department so strongly believed that Mosley was responsible for the murders blamed on Townsend that he appeared as a defense witness at Townsend's trial.⁵⁰⁷ The trial judge, however, precluded him from identifying Mosley as an alternative suspect.⁵⁰⁸ Mosley, who was mentally retarded and had dropped out of third grade at age thirteen,⁵⁰⁹ had been charged with committing numerous rapes in 1973, but was found not guilty by reason of insanity.⁵¹⁰ He remained involuntarily civilly committed until 1979.⁵¹¹ Following release from the hospital, he was convicted of a sexual battery committed in April 1980 and sentenced to fifteen years in prison.⁵¹² The conviction was reversed on appeal based on ineffective assistance of counsel because his lawyer had not presented an insanity defense.⁵¹³ Pursuant to a plea agreement following the remand, Mosley was released from prison in 1983.⁵¹⁴

Detective Evans persisted in arguing that Mosley was responsible for the rapes and murders committed in the area.⁵¹⁵ The crimes, most of which targeted women and children, all but ceased while Mosley was in custody, but resumed during his periods of freedom.⁵¹⁶ Mosley was again arrested for sexual battery in May 1984, but a jury found him not guilty later that year.⁵¹⁷ Finally, in 1987, too late for Jerry Frank Townsend, Frank Lee Smith, and the scores of women he had victimized, Mosley was arrested and

⁵⁰⁵ See Jonathon King, *The 15-year Hunt for a Serial Killer After a Dozen Murders, 40 Rapes and the Sporadic Pursuit of Prime Suspects, Did the Fort Lauderdale Police Finally Get the Right Man?*, FT. LAUDERDALE SUN-SENTINEL, Oct. 30, 1988, at 6, available at 1988 WLNR 1977209.

⁵⁰⁶ *Id.*

⁵⁰⁷ King, *supra* note 483.

⁵⁰⁸ *Id.*

⁵⁰⁹ King, *supra* note 505.

⁵¹⁰ King, *supra* note 483.

⁵¹¹ See Simon, *supra* note 484, at 130.

⁵¹² *Id.* at 131.

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ King, *supra* note 483; Simon, *supra* note 484, at 131 (explaining how Evans continued to believe that Mosley was the perpetrator and sought his arrest, prosecution, and 24-hour surveillance of Mosley).

⁵¹⁶ King, *supra* note 483; see also Simon, *supra* note 484, at 130–31 (describing the series of murders and rapes in Fort Lauderdale between 1979 and 1980).

⁵¹⁷ Simon, *supra* note 484, at 131.

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confessed to murdering two women.⁵¹⁸ He was found incompetent to stand trial and committed to a state hospital.⁵¹⁹ He remained involuntarily civilly committed as of 2009.⁵²⁰ He may never be released from custody.⁵²¹

Kenneth Phillips

Kim Ancona worked as a cocktail lounge waitress in Phoenix, Arizona, where she was responsible for closing the establishment at the end of business hours.⁵²² Her body was found in the men's restroom of the lounge on the morning of December 29, 1991, where she had been stabbed to death and sexually assaulted.⁵²³ Human bite marks were left on her breast and stab wounds on her neck.⁵²⁴ The police learned that Ancona had mentioned that "Ray" had offered to help her close the bar on the night of her death.⁵²⁵ The address book found in her purse included Ray Krone's name.⁵²⁶ Krone, a U.S. Air Force veteran and a mail carrier for the U.S. Postal Service who had no prior criminal record, was a regular patron at the lounge.⁵²⁷ He had recently given Ancona a ride to a Christmas party.⁵²⁸ The police asked Krone to accompany them to the police station, where he provided hair and blood samples and responded to questioning.⁵²⁹ Krone, who had distinctively irregular teeth, also bit into Styrofoam so that the police could secure a dental impression.⁵³⁰ A dental examiner concluded that the marks on Ancona's body were consistent with the impressions of Krone's teeth.⁵³¹ Krone was arrested and charged with rape and capital murder.⁵³²

⁵¹⁸ King, *supra* note 483.

⁵¹⁹ *Id.*

⁵²⁰ *Id.*

⁵²¹ See King, *supra* note 505.

⁵²² *Meet Exoneree Ray Krone and Learn What Went Wrong*, 1 JUST. PROJECT Q., 1, 7 (n.d.), available at http://www.azjusticeproject.org/Assets/newsletter/jp_quarterly_01.pdf [hereinafter *Meet Exoneree Ray Krone*].

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ *Id.* at 8.

⁵²⁶ *Id.*

⁵²⁷ *Id.* at 7.

⁵²⁸ *Id.* at 8.

⁵²⁹ See *State v. Krone*, 897 P.2d 621, 621–22 (Ariz. 1995).

⁵³⁰ *Meet Exoneree Ray Krone*, *supra* note 522, at 7.

⁵³¹ *Id.*

⁵³² *Id.*; see *Krone*, 897 P.2d at 621; Molly O'Toole, *Ex-Death Row Inmate Krone Speaks to The Sun*, CORNELL DAILY SUN (Nov. 13, 2006, 1:00 AM), <http://cornellsun.com/node/19806> (last visited May 18, 2013); Ray Krone, Address to students at Mansfield University (Apr. 5,

Scant other evidence connected Krone to the crime.⁵³³ He had consistently maintained his innocence and his roommate corroborated that he had been at home and gone to bed early on December 28, 1991—hours before the murder.⁵³⁴ Bloody footprints at the crime scene were linked to size nine or ten Converse athletic shoes; Krone owned no Converse shoes and wore a size eleven.⁵³⁵ Later on the day of the murder, a man mysteriously left a note for homicide detectives stating that he had seen “an Indian about 5’8” to 6’1” . . . [who was fat and wearing blue jeans] hanging around” behind the lounge between 3:30 and 4:30 a.m. on December 29.⁵³⁶ A friend of Ancona told the police that the slain waitress had refused to serve a heavy-set, highly intoxicated Native American with long black hair who was wearing blue jeans not long before the lounge closed.⁵³⁷ A jet black hair was found congealed in blood on Ms. Ancona’s buttocks, although a crime lab technician neglected to analyze that hair while concluding that other hairs discovered near her body were “consistent’ with Krone’s.”⁵³⁸

The prosecution enlisted a forensic odontologist, Dr. Raymond Rawson, to conduct another comparison between the bite marks found on Ancona’s body and the dental impression secured from Krone.⁵³⁹ Dr. Rawson prepared an elaborate videotape demonstrating the technique he used to analyze the bite marks and used the videotape at Krone’s 1992 murder trial “to show a match between Krone’s teeth and Ancona’s wounds.”⁵⁴⁰ The Supreme Court of Arizona later described this testimony as “critical to the State’s case”⁵⁴¹ and concluded that “[w]ithout the bite marks, the State arguably had no case.”⁵⁴² A jury convicted Krone of capital murder and the trial judge sentenced him to death.⁵⁴³ Krone remained on Arizona’s death row until the Supreme Court of Arizona reversed his conviction in 1995 because the prosecution had

2010) (transcript available at <http://files.podcast.mansfield.edu/transcripts/RayKroneSpeech.pdf>) [hereinafter Ray Krone Address].

⁵³³ *Meet Exoneree Ray Krone*, *supra* note 522, at 8.

⁵³⁴ *See id.*; Robert Nelson, *About Face*, PHX. NEW TIMES (Apr. 21, 2005), <http://www.phoenixnewtimes.com/2005-04-21/news/about-face>.

⁵³⁵ *Id.*; *see Meet Exoneree Ray Krone*, *supra* note 511, at 9.

⁵³⁶ Nelson, *supra* note 534.

⁵³⁷ *Meet Exoneree Ray Krone*, *supra* note 522, at 10.

⁵³⁸ Nelson, *supra* note 534; *Meet Exoneree Ray Krone*, *supra* note 522, at 10.

⁵³⁹ *State v. Krone*, 897 P.2d 621, 622 (Ariz. 1995).

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* at 624.

⁵⁴² *Id.* at 622.

⁵⁴³ *Id.* at 621.

failed to provide defense counsel with a copy of Rawson's videotaped demonstration sufficiently in advance of the trial to allow for adequate preparation.⁵⁴⁴

Krone was retried and again was convicted of capital murder.⁵⁴⁵ As in the initial trial, the prosecution's case centered on Dr. Rawson's bite mark testimony.⁵⁴⁶ Citing his lingering doubt about guilt, the trial judge sentenced Krone to life imprisonment.⁵⁴⁷ Krone remained incarcerated until April 2002, when DNA testing of blood, saliva, and hair from the murder scene excluded him as the source and matched Kenneth Phillips, a heavy set Native American with long black hair who had lived just 600 yards⁵⁴⁸ from the site of the killing.⁵⁴⁹ In December 1991, when Ms. Ancona was raped and murdered, Phillips was on probation for breaking into a woman's home and choking her.⁵⁵⁰ When confronted with the DNA match, he reportedly admitted to having blacked out from drinking on the night of the murder, and awoke to find himself covered in blood without remembering how he came to be in that condition.⁵⁵¹

Phillips's DNA was in the CODIS database because he had been convicted of choking and sexually assaulting a seven-year-old girl.⁵⁵² He victimized the child just weeks after he had raped and murdered Ms. Ancona, while the authorities had prematurely focused their attention on Ray Krone.⁵⁵³ Phillips pleaded guilty to the crimes committed against Ancona in exchange for a sentence of life imprisonment.⁵⁵⁴ Ray Krone became the one hundredth person

⁵⁴⁴ *Id.* at 625.

⁵⁴⁵ Hans Sherrer, *Twice Wrongly Convicted of Murder—Ray Krone is Set Free After 10 Years*, 2 JUST. DENIED MAG. 8, available at <http://www.justicedenied.org/volume2issue8.htm#Ray> (last visited May 18, 2013).

⁵⁴⁶ *Id.*

⁵⁴⁷ Ray Krone Address, *supra* note 532.

⁵⁴⁸ Sherrer, *supra* note 545.

⁵⁴⁹ Nelson, *supra* note 534; Sherrer, *supra* note 545.

⁵⁵⁰ Nelson, *supra* note 534; Sherrer, *supra* note 545.

⁵⁵¹ Ray Krone Address, *supra* note 532; Robert Nelson, *Death Road: Ray Krone is America's New Anti-Death-Penalty Poster Boy*, PHX. NEW TIMES (May 22, 2003), <http://www.phoenixnewtimes.com/2003-05-22/news/death-road>.

⁵⁵² See Nelson, *supra* note 534.

⁵⁵³ See *id.*; Sherrer, *supra* note 534.

⁵⁵⁴ *Information for Inmate 077157 PHILLIPS*, ARIZ. DEPARTMENT OF CORRECTIONS, http://www.azcorrections.gov/inmate_datasearch/results_Minh.aspx?InmateNumber=077157&LastName=PHILLIPS&FNMI=K&SearchType=SearchInet (last visited May 18, 2013) (displaying results of Inmate Datasearch for Kenneth Phillips). See generally Phillips v. Araneta, 93 P.3d 480, 486 (Ariz. 2004) (en banc) (holding that while the trial judge did not abuse his discretion by ordering a mental health evaluation of defendant Phillips, the order should nonetheless be vacated because the order did not sufficiently protect Phillips against self-incrimination); Arizona v. Foreman, 118 P.3d 1117, 1121 (Ariz. Ct. App. 2005) (holding that the trial court erred in holding that A.R.S. § 13-4426.01 was unconstitutional because

exonerated since 1973 in this country after being convicted of capital murder and sentenced to death.⁵⁵⁵

Willie Randolph

Fourteen-year-old Cateresa Matthews was last seen alive on November 19, 1991, when she began walking from her great-grandmother's house to her own home in Dixmoor, Illinois, a suburb of Chicago.⁵⁵⁶ Her body was discovered in a field near a major highway on December 8.⁵⁵⁷ She had been shot in the mouth and sexually assaulted.⁵⁵⁸ The condition of her body suggested that she had only recently died and an autopsy report listed December 8 as the date of her death.⁵⁵⁹ The investigation of the crime soon went cold and the case yielded few clues until the following October, when Dixmoor police apparently learned from a fifteen-year-old classmate of the young victim that another fifteen-year-old, Jonathan Barr, stated that he had seen Cateresa get into a car occupied by Robert Veal, Robert Taylor, and some other boys on the date of her disappearance.⁵⁶⁰ Barr, Veal, and Taylor were all fourteen years old at the time of the crime.⁵⁶¹

The police questioned Robert Veal, a learning-disabled fifteen-year-old, over a several hour period on October 29, 1992.⁵⁶² Veal signed a statement admitting that he had participated with Barr,

the defendant, Phillips, did not show that victim impact information existed or that it was necessary).

⁵⁵⁵ Nelson, *supra* note 551; Beth DeFalco & Dennis Wagner, *DNA Evidence Frees 100th Death Row Inmate*, USA TODAY (Apr. 10, 2002), <http://www.usatoday.com/news/nation/2002/04/10/krone.htm>; *Know the Cases: Ray Krone*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ray_Krone.php (last visited May 18, 2013). Although Krone was heralded as the one hundredth death-sentenced exonerate when he was released from prison, where he was in service of a life sentence following conviction at his second trial, after the reversal of his original conviction and capital sentence, the Death Penalty Information Center currently identifies him as the ninety-eighth death-sentenced individual to be exonerated. *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited May 18, 2013).

⁵⁵⁶ Joshua A. Tepfer et al., *Convenient Scapegoats: Juvenile Confessions and Exculpatory DNA in Cook County, Illinois*, 18 CARDOZO J. L. & GENDER 631, 638 (2012).

⁵⁵⁷ *Id.* at 639.

⁵⁵⁸ *See id.*

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.* at 639–40.

⁵⁶¹ *Know the Cases: Shainne Sharp*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Shainne_Sharp.php (last visited May 18, 2013). *See also* Joshua A. Tepfer & Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, 64 ME. L. REV. 553, 570 (2012) (explaining that nearly one year after Cateresa Matthews was murdered, police brought in for questioning three fifteen-year-olds).

⁵⁶² Tepfer et al., *supra* note 556, at 640.

Taylor, seventeen-year-old James Harden, and seventeen-year-old Shainne Sharp in Cateresa's rape and murder.⁵⁶³ Later that day, the police secured an incriminating admission from Taylor, who identified Veal and the other three boys named in Veal's statements as also being involved.⁵⁶⁴ On October 31, Sharp, who was in police custody for twenty-one hours, confessed as well, and also named the other four boys.⁵⁶⁵ The three boys' statements were consistent that Cateresa was raped and murdered on November 19—rather than December 8—although they differed in significant particulars.⁵⁶⁶ None of the boys were represented by counsel or accompanied by an interested adult.⁵⁶⁷ Subsequently, all of the boys, who would become known as the Dixmoor Five, were arrested and charged with the crimes.⁵⁶⁸

The charges were not reassessed when DNA analysis of sperm retrieved from Cateresa's body revealed a single male profile—although the crime had been depicted as a gang rape and murder—and excluded all five of the youths as the source.⁵⁶⁹ With little incriminating evidence other than the confessions, prosecutors negotiated guilty pleas with Veal and Sharp (Harden had retracted his admissions) in exchange for their testifying against the other defendants.⁵⁷⁰ Harden was convicted following a bench trial in 1995 and was sentenced to eighty years in prison.⁵⁷¹ Barr and Taylor were convicted at a trial conducted before separate juries in 1997 and were sentenced to eighty-five years and eighty years imprisonment, respectively.⁵⁷² Veal and Sharp received twenty-year prison terms as a part of their plea-bargains, effectively making them eligible for release within eight years of their sentencing.⁵⁷³

In 2005, Barr and Taylor sought more refined DNA testing of the

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Know the Cases: Shainne Sharp*, *supra* note 561.

⁵⁶⁶ Tepfer et al., *supra* note 556, at 641.

⁵⁶⁷ *See id.* at 640–41; *Know the Cases: Shainne Sharp*, *supra* note 561.

⁵⁶⁸ Tepfer et al., *supra* note 556, at 639, 641; Tepfer & Nirider, *supra* note 561, at 571; *see* Joint Petition for Relief from Judgment, Immediate Vacation of Convictions, and Release of Petitioners on Their Own Recognizance, *People v. Harden*, No. 92-CR-27247 & *People v. Barr*, 95-CR-23475 (Cook County Cir. Ct. Mar. 25, 2011), *available at* <http://www.cwcy.org/Sealed-Joint-Petition-to-vacate.pdf>.

⁵⁶⁹ Tepfer et al., *supra* note 556, at 641.

⁵⁷⁰ *Id.* at 643.

⁵⁷¹ *See id.* at 645; *see Know the Cases: Shainne Sharp*, *supra* note 561.

⁵⁷² *Know the Cases: Shainne Sharp*, *supra* note 561; *see* Tepfer & Nirider, *supra* note 561, at 572.

⁵⁷³ Tepfer et al., *supra* note 556, at 643.

crime scene evidence but were rebuffed.⁵⁷⁴ Harden filed a motion for additional DNA testing in 2009, which was joined the following year by Barr and Taylor.⁵⁷⁵ The case against the defendants then began to crumble. Robert Veal recanted his confession and trial testimony in 2010.⁵⁷⁶ After considerable delay caused by uncertainty surrounding its whereabouts, the prosecution consented to having the preserved semen sample retested and entered into the CODIS database.⁵⁷⁷ In March 2011, the CODIS run produced a hit: the DNA profile from Cateresa Matthews's rape and murder matched that of Willie Randolph, an offender with a lengthy history of sexual assaults and criminal violence.⁵⁷⁸

When Cateresa's body was discovered in December 1991, Randolph was thirty-three years old.⁵⁷⁹ He lived within a mile of both Cateresa's great-grandmother's house and the crime scene, and had recently been paroled from prison following a 1981 conviction in which he had robbed a woman at gunpoint.⁵⁸⁰ Randolph had served an earlier prison sentence following his 1977 convictions for rape, deviate sexual assault, and robbery.⁵⁸¹ A former girlfriend reported that in the late 1970s, Randolph had raped her in the same field where Cateresa's body had been found, and that he had beaten her with a crowbar and broken her arm when she terminated their relationship.⁵⁸² His crimes continued in the wake of Cateresa's rape and murder, and after Barr, Taylor, Harden, Veal, and Sharp were arrested, convicted, and incarcerated for the offenses.⁵⁸³ Randolph was arrested in March 1992 for possession of crack cocaine and two months later for possessing a firearm as a convicted felon.⁵⁸⁴ He received prison sentences of two and four years for the respective crimes.⁵⁸⁵ He was convicted and served jail time for aggravated assault with a deadly weapon and domestic battery for knifing his girlfriend in November 1998.⁵⁸⁶ He subsequently was convicted and

⁵⁷⁴ *Id.* at 645–46.

⁵⁷⁵ *Id.* at 647.

⁵⁷⁶ *Id.* at 648.

⁵⁷⁷ *Id.* at 647.

⁵⁷⁸ *Id.* at 648; see Tepfer & Nirider, *supra* note 561, at 572.

⁵⁷⁹ Tepfer et al., *supra* note 556, at 648.

⁵⁸⁰ *Id.* at 649.

⁵⁸¹ *Id.*

⁵⁸² *Id.* at 652.

⁵⁸³ See *id.* at 649–50.

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* at 650.

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imprisoned for drug offenses and residential burglaries.⁵⁸⁷ In April 2011, after his DNA profile was matched to the sperm sample retrieved from Cateresa Matthews's body, he was arrested for additional drug crimes and then sentenced to prison for three more years.⁵⁸⁸

Despite the DNA match linking Randolph to Cateresa Matthews, Randolph denied having engaged in sexual relations with her or even knowing her.⁵⁸⁹ Prosecutors initially resisted motions to vacate Barr, Taylor, and Harden's convictions.⁵⁹⁰ An attorney representing Shainne Sharp, when Sharp was serving a prison sentence in Indiana in 2011 for an unrelated drug offense,⁵⁹¹ then advised the State Attorneys that Sharp had recanted his trial testimony and maintained that he, too, was innocent of Matthews's rape and murder.⁵⁹² Finally, on November 3, 2011, the charges against Barr, Taylor, and Harden were dismissed, and the young men were released from prison.⁵⁹³ Barr and Taylor were then thirty-four years old, and Harden thirty-six.⁵⁹⁴ Each had been incarcerated for nearly twenty years.⁵⁹⁵ The convictions of Veal and Sharp were vacated in December 2011 and January 2012, respectively.⁵⁹⁶ As of February 2013, Willie Randolph remained incarcerated.⁵⁹⁷ He had yet to be charged with Cateresa Matthews's rape and murder.⁵⁹⁸ An attorney representing James Harden commented following the exoneration of Harden, Barr, and Taylor that

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 651, 654; Sealed Joint Petition for Relief from Judgment, Immediate Vacation of Convictions, and Release of Petitioners of Their Own Recognizance at 10–12, 22–31, *Illinois v. Harden* (No. 92-CR-27247) & *Illinois v. Barr* (No. 95-CR-23475).

⁵⁸⁹ Tepfer et al., *supra* note 556, at 651; Press Release, Three Men from Cook County, Illinois, Exonerated of 1991 Rape and Murder, Exonerations of Two Others to Follow (Nov. 3, 2011), *available at* http://www.innocenceproject.org/Content/Three_Men_from_Cook_County_Illinois_Exonerated_of_1991_Rape_and_Murder_Exonerations_of_Two_Others_to_Follow.php [hereinafter Three Men Press Release].

⁵⁹⁰ Tepfer et al., *supra* note 556, at 651.

⁵⁹¹ *Know the Cases: Shainne Sharp*, *supra* note 561.

⁵⁹² Tepfer et al., *supra* note 556, at 653.

⁵⁹³ *Id.* at 654.

⁵⁹⁴ Steve Mills & Andy Grimm, *After Years in Prison, Men Cleared of Dixmoor Crime*, CHI. TRIB., Nov. 4, 2011, at 1.

⁵⁹⁵ Andy Grimm, *Last of 3 Cleared in 1991 Killing Freed*, CHI. TRIB., Nov. 10, 2011, at 12.

⁵⁹⁶ *Know the Cases: Shainne Sharp*, *supra* note 561.

⁵⁹⁷ See *Inmate Search*, ILL. DEPARTMENT OF CORRECTIONS, <http://www2.illinois.gov/idoc/offender/pages/inmatesearch.aspx> (last visited May 18, 2013) (select "IDOC#"; then type "A71871"; then click the "Inmate Search" hyperlink).

⁵⁹⁸ Tepfer et al., *supra* note 556, at 654; Tepfer & Nirider, *supra* note 561, at 573; Brian Slodysko, *Dixmoor Murder Conviction is Vacated*, CHI. TRIB., Dec. 13, 2011, at 10.

“[e]ven before they were convicted, the state had DNA evidence proving that the confessions were false, yet it chose to go forward with the prosecutions in spite of this evidence This destroyed the lives of these young men while the real perpetrator was allowed to go free, destroying even more lives during a 20-year crime spree.”⁵⁹⁹

Matias Reyes

Few crimes have roiled America with the intensity of the “the Central Park Jogger case,” which originated with a woman’s horrific rape and beating after she had embarked on a nighttime jog through New York City’s Central Park.⁶⁰⁰ She was left near death, with a fractured skull and enormous blood loss, on April 19, 1989.⁶⁰¹ News media trumpeted the violent episode and infused it with cultural meaning.⁶⁰² As *Time* magazine later described it:

[The case] introduced New York City and the world to the word wilding. It came to stand for a racial nightmare: a young, white female stockbroker goes jogging in the park and is raped, beaten, and left near dead by a giddy horde of teenagers. Within days, five black and Hispanic teenagers, ages 14 to 16, were arrested and charged with the crime. The teens—Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Kharey Wise—had been part of a larger rampage in which several people were randomly attacked in the park that night. The boys described it as wilding, and four of them confessed on videotape that the jogger had been one of their victims.⁶⁰³

The police also obtained admissions from the fifth boy, fifteen-year-old Yusef Salaam, although his interrogation session had not been video-recorded.⁶⁰⁴ The boys’ incriminating statements were

⁵⁹⁹ Three Men Press Release, *supra* note 589 (quoting Tara Thompson of the UChicago Law School Exoneration Project).

⁶⁰⁰ See, e.g., Craig Wolff, *Youths Rape and Beat Central Park Jogger*, N.Y. TIMES, Apr. 21, 1989, at B1 (recounting the details of the Central Park Jogger’s rape and beating).

⁶⁰¹ See, e.g., *id.* (describing the victim’s injuries).

⁶⁰² See, e.g., SARAH BURNS, *THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING* 67–90 (2011) (detailing the media’s response to the Central Park Jogger case and exploring the cultural issues it raised).

⁶⁰³ Ron Stodghill, *Law: True Confession of the Central Park Rapist*, TIME (Dec. 16, 2002), available at www.time.com/time/printout/0,8816,1003874,00.html.

⁶⁰⁴ Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 480–81; *Know the Cases: Yusef Salaam, INNOCENCE PROJECT*, PROJECT,

inconsistent in important particulars, including where the assault had occurred, what weapons were used, and who had participated in which aspects of the beating and rape.⁶⁰⁵ None of the boys were represented by an attorney, and two of them, Salaam and sixteen-year-old Korey (Kharey) Wise, were questioned without their parents or another responsible adult being present.⁶⁰⁶ The police made use of interrogation tactics designed to induce admissions, including “good cop-bad cop” ploys and lying about evidence that purportedly confirmed the boys’ guilt.⁶⁰⁷ Most of the youths were interrogated in multiple sessions that lasted for several hours; fifteen-year-old Raymond Santana’s videotaped statement was given after he had been in custody and subjected to periodic questioning for more than twenty-seven hours.⁶⁰⁸

The five youths pleaded not guilty and were prosecuted in two separate trials in 1990.⁶⁰⁹ Prior to trial, a DNA analysis of semen found on the victim’s sock excluded each of them as well as the victim’s boyfriend as the source.⁶¹⁰ The prosecution’s case rested almost exclusively on the boys’ incriminating statements.⁶¹¹ Following a six-week trial that ended in August, McCray, Salaam, and Santana were convicted of rape and robbery.⁶¹² At a trial that

http://www.innocenceproject.org/Content/Yusef_Salaam.php (last visited May 18, 2013).

⁶⁰⁵ Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 217–18 (2006); see also BURNS, *supra* note 602, at 37–56, 64 (explaining that in the statements made by the boys, “the descriptions of the rape var[ie]d widely”).

⁶⁰⁶ Under New York law, juveniles younger than sixteen were not to be questioned by the police in the absence of a parent or another interested adult. Salaam, although in fact only fifteen, had presented identification indicating that he was sixteen years old and his statements were admitted into evidence because the police reasonably believed that he was sixteen. *People v. Salaam*, 629 N.E.2d 371, 372, 374 (N.Y. 1993).

⁶⁰⁷ See BURNS, *supra* note 602, at 46; Leo et al., *supra* note 604, at 481. One police officer admitted lying to Salaam by telling him that his fingerprints had been found on the victim’s pants. BURNS, *supra* note 602, at 46; Leo et al., *supra* note 604, at 481. The youths and various relatives claimed that police officers had shouted and cursed at them during the interrogation sessions, although the trial judge later ruled that the confessions were voluntary. Leo et al., *supra* note 589, at 481. Officers relied on techniques of minimization and maximization, alternately suggesting seemingly innocuous explanations for incriminating details, and implying that grave consequences would accompany denials. BURNS, *supra* note 602, at 56–63.

⁶⁰⁸ BURNS, *supra* note 602, at 49.

⁶⁰⁹ *Id.* at 131, 161.

⁶¹⁰ *Id.* at 113, 146–47.

⁶¹¹ See *id.* at 103.

⁶¹² *People v. Wise*, 752 N.Y.S.2d 837, 840 (Sup. Ct. N.Y. County 2002); see also *People v. Salaam*, 629 N.E.2d 371, 371 (N.Y. 1993) (reciting Salaam’s convictions of rape and robbery in the first degree); *People v. McCray*, 604 N.Y.S.2d 93, 94 (App. Div. 1st Dep’t 1993) (reciting McCray’s convictions for rape and robbery in the first degree). Each defendant also was convicted of assault and riot, but those convictions were set aside because of their juvenile

concluded in December, Richardson was convicted of attempted murder, robbery, rape, and sodomy, and Wise was found guilty of assault, sexual abuse, and riot.⁶¹³ Wise, the lone defendant who was sixteen at the time of the crimes, was sentenced to five to fifteen years of imprisonment.⁶¹⁴ He was released from prison in August 2002, after having been incarcerated for more than thirteen years from the time of his arrest.⁶¹⁵ The other four boys received five to ten year prison sentences, the maximum allowable under juvenile sentencing standards.⁶¹⁶ Each served between six and eight years before being released.⁶¹⁷

In December 2002, the Manhattan District Attorney's Office joined the defendants' motion to vacate their convictions, dismissed the charges against them, and McCray, Richardson, Salaam, Santana, and Wise were exonerated.⁶¹⁸ Those dramatic developments followed the admission of Matias Reyes, a convicted murderer and rapist then serving a thirty-three-year to life prison sentence, that he and he alone had assaulted and raped Trisha Meili, "the Central Park jogger."⁶¹⁹ DNA testing confirmed that Reyes was the source of semen found on clothing that Ms. Meili had been wearing when attacked.⁶²⁰ Reyes's detailed explanation of how he committed the crime, although imperfectly matching some of the evidence, included a number of particulars that corroborated his account.⁶²¹ Reyes's confession apparently was motivated by a "spiritual conversion" coupled with lingering guilt about the crime and the wrongful convictions of Korey Wise (who he had met in prison) and the other youths, although he did not come forward until long after the statute of limitations had expired, barring his

status. *Wise*, 752 N.Y.S.2d at 840; see *Salaam*, 629 N.E.2d at 371; *McCray*, 604 N.Y.S.2d at 94 (reciting McCray's convictions for rape and robbery in the first degree). Raymond Santana did not perfect an appeal. *Wise*, 752 N.Y.S.2d at 840.

⁶¹³ *Wise*, 752 N.Y.S.2d at 840; *People v. Wise*, 612 N.Y.S.2d 117, 117 (App. Div. 1st Dep't 1994); *People v. Richardson*, 608 N.Y.S.2d 627, 627 (App. Div. 1st Dep't 1994).

⁶¹⁴ *Wise*, 612 N.Y.S.2d at 117.

⁶¹⁵ BURNS, *supra* note 602, at 189.

⁶¹⁶ *Id.* at 161, 176.

⁶¹⁷ *See id.* at 184–85.

⁶¹⁸ *See Wise*, 752 N.Y.S.2d at 839–40, 848, 850; Robert D. McFadden & Susan Saulny, *13 Years Later, Official Reversal in Jogger Attack: A Probable Lone Rapist*, N.Y. TIMES, Dec. 6, 2002, at A1; Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1.

⁶¹⁹ *Wise*, 752 N.Y.S.2d at 843–44.

⁶²⁰ *Id.* at 847.

⁶²¹ *Id.* *See* Assistant District Attorney, County of New York, Affirmation in Response to Motion to Vacate Judgment of Conviction, at 46–47, *People v. Wise*, 752 N.Y.S.2d 837 (Sup. Ct. New York County 1994) (No. 4762/89) [hereinafter DA's Affirmation], available at <http://big.assets.huffingtonpost.com/wise.pdf>.

prosecution for the vicious assault.⁶²²

Reyes was eighteen years old on April 19, 1989, the date of Ms. Meili's assault and the infamous "wilding"⁶²³ episode in Central Park.⁶²⁴ Two days earlier, he had beaten, torn the clothing off, and raped another woman in Central Park.⁶²⁵ When the woman described her assailant and remembered that he had fresh stitches in his chin, a detective used hospital records to identify Reyes, who had recently received stitches and otherwise fit the description, as a suspect.⁶²⁶ The police investigation ended without the lead to Reyes being pursued, apparently owing in part to the victim's leaving New York City and declining to participate further in the investigation.⁶²⁷ Nor did the police connect that attack to the Central Park jogger assault, perhaps because their attention had focused on the youths they had arrested and then charged upon securing their incriminating admissions.⁶²⁸ Reyes remained at large, continuing "a sporadic siege of violence on the Upper East Side for the next four months."⁶²⁹

On June 11, 1989, Reyes entered a woman's apartment, raped her in her shower and then again on her bed, tried to drown her, and then repeatedly stabbed her, attempting to blind her in the process.⁶³⁰ On June 14, he raped a pregnant woman in her apartment after locking her three small children in another room, where they could hear their mother screaming for her life.⁶³¹ Telling her that she had a choice between her eyes and her life, he

⁶²² See BURNS, *supra* note 602, at 188; William K. Rashbaum, *Convicted Killer and Rapist Says He Attacked Central Park Jogger*, N.Y. TIMES, June 12, 2002, at B2; Christine Haughney, *Killer Claims He Attacked N.Y. Jogger*, CHI. TRIB., Sept. 6, 2002, at 19; Kevin Flynn, *Suspect in Rape Absorbed Pain and Inflicted It*, N.Y. TIMES, Dec. 7, 2002, at A1; DA's Affirmation, *supra* note 621, at 19. See generally TRISHA MEILI, *I AM THE CENTRAL PARK JOGGER: A STORY OF HOPE AND POSSIBILITY* (2003) (describing how Reyes confessed to her rape after the statute of limitations had tolled).

⁶²³ See Robert F. Worth, *Wilding: A Word That Seared a City's Imagination*, N.Y. TIMES, Dec. 6, 2002, at B4.

⁶²⁴ Jim Dwyer, *Amid Focus on Youths in Jogger Case, a Rapist's Attacks Continued*, N.Y. TIMES, Dec. 4, 2002, at B1 [hereinafter Dwyer, *Amid Focus*]. See Flynn, *supra* note 622, at A1.

⁶²⁵ Chris Smith, *Investigating the Investigation: Central Park Revisited*, N.Y. MAG., Oct. 21, 2002, at 32.

⁶²⁶ Dwyer, *Amid Focus*, *supra* note 624, at B1.

⁶²⁷ *Id.*

⁶²⁸ See BURNS, *supra* note 602, at 115–16. See generally Dwyer, *Amid Focus*, *supra* note 609 (indicating that the police department's focus was on the five teenagers that were ultimately arrested after they all confessed to the attack on the jogger).

⁶²⁹ Jim Dwyer, *Verdict That Failed the Test of Time*, N.Y. TIMES, Dec. 6, 2002, at A1 [hereinafter Dwyer, *Verdict That Failed the Test of Time*].

⁶³⁰ See BURNS, *supra* note 602, at 116.

⁶³¹ *Id.* at 116–17.

then stabbed her seven times.⁶³² She died three hours later.⁶³³ On July 19, he repeatedly raped another woman after gaining access to her apartment and, armed with a knife, and again threatening that he would either have to kill her or blind her, stabbed her about the eyes.⁶³⁴ He tied her up, stole her ATM card, and used it to withdraw \$300 from her bank account, and then called 911 to request that an ambulance be sent to her apartment.⁶³⁵ The recording of this telephone call would later be used to link Reyes to the crimes.⁶³⁶ On July 27, he accosted a woman in the hallway of her apartment building, but fled when a neighbor approached before he was able to force the woman into her unit.⁶³⁷ Finally, on August 5, 1989, Reyes made his way into another woman's apartment, raped her in her shower and on her bed, and then pocketed her ATM card.⁶³⁸ The woman managed to break away and cried for help.⁶³⁹ Two men captured Reyes as he tried to escape and subdued him until the police arrived.⁶⁴⁰

Reyes pleaded guilty to murder and four rapes in 1991.⁶⁴¹ At the November hearing where his sentence of thirty-three years to life imprisonment was imposed, he hurled obscenities at the judge, wheeled and punched his lawyer in the face, and then injured court officers as they wrestled to control him.⁶⁴² While serving his sentence and prior to coming forward and admitting his responsibility for raping and assaulting the Central Park jogger, he was cited for multiple prison infractions ranging from arson to fighting.⁶⁴³ A reporter for the *New York Times* observed that no explanation was offered “[o]n the subject of why Mr. Reyes was not caught sooner, . . . [nor] on the topic of how the apparently false confessions were obtained.”⁶⁴⁴ The reporter further noted that “[t]he former defendants have lawyers to argue their case; [and] the

⁶³² *Id.* at 117.

⁶³³ *Id.*

⁶³⁴ *Id.* at 117–18. See generally Flynn, *supra* note 622, at A1 (detailing how victims who survived encounters with Mr. Reyes were all stabbed around the eyes and how Reyes raped a twenty-year-old victim in her apartment on July 19th).

⁶³⁵ BURNS, *supra* note 602, at 118.

⁶³⁶ Flynn, *supra* note 622, at A1.

⁶³⁷ BURNS, *supra* note 602, at 118.

⁶³⁸ *Id.*; Dwyer, *Amid Focus*, *supra* note 624, at B1.

⁶³⁹ BURNS, *supra* note 602, at 118; Dwyer, *Amid Focus*, *supra* note 624, at B1.

⁶⁴⁰ BURNS, *supra* note 602, at 118; Dwyer, *Amid Focus*, *supra* note 624, at B1; Chris Smith, *Investigating the Investigation: Central Park Revisited*, N.Y. MAG., Oct. 21, 2002, at 32.

⁶⁴¹ Rashbaum, *supra* note 622, at B2.

⁶⁴² Smith, *supra* note 625, at 29, 84.

⁶⁴³ Flynn, *supra* note 622, at A1.

⁶⁴⁴ Dwyer, *Verdict That Failed the Test of Time*, *supra* note 629, at A1.

former prosecutors and detectives have their outlets to argue their diligence. In this latest debates, the victims of Mr. Reyes are, so far, unspoken for.”⁶⁴⁵

Altemio Sanchez

Delaware Park, designed by Frederick Law Olmsted, is considered to be Buffalo, New York’s “Central Park.”⁶⁴⁶ A series of rapes with a similar *modus operandi* began there in 1981, causing citizens and the police to be on alert for “the Delaware Park rapist.”⁶⁴⁷ A city official, who had previously been a police officer, reported seeing a suspicious man in the vicinity the day before the July 8, 1984 rape of a female jogger.⁶⁴⁸ When the official spotted the man again, well over a year later, he recorded the license plate number of the car he was driving and notified the police.⁶⁴⁹ The car belonged to Anthony Capozzi, a twenty-nine-year-old man with a history of schizophrenia.⁶⁵⁰ Capozzi was arrested on September 13, 1985.⁶⁵¹ Six women who had been raped in Delaware Park separately viewed line-ups in which Capozzi appeared.⁶⁵² Although some discrepancies existed between the victims’ verbal descriptions of their assailant and Capozzi—the rapist reportedly weighed between 150 and 160 pounds, whereas Capozzi weighed more than 200 pounds, and Capozzi had a three-inch scar on his face that none of the victims had mentioned—three of the women, including the victim of the July 8, 1984 assault, identified Capozzi as their assailant.⁶⁵³ Capozzi was tried in 1987 for committing the three rapes, was convicted of two of them, and was sentenced to serve eleven to thirty-five years in prison.⁶⁵⁴

⁶⁴⁵ *Id.*

⁶⁴⁶ *Delaware Park*, BUFFALO OLMSTED PARKS CONSERVANCY, http://bfloparks.org/parksystem/majorparks/36/delaware_park (last visited May 18, 2013); *The Conservancy*, BUFFALO OLMSTED PARKS CONSERVANCY, <http://bfloparks.org/pages/7/theconservancy> (last visited May 18, 2013).

⁶⁴⁷ See, e.g., Maki Becker, *How Capozzi’s Case Went Terribly Wrong*, BUFFALO NEWS, Mar. 30, 2007, at A1 [hereinafter Becker, *Capozzi’s Case*] (noting the sexual assaults that dated back to 1981 had residents nervous). See also Michael Beebe, *‘No Mercy’: Bike Path Killer Gets Life in Prison*, BUFFALO NEWS, Aug. 15, 2007, at A1 [hereinafter Beebe, *No Mercy*] (describing that a wire garrote was used on the victims’ necks).

⁶⁴⁸ Becker, *Capozzi’s Case*, *supra* note 647, at A1.

⁶⁴⁹ *Id.*

⁶⁵⁰ *Inmate Exonerated in 2 1980s Rapes*, BUFFALO NEWS, Mar. 28, 2007, available at 2007 WLNR 5979307.

⁶⁵¹ Becker, *Capozzi’s Case*, *supra* note 647, at A1.

⁶⁵² *Id.*

⁶⁵³ *Id.*

⁶⁵⁴ *Know the Cases: Anthony Capozzi*, INNOCENCE PROJECT,

Capozzi consistently refused to admit that he had committed the crimes while incarcerated, and consequently was barred from enrolling in prison classes that were a prerequisite for sex offenders to earn good time credit.⁶⁵⁵ He was denied parole five times.⁶⁵⁶ On April 3, 2007—shortly before he was to be considered yet again for parole and after he had been confined for nearly twenty-two years—he was exonerated.⁶⁵⁷ His convictions were vacated and the charges against him were dismissed after rape kits were located in his cases, and DNA tests were conducted that excluded him as the source of the preserved semen.⁶⁵⁸ DNA from the rape kits—which had been stored in a local hospital and had been available for testing for years although, neither Capozzi’s attorney nor the prosecution knew about their existence—matched the DNA profile of Altemio Sanchez.⁶⁵⁹

Sanchez, who had coached Little League baseball, was an active member of his church, and was highly regarded by his neighbors,⁶⁶⁰ concurrently was a serial rapist and murderer. Known only as the “Bike Path Rapist” or the “Bike Path Killer” before he was finally exposed, Sanchez claimed at least sixteen sexual assault victims and three slaying victims over three decades between the late 1970s and September 2006.⁶⁶¹ His three known murders—Linda Yalem in 1990,⁶⁶² Majane Mazur in 1992,⁶⁶³ and Joan Diver in 2006⁶⁶⁴—were all committed after Capozzi’s September 1985 arrest and convictions for the rapes that Sanchez had also perpetrated.⁶⁶⁵ At

http://www.innocenceproject.org/Content/Anthony_Capozzi.php (last visited May 18, 2013). See also *People v. Capozzi*, 544 N.Y.S.2d 95, 95–96 (App. Div. 4th Dep’t 1989) (affirming the defendant’s conviction).

⁶⁵⁵ Michael Beebe, *Capozzi a Free Man After 22 Years*, BUFFALO NEWS, Apr. 3, 2007, available at 2007 WLNR 6401112 [hereinafter Beebe, *Capozzi a Free Man*].

⁶⁵⁶ *Id.*; Stephen T. Watson, *Capozzi Gets \$4.25 Million from State in Settlement*, BUFFALO NEWS, July 1, 2010, at A1.

⁶⁵⁷ See Beebe, *Capozzi a Free Man*, *supra* note 655.

⁶⁵⁸ *Id.*; Maki Becker, *Newfound Evidence That Exonerates Capozzi Stored at ECMC All Along*, BUFFALO NEWS, Mar. 29, 2007, at A1 [hereinafter Becker, *Newfound Evidence*].

⁶⁵⁹ Becker, *Newfound Evidence*, *supra* note 658; Michael Beebe, *Capozzi Officially Cleared of Rape Charges*, BUFFALO NEWS, Apr. 3, 2007, at A1 [hereinafter Beebe, *Capozzi Officially Cleared*].

⁶⁶⁰ Maki Becker, *Two Lives in Juxtaposition*, BUFFALO NEWS, Jan. 21, 2007, at A1 [hereinafter Becker, *Two Lives*]; Beebe, *No Mercy*, *supra* note 647, at A1.

⁶⁶¹ Maki Becker, *16 Rapes May Have Spanned 30 Years*, BUFFALO NEWS, May 18, 2007, at A1 [hereinafter Becker, *16 Rapes*]; Becker, *Two Lives*, *supra* note 660, at A1.

⁶⁶² Becker, *Two Lives*, *supra* note 660, at A1; Beebe, *No Mercy*, *supra* note 647, at A1.

⁶⁶³ Becker, *Two Lives*, *supra* note 660, at A1; Beebe, *No Mercy*, *supra* note 647, at A1.

⁶⁶⁴ Becker, *Two Lives*, *supra* note 660, at A1; Beebe, *No Mercy*, *supra* note 647, at A1.

⁶⁶⁵ *Inmate Exonerated in 2 1980s Rapes*, *supra* note 650.

least nine of his rapes occurred after Cappozi was arrested.⁶⁶⁶

The murder of Joan Diver on September 29, 2006 bore similarities to the numerous prior unsolved murders—Linda Yalem also was killed on September 29, sixteen years earlier—and rapes committed over the years in Buffalo-area communities and parks, causing police to re-investigate several of the earlier cases.⁶⁶⁷ Their diligence paid off when they contacted Wilfredo Caraballo in early January 2007; a man who was first interviewed in April 1981 when a woman who had been raped three days earlier spotted a man resembling her rapist and took down the license plate number of the car he was driving.⁶⁶⁸ The car was registered to Caraballo, who then told the police that his car was not insured and that it had not been driven for a long time, including on the day in question.⁶⁶⁹ When the victim of the rape was shown a photograph of Caraballo she ruled him out as a suspect.⁶⁷⁰ When the police interviewed Caraballo again in 2007, he told them a different story: that his nephew, Altemio Sanchez, had borrowed his car and was driving it on the day that the 1981 rape occurred.⁶⁷¹ Sanchez's name already was familiar to the police. He was on a suspect list they had developed because he was Hispanic (thus fitting the description offered by several victims), he had twice been arrested for frequenting prostitutes, and one of the bike path murder victims was a prostitute.⁶⁷²

The police had secured perspiration, believed to be that of Joan Diver's killer, from the car that Diver had been driving prior to her murder.⁶⁷³ The perspiration yielded a DNA profile.⁶⁷⁴ Investigators followed Sanchez after Caraballo's revelation and covertly seized a

⁶⁶⁶ Becker, *16 Rapes*, *supra* note 661, at A1; see T.J. Pignataro, *DNA Links Bike Path Killer to 8 More Rapes*, BUFFALO NEWS, July 25, 2007, at A1 (noting Sanchez confessed to at least eight rapes between 1981 and 1994).

⁶⁶⁷ Becker, *16 Rapes*, *supra* note 661, at A1; Becker, *Two Lives*, *supra* note 660, at A1.

⁶⁶⁸ See Lou Michel, *26 Years of Carrying the Burden of Untruth*, BUFFALO NEWS, Jan. 16, 2007, at A1 (discussing how Sanchez's uncle finally told the truth about his car that was used in one of the earlier attacks).

⁶⁶⁹ Gene Warner et al., *1981 Rape Case, DNA Led to Bike Path Killing Suspect: Dogged Detective Work Draws Praise*, BUFFALO NEWS, Jan. 16, 2007, at A1; see also Michael Beebe, *Sanchez Says He Confessed to Uncle in 1981*, BUFFALO NEWS, Aug. 16, 2007, at A1 ("Caraballo, the car's owner, told police then that he had not driven the car for weeks.").

⁶⁷⁰ Warner et al., *supra* note 669, at A1.

⁶⁷¹ *Id.*

⁶⁷² Donn Esmonde, Commentary, *Teamwork Turned Up Sanchez*, BUFFALO NEWS, Jan. 21, 2007, at B1; Gene Warner, *Cooperation the Key to Finding a Killer*, BUFFALO NEWS, May 20, 2007, at A1.

⁶⁷³ Michael Beebe, *Bike Path Killer's Secrets are Likely to Remain Untold*, BUFFALO NEWS, Aug. 13, 2007, at A1; Warner, *supra* note 672, at A1.

⁶⁷⁴ Warner, *supra* note 672, at A1.

drinking glass and utensils that Sanchez had used while dining at a restaurant with his wife.⁶⁷⁵ The DNA profile from saliva on those items matched the profile obtained from Diver's car, leading to Sanchez's arrest on January 15, 2007.⁶⁷⁶ Within days of the arrest, the authorities suspected that Capozzi had wrongfully been convicted of rapes that Sanchez had been committed.⁶⁷⁷ After the rape kits stored at the Erie County Medical Center were located and DNA testing confirmed that suspicion, Capozzi was cleared.⁶⁷⁸ Although statutes of limitations had long ago expired for the rapes attributed to him, Sanchez pleaded guilty in August 2007 to the murders of Linda Yalem, Majane Mazur, and Joan Diver.⁶⁷⁹ He was sentenced to seventy-five years to life in prison.⁶⁸⁰

Timothy Spencer

On January 23, 1984, Arlington, Virginia police discovered the body of Carolyn Hamm, a thirty-two-year-old attorney who had been strangled and raped in her home.⁶⁸¹ A noose was fashioned around her neck and her wrists had been bound with venetian blind cords.⁶⁸² Two individuals reported that they had seen David Vasquez, variously described as "creepy," "weird," and a "peeping Tom," near Hamm's house on the days before and after the murder.⁶⁸³ Vasquez, thirty-seven years old and a man of limited intelligence, used to live in the neighborhood but he had since moved to Manassas, about thirty miles away.⁶⁸⁴ Investigators followed up by interviewing Vasquez.⁶⁸⁵ After falsely telling him that his fingerprints had been found at the murder scene, they secured his confession, which largely took the form of his reporting

⁶⁷⁵ Warner et al., *supra* note 669, at A1; see Warner, *supra* note 672, at A1.

⁶⁷⁶ Warner, *supra* note 672, at A1.

⁶⁷⁷ Gene Warner, *Police: Jailed Man May Be Innocent*, BUFFALO NEWS, Jan. 28, 2007, at A1.

⁶⁷⁸ Pignataro, *supra* note 666, at A1.

⁶⁷⁹ Becker, *16 Rapes*, *supra* note 661, at A1; Beebe, *No Mercy*, *supra* note 647, at A1.

⁶⁸⁰ Beebe, *No Mercy*, *supra* note 647, at A1.

⁶⁸¹ Jonah Horwitz & Rob Warden, *Meet the Exonerated: David Vazquez*, NORTHWESTERN L. CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/vavasquezdSummary.html> (last visited May 18, 2013); Dana L. Priest, *At Each Step, Justice Faltered for Va. Man*, WASH. POST, July 16, 1989, at A1, reprinted in TRUE STORIES OF FALSE CONFESSIONS 269, 270 (Rob Warden & Steven A. Drizin eds., 2009).

⁶⁸² Horwitz & Warden, *supra* note 681.

⁶⁸³ *Id.*; GOULD, *supra* note 183, at 112.

⁶⁸⁴ Horwitz & Warden, *supra* note 681; Uphoff, *supra* note 97, at 792.

⁶⁸⁵ Horwitz & Warden, *supra* note 681.

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a “horrible dream” that corresponded to the killing.⁶⁸⁶ An FBI agent who reviewed a transcript of the audio-recorded interrogation sessions years later remarked: “[w]e sure would like to have a copy of this for training purposes. How *not* to do an interview!”⁶⁸⁷ The transcript revealed that a confused but compliant Vasquez repeatedly gave inaccurate answers to questions and frequently simply ratified information supplied by the police through their leading questions.⁶⁸⁸

Some considerable problems existed concerning the evidence of Vasquez’s guilt. Vasquez’s blood type did not match that of the presumed rapist, as revealed by analysis of semen linked to the crime.⁶⁸⁹ Nor did shoeprints left at Ms. Hamm’s home conform to the size or brand of Vasquez’s shoes.⁶⁹⁰ Vasquez did not drive and he had no explanation for how he might have traveled between Manassas, where he lived and worked, and Arlington in order to commit the crime.⁶⁹¹ How the crime was committed, including the

⁶⁸⁶ GOULD, *supra* note 183, at 113, 115–16; Horwitz & Warden, *supra* note 681; Uphoff, *supra* note 97, at 792.

⁶⁸⁷ PAUL MONES, *STALKING JUSTICE* 173–74 (1995).

⁶⁸⁸ For example, the transcription revealed the following exchanges between the police and Vasquez during an interrogation session regarding Carolyn Hamm’s murder:

Det. 1: Did she tell you to tie her hands behind her back?

Vasquez: Ah, if she did, I did.

Det. 2: Whatcha use?

Vasquez: The ropes?

Det. 2: No, not the ropes. Whatcha use?

Vasquez: Only my belt.

Det. 2: No, not your belt . . . Remember being out in the sunroom, the room that sits out to the back of the house? . . . and what did you cut down? To use?

Vasquez: That, uh, clothesline?

Det. 2: No, it wasn’t a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?

Vasquez: Ah, it’s the same as rope?

Det. 2: Yeah.

Det. 1: Okay, now tell us how it went, David—tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that’s all.

Det. 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it . . .

Det. 2: (slamming his hand on the table and yelling) You hung her!

Vasquez: What?

Det. 2: You hung her!

Vasquez: Okay, so I hung her.

Brandon L. Garrett, *The Substance of False Confessions*, 62 *STAN. L. REV.* 1051, 1081–82 (2010) (alterations in original). *See also* MONES, *supra* note 687, at 77–82, 174–75 (providing transcripts of the interrogations).

⁶⁸⁹ Horwitz & Warden, *supra* note 681; TRUE STORIES OF FALSE CONFESSIONS, *supra* note 681, at 274.

⁶⁹⁰ GOULD, *supra* note 183, at 117.

⁶⁹¹ *See id.* at 112–13, 118; MONES, *supra* note 687, at 86–87.

manner of entry into the home and the ligatures used, suggested a measure of skill and intelligence that likely exceeded Vasquez's limited capacity.⁶⁹² These shortcomings were apparently overcome by speculation, unsupported by Vasquez's admissions or other evidence that he may have acted with an accomplice.⁶⁹³ Vasquez was indicted for capital murder, rape, and burglary.⁶⁹⁴ Already having confessed, and facing the threat of the death penalty, Vasquez pleaded guilty in February 1985—through an *Alford* plea⁶⁹⁵—to second degree murder and burglary.⁶⁹⁶ He was sentenced to thirty-five years in prison.⁶⁹⁷

Nearly three years later, on December 1, 1987, Susan Tucker was murdered in her Arlington home.⁶⁹⁸ Like Carolyn Hamm, she had been strangled and raped.⁶⁹⁹ A rope was wrapped tightly around her neck and her arms had been tied together.⁷⁰⁰ As with Hamm's murder, entry had been made into the home through a small basement window.⁷⁰¹ Semen from the Tucker crime scene was consistent with the semen recovered from Hamm's rape and murder; the two samples shared characteristics reflected in only thirteen percent of the population.⁷⁰² A detective with the Arlington County Police Department noted the striking similarities between the two cases, yet he was aware that Vasquez remained in prison and could not have committed the recent crime.⁷⁰³ He thus interviewed the incarcerated Vasquez, anticipating that whoever killed Tucker might have been Vasquez's accomplice in the Hamm murder.⁷⁰⁴ Instead, he left believing that Vasquez was innocent of raping and murdering Carolyn Hamm.⁷⁰⁵

⁶⁹² See MONES, *supra* note 687, at 13, 87.

⁶⁹³ See GOULD, *supra* note 183, at 117; MONES, *supra* note 687, at 13, 56, 87–88; Horwitz & Warden, *supra* note 681.

⁶⁹⁴ Uphoff, *supra* note 97, at 792–93.

⁶⁹⁵ An *Alford* plea is a guilty plea, although the defendant is not required to admit to committing the offense when tendering it. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

⁶⁹⁶ GOULD, *supra* note 183, at 117–18; Horwitz & Warden, *supra* note 681.

⁶⁹⁷ GOULD, *supra* note 183, at 118; MONES, *supra* note 687, at 13; U.S. DEP'T JUSTICE, NAT'L INST. OF JUSTICE, NCJ 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 73 (1996); see Uphoff, *supra* note 97, at 793.

⁶⁹⁸ GOULD, *supra* note 183, at 118; Horwitz & Warden, *supra* note 681.

⁶⁹⁹ GOULD, *supra* note 183, at 118.

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.*

⁷⁰² MONES, *supra* note 687, at 140–41.

⁷⁰³ GOULD, *supra* note 183, at 118, 119.

⁷⁰⁴ *Id.* at 118.

⁷⁰⁵ *Id.* (citations omitted); MONES, *supra* note 687, at 62, 92. Detective Joe Horgas's

Further investigation revealed that other rape-murders exhibiting the same *modus operandi* of the Hamm and Tucker killings had recently been committed on the south side of Richmond.⁷⁰⁶ Debbie Dudley Davis's body was found on September 19, 1987, followed by Susan Hellams's on October 2.⁷⁰⁷ On November 2, fifteen-year-old Diane Cho was raped and murdered in her family's home in nearby Chesterfield County.⁷⁰⁸ This recent spate of rapes and killings—attributed to the “Southside Strangler”—bore similarities to a rash of ten or more unsolved rapes committed in Arlington and Alexandria by a slender, masked black man between June 1983 and January 1984.⁷⁰⁹ Driven by the suspicion that the same man was responsible for the earlier rapes and the recent rape-murders, as well as the rape and murder of Carolyn Hamm for which Vasquez had been convicted, the police theorized that the two and a half year gap in offending between January 1984 and September 1987 might be explained by the perpetrator's incarceration during that interval.⁷¹⁰ Through continued, dogged investigation, detectives identified Timothy Spencer as a suspect.⁷¹¹

Spencer had been arrested for an Alexandria burglary in late January 1984, and was convicted, incarcerated, and then released to a Richmond halfway house in September 1987.⁷¹² He matched the general description of the man responsible for the earlier string of rapes in Arlington and Alexandria.⁷¹³ The forensic use of DNA was just dawning in late 1987.⁷¹⁴ Investigators delivered blood and semen from the series of crimes they believed Spencer had committed to a New York laboratory for analysis.⁷¹⁵ Spencer was placed under surveillance while the tests were being conducted.⁷¹⁶ Fearing that he might strike again before the results were available, the police arrested Spencer following his January 1988

investigation was largely responsible for Vasquez's eventual exoneration and the apprehension of the true perpetrator. See GOULD, *supra* note 183, at 119 (noting that Horgas had to convince the FBI of the true perpetrator's guilt).

⁷⁰⁶ See MONES, *supra* note 687, at 92–99.

⁷⁰⁷ Horwitz & Warden, *supra* note 681.

⁷⁰⁸ *Id.*

⁷⁰⁹ See GOULD, *supra* note 183, at 119.

⁷¹⁰ *Id.*; Horwitz & Warden, *supra* note 681.

⁷¹¹ MONES, *supra* note 687, at 189–97; Horwitz & Warden, *supra* note 681.

⁷¹² MONES, *supra* note 687, at 191, 192, 193, 196.

⁷¹³ See *id.* at 192–93.

⁷¹⁴ See *id.* at 159.

⁷¹⁵ *Id.* at 156, 158, 202.

⁷¹⁶ *Id.* at 201, 202.

indictment for burglary, rape, and murder in Susan Tucker's case.⁷¹⁷ Believing that he faced only burglary charges, Spencer consented to giving a blood sample, which also was forwarded to the New York crime lab.⁷¹⁸ The results came back in March 1988.⁷¹⁹ DNA from Spencer's blood matched the DNA profile from semen linked to the rape and murder of Susan Tucker, Debbie Davis, and a rape committed in Arlington in 1983.⁷²⁰ Biological evidence from Carolyn Hamm's rape and murder was insufficient to allow analysis.⁷²¹

The absence of DNA evidence linking Spencer to Carolyn Hamm's rape and murder, along with Vasquez's incriminating admissions, guilty plea, and the theory that he had not acted alone, presented difficulties in ensuring that Vasquez would be exonerated. The combined efforts of the lead detective and prosecutor and a detailed report issued by the FBI that concluded that Spencer and Spencer alone was responsible for the serial rapes and murders, including Hamm's, ultimately led Governor Gerald Baliles to pardon Vasquez.⁷²² Vasquez was released from prison on January 4, 1989.⁷²³ Between October 1988 and June 1989, in four separate trials, Spencer was convicted and sentenced to death for raping and murdering Susan Tucker, Debbie Davis, Susan Hellams, and Diane Cho.⁷²⁴ He had committed each of those crimes after Vasquez's wrongful conviction and incarceration for raping and murdering Carolyn Hamm.⁷²⁵ Spencer was executed in Virginia's electric chair on April 27, 1994.⁷²⁶

Chester Dewayne Turner

Although they received far less attention than other serial killings in Los Angeles, including those popularly ascribed to such redoubtable figures as the Night Stalker, the Hillside Strangler, and the Freeway Killer, numerous women—predominantly black and marginalized because most were drug addicts, homeless, or

⁷¹⁷ *Id.* at 202, 212, 213, 217.

⁷¹⁸ *Id.* at 222, 248.

⁷¹⁹ *Id.* at 254–55.

⁷²⁰ *Id.*

⁷²¹ *Id.* at 261.

⁷²² *Id.* at 292–94, 296.

⁷²³ *Id.* at 296.

⁷²⁴ *Id.* at 300, 301.

⁷²⁵ See *supra* text accompanying notes 698–709.

⁷²⁶ MONES, *supra* note 687, at 308, 312, 314.

prostitutes—were raped and strangled within a thirty-block area on the south side of the city over the decade spanning the late 1980s through the late 1990s.⁷²⁷ David Allen Jones was convicted of murdering Mary Edwards and of manslaughter in the deaths of Tammie Christmas and Debra Williams following a 1995 trial.⁷²⁸ The three women had been strangled and raped, and their bodies left near the same elementary school, between September and December 1992.⁷²⁹ Jones became a suspect in the killings because he had been arrested and jailed in late December for attempting to rape a prostitute near the school and he had previously been arrested while at the school with another prostitute.⁷³⁰

Jones, a part-time janitor and barely literate with an IQ between sixty and seventy-three, underwent three interrogation sessions with the police.⁷³¹ Only the last two were recorded.⁷³² During those sessions, Jones insisted that he did not kill the women, although he admitted to having had sex with them near where their bodies were found, and to fighting with them and choking them after they demanded more money or drugs in exchange for sex acts.⁷³³ The recorded interrogations revealed that Jones's admissions were procured as his interrogator repeatedly corrected apparent misstatements and led him to acceptable responses by reminding him of details gleaned from the initial, unrecorded session.⁷³⁴ The police also showed him photos of the crime scenes, thus providing him with information pertinent to their questioning.⁷³⁵ Forensic analyses later established that Jones's blood type (O) did not match that linked to semen and saliva found on the women's bodies (type A), and that hair left on some of the victims was not consistent with Jones's.⁷³⁶ Prosecutors argued that these discrepancies were insignificant because the women likely had engaged in sexual relations with men in addition to Jones.⁷³⁷

⁷²⁷ Charlie LeDuff, *Man Charged in Killings City Didn't Know About*, N.Y. TIMES, Oct. 30, 2004, at A10; Andrew Blankstein et al., *DNA Analysis Links Inmate to 12 Slayings*, L.A. TIMES, Oct. 23, 2004, at A1.

⁷²⁸ Andrew Blankstein et al., *How Wrong Man Was Convicted in Killings*, L.A. TIMES (Ventura County ed.), Oct. 25, 2004, at A1.

⁷²⁹ *Id.*

⁷³⁰ *Id.*

⁷³¹ *Id.*

⁷³² *See id.*

⁷³³ *Id.*

⁷³⁴ *Id.*

⁷³⁵ *Id.*; Maura Dolan & Evelyn Larrubia, *Telling Police What They Want to Hear, Even if It's False*, L.A. TIMES, Oct. 30, 2004, at A1.

⁷³⁶ Blankstein et al., *supra* note 728, at A1.

⁷³⁷ Anna Gorman, *Ten Murder Charges Filed*, L.A. TIMES (Los Angeles ed.), Oct. 27, 2004,

Jones was sentenced to serve thirty-six years to life in prison following his convictions for the three killings and an unrelated rape.⁷³⁸ Meanwhile, the rapes and strangulation deaths of women continued in the South Los Angeles neighborhood. In March 2002, a Los Angeles sexual assault victim broke free from her assailant, reported the crime to the police, and a rape kit was preserved when she received medical attention.⁷³⁹ She identified Chester Dewayne Turner as her rapist.⁷⁴⁰ Turner pleaded no contest and was sentenced to eight years in prison.⁷⁴¹ A sample of his DNA was obtained following his conviction.⁷⁴² Investigators in the Los Angeles Police Department's cold case unit continued pursuing unsolved homicides.⁷⁴³ A database search linked Turner's DNA profile to two of the cases under investigation.⁷⁴⁴ DNA databank searches eventually linked Turner to the murder of fourteen women, one of whom was more than six months pregnant.⁷⁴⁵

Turner was convicted of murdering ten women and one viable fetus in May 2007.⁷⁴⁶ His victims were Diane Johnson (1987), Annette Ernest (1987), Anita Fishman (1989), Regina Washington (1989), Ms. Washington's fetus (1989), Andrea Tripplett (1993), Desarae Jones (1993), Natalie Price (1995), Mildred Beasley (1996), Paula Vance (1998), and Brenda Bries (1998).⁷⁴⁷ He was sentenced to death.⁷⁴⁸ In 2011, he was charged with four additional murders in the deaths of Elandra Bunn (1987), Mary Edwards (1992), Debra Williams (1992), and Cynthia Annette Johnson (1997).⁷⁴⁹ David Allen Jones had been convicted of two of the homicides (Edwards

at B1; see Blankstein et al., *supra* note 728, at A1.

⁷³⁸ Blankstein et al., *supra* note 728, at A1.

⁷³⁹ See Andrew Blankstein, Richard Winton & Jill Leovy, *DNA Analysis Links Inmate to 12 Slayings*, L.A. TIMES, Oct. 23, 2004, at A1.

⁷⁴⁰ See Ashley Surdin, *Witness in Murder Trial Tells of Attack*, L.A. TIMES, (Apr. 19, 2007), <http://articles.latimes.com/2007/apr/19/local/me-turner19>.

⁷⁴¹ *Id.*

⁷⁴² See John Spano, *L.A. Man Guilty in 11 Deaths*, L.A. TIMES, May 1, 2007, at A1.

⁷⁴³ See *id.*

⁷⁴⁴ *Id.*; see John Spano, *Trial of Suspected Serial Killer Set to Begin Today*, L.A. TIMES, Apr. 3, 2007, at B2.

⁷⁴⁵ See Christine Pelisek, *Silent Wraith: Chester Turner*, LA WEEKLY NEWS (May 2, 2007), <http://www.laweekly.com/2007-05-03/news/silent-wraith-chester-turner>; Jack Leonard & Andrew Blankstein, *Chester Turner, Serial Killer on Death Row, is Charged with Four More Murders*, L.A. TIMES (Feb. 2, 2011), <http://articles.latimes.com/print/2011/feb/02/local/la-me-serial-killer20110202>.

⁷⁴⁶ Leonard & Blankstein, *supra* note 745.

⁷⁴⁷ *Serial Killer: Chester DeWayne Turner*, L.A. TIMES, <http://projects.latimes.com/homicide/list/chester-dewayne-turner> (last visited May 18, 2013).

⁷⁴⁸ Leonard & Blankstein, *supra* note 745.

⁷⁴⁹ *Serial Killer: Chester DeWayne Turner*, *supra* note 747.

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and Williams) connected to Turner through the DNA matches.⁷⁵⁰ Biological evidence was not available for analysis in the third killing attributed to Jones.⁷⁵¹ Seven of Turner's identified victims were slain after Jones was arrested in late 1992 and charged with crimes that Turner had committed.⁷⁵² Jones was exonerated and released from prison in March 2004, following more than eleven years of incarceration.⁷⁵³

Robert Weeks

On the night of September 16, 1981, a forty-four-year-old woman was attacked on the roof of a Chicago parking garage.⁷⁵⁴ A man approached her from behind as she was entering her car, shoved her into the vehicle, fractured her nose as he beat her about the face, and then raped her.⁷⁵⁵ He then forced her into the car's trunk and drove to the garage's exit.⁷⁵⁶ The attendant at the exit gate recognized the vehicle and knew that the man was not its regular driver.⁷⁵⁷ He refused to allow the car to pass and summoned help.⁷⁵⁸ As a second attendant approached, the driver fled.⁷⁵⁹ On hearing screams coming from the car's trunk, the attendants freed the woman and called an ambulance.⁷⁶⁰ The woman's vaginal injuries were so pronounced that evidence could not be collected for a rape kit, but a semen deposit left on her clothing was located and preserved.⁷⁶¹

A composite sketch of the suspect was made from descriptions

⁷⁵⁰ Leonard & Blankstein, *supra* note 745.

⁷⁵¹ *Id.*

⁷⁵² See *Death Row Inmate Ordered to Stand Trial in 4 More Murders*, L.A. CBS LOCAL.COM (Nov. 4, 2011), <http://losangeles.cbslocal.com/2011/11/04/death-row-inmate-ordered-to-stand-trial-in-4-more-murders>; see *Serial Killer: Chester DeWayne Turner*, *supra* note 747.

⁷⁵³ Blankstein et al., *supra* note 728, at A1; Patrick McGreevy, *Council to Settle 6 LAPD Lawsuits*, L.A. TIMES, Oct. 5, 2006, at B3.

⁷⁵⁴ *Know the Cases: Jerry Miller*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Jerry_Miller.php (last visited May 18, 2013); see also Kari Lydersen, *Costs Are High for Convictions of Wrong People*, N.Y. TIMES (June 18, 2011), http://www.nytimes.com/2011/06/19/us/19cncwrongful.html?pagewanted=all&_r=0 (describing the attack and rape).

⁷⁵⁵ John Conroy & Rob Warden, *The High Costs of Wrongful Convictions: Human Costs—A Devastating Toll: Lost Freedom, Family and Friends*, BETTER GOV'T ASS'N (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_human_costs.aspx [Conroy & Warden, *High Costs of Wrongful Convictions*].

⁷⁵⁶ Lydersen, *supra* note 754; *Know the Cases: Jerry Miller*, *supra* note 754.

⁷⁵⁷ Lydersen, *supra* note 754.

⁷⁵⁸ *Id.*; *Know the Cases: Jerry Miller*, *supra* note 754.

⁷⁵⁹ Lydersen, *supra* note 754.

⁷⁶⁰ See *Know the Cases: Jerry Miller*, *supra* note 754.

⁷⁶¹ Conroy & Warden, *High Costs of Wrongful Convictions*, *supra* note 755.

provided by the victim and the parking garage attendants.⁷⁶² A police officer thought the sketch resembled Jerry Miller, an employed, twenty-three-year-old Army veteran with no criminal record, who the officer had stopped a few days earlier because he believed that Miller was suspiciously peering into parked cars.⁷⁶³ Miller was placed in a line-up, where both parking garage attendants identified him, although one did so only tentatively.⁷⁶⁴ Miller was brought to trial on charges of rape, aggravated kidnapping, and robbery.⁷⁶⁵ The two parking garage attendants identified him as the man who had been driving and then fled from the victim's car, while the victim testified that Miller "looked like" the man who had assaulted her.⁷⁶⁶ An analysis of the semen left on the victim's clothing conducted by a Chicago Police Department crime lab technician was "inconclusive" concerning whether Miller could be the source.⁷⁶⁷ Miller testified, maintaining his innocence and explaining that he had been home that night watching a televised boxing match between Sugar Ray Leonard and Thomas Hearns.⁷⁶⁸ The jury found him guilty and he was sentenced to forty-five years in prison on October 1, 1982.⁷⁶⁹

Miller remained incarcerated until he was paroled nearly a quarter-century later, in March 2006.⁷⁷⁰ As a convicted sex offender he was required to wear an electronic bracelet, have his photo and other identifying information posted on Illinois's sex offender registry, and he was subject to residential restrictions.⁷⁷¹ Still insisting that he had not committed the crimes, Miller had applied for post-conviction DNA testing with the assistance of the Innocence Project.⁷⁷² In March 2007, a comparison of the DNA profile left on

⁷⁶² Maurice Possley, *Cleared by DNA After 26 Years: Ex-Inmate Wins Battle to Prove His Innocence in '81 Chicago Rape*, CHI. TRIB., Apr. 22, 2007, at 26.

⁷⁶³ *Know the Cases: Jerry Miller*, *supra* note 754; Possley, *supra* note 762, at 26.

⁷⁶⁴ Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755.

⁷⁶⁵ Possley, *supra* note 762, at 26.

⁷⁶⁶ *Id.*

⁷⁶⁷ Hal Dardick, *Man Wrongly Convicted of Rape May Get \$6.3 Million*, CHI. TRIB. (June 25, 2010), available at http://articles.chicagotribune.com/2010-06-25/news/ct-met-city-lawsuit-settlement-0626-20100625_1_crime-lab-dna-testing-chicago-police. A lawsuit that later would be filed on Miller's behalf alleged that an expert witness had opined that the "inconclusive" result was inexplicable and that a competently conducted analysis at the time of the trial would have excluded Miller as the source of the semen. *Id.*

⁷⁶⁸ Possley, *supra* note 762, at 26.

⁷⁶⁹ Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755; Possley, *supra* note 762, at 26.

⁷⁷⁰ Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755.

⁷⁷¹ *Id.*

⁷⁷² Possley, *supra* note 762, at 26.

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the victim's clothing and Miller's profile excluded him as the source of the semen.⁷⁷³ Miller was exonerated the following month when a trial judge granted a motion jointly filed by Miller's attorneys and the prosecution to vacate his convictions.⁷⁷⁴ The governor subsequently pardoned him, entitling him to compensation for his wrongful conviction and incarceration.⁷⁷⁵

Within days of Miller's exoneration, the DNA profile from the victim's clothing was entered into the national DNA database and produced a match to Robert Weeks, who then was imprisoned following his conviction in May 2004 for assaulting police officers who had placed him under arrest for indecent exposure at O'Hare Airport.⁷⁷⁶ That offense was not the only one that Weeks had committed since the September 16, 1981 rape, kidnapping, and robbery that had resulted in Miller's wrongful conviction and incarceration.⁷⁷⁷ Indeed, "[w]hile . . . Miller lost more than half of his life [to imprisonment], the real perpetrator indulged in a decades-long crime spree,"⁷⁷⁸ as follows:

September 21, 1981: Five days after the parking lot rape [for which Miller was convicted], Weeks attacked a man near Division and Ashland at 11:55 p.m., beating his face and body with a chain in an unsuccessful attempt to steal the victim's watch.

April 4, 1982: At 4:10 a.m., Weeks grabbed a 33-year-old woman who was coming home from work, pulled her into an alley off Division and Ashland, punched her in the face, bounced her head against the pavement, raped her, choked her, kicked her in the head, and then robbed her. She required surgery for a broken cheekbone and spent five days in the hospital.

⁷⁷³ Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755; Dardick, *supra* note 767.

⁷⁷⁴ Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755; Possley, *supra* note 762, at 26.

⁷⁷⁵ *Blagojevich Authorizes 26 Pardons*, CHI. TRIB., Oct. 31, 2008, at 27; Michael Higgins, *Cleared—But Not Yet Innocent: Man Wrongfully Convicted of Rape Seeks Full Pardon*, CHI. TRIB. Oct. 10, 2007, at 4. In addition to compensation that he received from the State, Miller was awarded \$6.3 million by virtue of a settlement reached in a lawsuit that he had filed against the City of Chicago. Rob Warden, *Meet the Exonerated: Jerry Miller*, NORTHWESTERN L. CENTER ON WRONGFUL CONVICTIONS <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilmillerjerrySummary.html> (last visited May 18, 2013); Dardick, *supra* note 767.

⁷⁷⁶ Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755.

⁷⁷⁷ *Id.*

⁷⁷⁸ *Id.*

April 9, 1982: Five days after the above rape, Weeks grabbed a 34-year-old woman at approximately 1 a.m. as she parked her car in an alley in Wicker Park, struck her in the face, choked her, bit her on the forehead, and tried to force her back into the car. He was unable to proceed further because a civilian responded to her screams, gave chase, and alerted police.

April 9, 1982: Weeks attacked the four officers who arrived on the scene in response to the above attack. According to court documents, he bit one officer in the hand, kicked two in the groin, and struck another in the face. Weeks pleaded guilty to the attacks on the two women in Wicker Park and the attacks on the officers, and in August, 1982 was sentenced to 12 years by Judge Thomas Maloney.

August 13, 1996: After being arrested while breaking into cars in Wicker Park, Weeks kicked the squad car window causing the door to bend out.

February 10, 1999: Weeks pleaded guilty to violating sex offender registration requirements.

December 22, 2000: Weeks raped a 28-year-old Wicker Park resident as she returned home from a party at 4:30 a.m. The woman was treated for lacerations, contusions, and hematomas to her face, neck, ribs, and legs. Weeks, who fled the scene, was not identified as the perpetrator for six years.

February 7, 2001: Weeks attacked a 23-year-old woman near Division and Ashland at 1:50 a.m. as she walked home from work, hit her in the head with a rock, broke her nose, crushed her orbital bone, and raped her. Aside from severe facial and head injuries, she suffered a compound fracture of the right wrist that required surgery. Weeks was in prison on other charges by the time he was identified as the perpetrator six years later.

March 23, 2001: After being taken to a South Side police station on a battery charge, Weeks attacked five Chicago police officers while being booked and taken to the lockup. He punched one in the face, kicked two in the head, spat in the face of a fourth, and kicked a lieutenant in the groin and back (leaving a footprint on his shirt). The lieutenant was also treated at Mercy Hospital for lacerations to his hand, sustained in the effort to get Weeks into a cell.

May 1, 2004: Weeks attacked two Chicago police officers who had arrived at the O'Hare L platform in response to a

complaint of public indecency. They tried to arrest Weeks, had to call for backup, and after he was subdued, the responding officers were taken to Resurrection Hospital, one in an ambulance, the other in a police car.⁷⁷⁹

III. WHEN THE GUILTY GO FREE

The toll of new victims claimed by the score of offenders in the cases discussed above, while innocent persons were charged, convicted, and punished for their earlier crimes, is both tragic and staggering. Added to the uncompensable individual harms caused by wrongful convictions are extravagant social costs, as well.⁷⁸⁰ Some erroneous convictions, and the corollary failure to bring the true offenders to justice, are doubtlessly inevitable notwithstanding the best efforts of those who administer the laws. Occasional miscarriages of justice have been and will continue to be tolerated by the American public; their detection and correction sometimes are even offered as evidence that “the system works.”⁷⁸¹ Just as surely, however, there must come a tipping point where, owing to the prevalence of error or its magnitude in individual cases, public confidence in the administration of justice is undermined.⁷⁸² The consequence is a serious erosion of perceived legitimacy in the operation of the criminal law.⁷⁸³

⁷⁷⁹ *Id.*

⁷⁸⁰ Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755.

⁷⁸¹ See *Kansas v. Marsh*, 548 U.S. 163, 193 (2006) (Scalia, J., concurring) (“Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success.”). See generally Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 668 (2007) (discussing mythology of innocence and data suggesting that the criminal justice system is working effectively in spite of some who are wrongfully convicted); Adam I. Kaplan, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 U.C.L.A. L. REV. 227, 238 (2008); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 707 (footnote omitted) (“Public officials sometimes respond that the fact of an exoneration proves that ‘the system works’ to correct its own mistakes, obviating the need to address deeper systemic issues.”); Lawrence C. Marshall, *Do Exonerations Prove That “The System Works?”*, 86 JUDICATURE 83, 84 (Sept.–Oct. 2002) (arguing that discovery of wrongful convictions of inmates sentenced to death in Illinois is not evidence that the system works); Margaret Raymond, *The Problem With Innocence*, 49 CLEV. ST. L. REV. 449, 453 (2001) (“[F]ar from concluding that the wrongful convictions cases reveal a system that is fundamentally broken, others will view these cases as proof that the existing system for identifying and redressing injustices works.”).

⁷⁸² Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1437 (2012) (footnote omitted) (“[R]esearch has suggested that wrongful convictions lower the public’s faith in the criminal justice system . . .”).

⁷⁸³ See, e.g., C. Ronald Huff, *Wrongful Convictions in the United States*, in WRONGFUL

The crisis in public confidence in the administration of justice occasioned by wrongful convictions is fueled not only by empathy for the unfortunate innocents, but also by the widely shared, deep-seated belief that it is fundamentally wrong, even offensive, to allow perpetrators of criminal violence to flout the law and avoid responsibility for the harm they have caused. The intensity of the perceived unfairness triggered by culpable offenders escaping justice surfaces, ironically, even in the aftermath of trials in which defendants' acquittals have incensed a skeptical public.⁷⁸⁴ Indeed,

CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 59, 69 (C. Ronald Huff & Martin Killias eds., 2008) (“[T]he U.S. criminal justice system’s accuracy is essential to its perceived legitimacy, and systematic attention must be paid to the errors that are committed and how those errors might be reduced.”); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 137 (2008) (footnote omitted) (“[W]rongful convictions are an injustice that undermines our respect for and faith in our criminal justice institutions and the rule of law because they are inflicted directly by the State.”); Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. OF CRIM. L. & CRIMINOLOGY 825, 836 (2010) (“[T]he harms of wrongful convictions may seem obvious. So long as the wrong suspect is behind bars, the public remains at risk as the actual perpetrator is free to roam the community and prey on others. Taxpayers must commit resources to cover the imprisonment of an innocent person. The public may lose trust in the criminal justice system. And, of course, the innocent defendant loses his freedom while forced to confront the dangers of imprisonment.”); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 611 (2009) (footnotes omitted) (“Continuing on the present course that leads to wrongful convictions permits the actual perpetrator to commit more crimes, requires society to compensate innocent suspects who were wrongly incarcerated, and causes further diminution of trust in the criminal justice system. Though precise cost estimates of the additional crimes and compensation of the innocent may not be absolutely essential, at the least we must acknowledge that the lost trust in the system is priceless.”); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 789 (2007) (“[A wrongful conviction] not only imposes pain that has a moral claim to our recognition, but it is also seriously corrosive to the respect for law of the wronged individuals, and that of all those around them who believe the convicted were in fact innocent.”); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VANDERBILT L. REV. 143, 214 (2011) (“As a normative matter, one can neither justify nor dismiss the risk of wrongful convictions, no matter which other competing objectives might be served by them. Convicting a person for a crime he did not commit renders any such objective—the public’s acceptance of the verdict, the assertion of the state’s authority, and the expression of society’s values—a vacuous, even cynical, exercise of power.”); Locke E. Bowman, *Lemonade Out of Lemons: Can Wrongful Convictions Lead to Criminal Justice Reform?*, 98 J. CRIM. L. & CRIMINOLOGY 1501, 1503 (2008) (footnote omitted) (reviewing GOULD, *supra* note 183) (“The costs [of wrongful convictions] are enormous and impossible to quantify. Immeasurable suffering is caused to the wrongfully convicted as a result of shattered personal and community ties, the loss of freedom (sometimes for decades), harsh conditions of imprisonment, and ruined psyches. There is also a broader effect, as confidence in the criminal justice system is shaken. Police-community relations may be further undermined in communities where such relationships have historically been strained. In extreme cases, the legitimacy of the entire criminal justice process may be called into question.”).

⁷⁸⁴ See M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TULANE L. REV. 1855, 1856–57

the “strain . . . upon the integrity of the justice system”⁷⁸⁵ is felt so acutely when the guilty escape justice that the historic prohibition against double jeopardy has given way in England and kindred common law countries to permit retrials in serious criminal cases “where compelling fresh evidence has come to light after an acquittal.”⁷⁸⁶ Among the most deeply affected in cases where justice has miscarried may be the victims of crime and their families. Victims and their relatives not only may have inadvertently contributed to an innocent person’s wrongful conviction through their cooperation with authorities or their testimony, but they also likely lived for years under the mistaken belief that their cases had been finally resolved and their assailants incapacitated, when in fact their assailants remained menacingly at large.⁷⁸⁷

(1993) (footnotes omitted) (“When four white Los Angeles police officers were acquitted in the brutal beating of Rodney King, an unemployed African-American construction worker, the nation’s outrage erupted in large part through mass urban rebellion in Los Angeles and several other cities. The exoneration of these officers, which shocked and angered a majority of the nation, was acutely symbolic of the daily experience and frustration of African Americans, Latino Americans, and Native Americans: that crimes against these communities, committed by government’s most visible representatives, continually go unpunished.”). Two of the police officers acquitted in the state prosecution later were convicted in federal court of violating Rodney King’s civil rights and were sentenced to prison. Jennifer Medina, *Police Beating Victim Who Asked ‘Can We All Get Along?’*, N.Y. TIMES, June 18, 2012, at A1. Although no violence ensued in their wake, the acquittals in the murder trials of O.J. Simpson (in Los Angeles, California, in 1995) and Casey Anthony (in Orlando Florida, in 2011) often are cited as causing a considerable measure of public skepticism and cynicism regarding the administration of justice. See Forst, *supra* note 31, at 1259; Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1326 (1997); Nicholas A. Battaglia, Comment, *The Casey Anthony Trial and Wrongful Exonerations: How “Trial by Media” Cases Diminish Public Confidence in the Criminal Justice System*, 75 ALB. L. REV. 1579, 1580–81 (2012); Lizette Alvarez, *On Her Release, a Chorus of “Happy Trails” to Anthony, Minus the “Happy”*, N.Y. TIMES, July 17, 2011, at 13.

⁷⁸⁵ Kenneth G. Coffin, *Double Take: Evaluating Double Jeopardy Reform*, 85 NOTRE DAME L. REV. 771, 774 (2010).

⁷⁸⁶ *Id.* at 773–74 (quoting HOME DEP’T, JUSTICE FOR ALL, 2002, CM 5563, at 83 (U.K.), <http://www.cps.gov.uk/publications/docs/jfawhitepaper.pdf>. See generally David S. Rudstein, *Retrying the Acquitted in England Part II: The Exception to the Rule Against Double Jeopardy for “Tainted Acquittals”*, 9 SAN DIEGO INT’L L. J. 217, 228–29 (2008) (discussing exception to the traditional English rule against double jeopardy); Steven V. DeBraccio, Comment, *The Double Jeopardy Clause, Newly Discovered Evidence, and an “Unofficial Exception” to Double Jeopardy: A Comparative International Perspective*, 76 ALB. L. REV. 1821, 1821–22, 1830–34 (2013) (describing the history of the act and the procedure through which “a prosecutor could appeal an acquittal and retry a defendant on the grounds that newly discovered evidence incriminated him”); Nyssa Taylor, Note, *England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes*, 19 TEMP. INT’L & COMP. L.J. 189, 189 (2005) (discussing relaxation of common law double jeopardy rule in England and similar proposal in Australia).

⁷⁸⁷ JENNIFER THOMPSON-CANNINO ET AL., PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 211–17 (2009) (describing reactions of rape victim Jennifer Thompson-Cannino on learning that her identification and trial testimony had helped erroneously

Another consequence of wrongful convictions is their substantial financial cost, which almost invariably is passed on to taxpayers. The Better Government Association and the Center on Wrongful Convictions' study of eighty-five acknowledged wrongful convictions in Illinois reported that city, county, and state funds totaling \$155.9 million had been paid through 2010 to exonerees through settlements and judgments reached in lawsuits.⁷⁸⁸ Pending suits and anticipated new litigation ultimately were expected to make that figure balloon to the neighborhood of \$300 million.⁷⁸⁹ Additional compensation in the amount of \$8.2 million was awarded to wrongly incarcerated individuals by the Illinois Court of Claims.⁷⁹⁰ On top of those costs, government entities, and hence state and local taxpayers, paid \$31.6 million in attorneys' fees to defend officials against lawsuits filed in these cases.⁷⁹¹ The study estimated the costs of incarcerating the wrongfully convicted, who spent a combined 926 years behind bars, to be \$18.5 million.⁷⁹² Based on these figures, the total cost to Illinois taxpayers of the eighty-five cases of wrongful conviction was a whopping \$214 million, with perhaps \$100 million to \$150 million more expected to accrue as additional lawsuits are filed and resolved.⁷⁹³

Huge additional direct and indirect monetary costs spiral from wrongful convictions and the new crimes that the actual perpetrators commit. These costs, which are virtually incalculable, include the wages lost to the falsely convicted and their families during (and frequently after) years of incarceration; expenses associated with exonerees' psychological counseling, education, job-

convict Ronald Cotton while the actual rapist, Bobby Poole, escaped prosecution for the crime); Givelber, *supra* note 784, at 1394 (footnote omitted) ("The costs of these erroneous convictions extend beyond the enormous price to defendants. Victims and their families also pay a significant price. Persuaded that the person convicted is the perpetrator, victims frequently experience a subsequent exoneration as a fresh injury, if not the reawakening of an old wound. Moreover, victims are confronted with the terrible realization that if the person who was convicted is not guilty, then the true perpetrator remains at large."); Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88 CORNELL L. REV. 486, 505-14 (2003) (discussing media accounts of the views of murder victims' family members in cases in which the individuals convicted of the crimes and sentenced to death later were exonerated); Bowman, *supra* note 783, at 1502 ("With news of exonerations, victims and their family members are forced to relive the crime and its aftermath, years after they had every reason to believe the guilty party had been safely locked away.").

⁷⁸⁸ Conroy & Warden, *Tax Dollars Wasted*, *supra* note 10.

⁷⁸⁹ *Id.*

⁷⁹⁰ *Id.*

⁷⁹¹ *Id.*

⁷⁹² *Id.*

⁷⁹³ *See id.*

training, and other post-release services; and the property damage, medical and mental health care expenses,⁷⁹⁴ and lost wages suffered by the victims of the true offenders' new crimes.⁷⁹⁵ Such expenditures must surely total in the hundreds of millions or billions of dollars when aggregated.⁷⁹⁶

The individual and social harms spawned by wrongful convictions are undeniable, compound, and severe. The new crimes committed by offenders who have cheated justice, and the brutal devastation of the lives of additional rounds of victims, are paramount among those harms. Everyone loses when criminal justice miscarries; everyone, that is, except the murderers, rapists, burglars, robbers, and other lawbreakers who remain at liberty, often to reoffend, while the innocent are punished in their stead. In light of these seemingly obvious truths, it might be assumed that policymakers, politicians, and criminal justice officials would join forces and rally to enhance the reliability of systems of criminal justice and hence minimize the intertwined risks of convicting the innocent and enabling the guilty to go free. Yet sadly, policy reforms that would improve reliability in criminal justice practices and could readily be implemented too often stall or lag.⁷⁹⁷ Progress can be held hostage by the rhetoric of competing ideologies, a mystifying blindness by representatives of diverse political views to the overwhelming commonality of interests shared by all, or simply a lack of will.

Considerable resistance to implementing reforms almost certainly owes to the misperception that measures enacted to safeguard the

⁷⁹⁴ Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 713 (2002).

⁷⁹⁵ See Medwed, *supra* note 1, at 1565.

⁷⁹⁶ See generally Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice*, in 4 CRIM. JUST. 263, 263–315 (David Duffee ed. 2000), available at <http://www.smartpolicinginitiative.com/sites/all/files/Measuring%20the%20Costs%20and%20Benefits%20of%20Crime%20and%20Justice.pdf> (discussing the costs and benefits of the criminal justice system). See also Forst, *supra* note 31, at 1219–24, 1221 tbl. 1 (citation omitted) (discussing the costs of a failed criminal justice system).

⁷⁹⁷ See, e.g., Gould & Leo, *supra* note 783, at 866–67 (footnotes omitted) (“Considering the interests at stake in a criminal prosecution and conviction, . . . it is incredible to the point of embarrassing that the American system of justice has been so resistant to innocence commissions or post-exoneration review. . . . Wrongful convictions do such harm to so many that one would expect criminal justices to seek out the lessons from past errors in order to prevent them. And yet, experience suggests otherwise. Only a handful of states have undertaken serious and systematic review of wrongful convictions, and when practitioners have been involved, it has often taken ‘kicking and screaming’ to introduce new approaches or technologies to improve their work.”). See generally Robert J. Norris et al., *“Than That One Innocent Suffer”: Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1308–60 (2011) (discussing reforms aimed at limiting the number of wrongful convictions and giving an overview of states’ progress with enacting these reforms).

innocent must also invariably or often serve to shield the guilty.⁷⁹⁸ Such thinking likely helps account for intransigence in having the police videotape interrogation sessions, in limiting or more carefully scrutinizing the testimony of incentivized informants, in tightening regulations that govern identification procedures, and adopting other reforms that could be expected to help prevent miscarriages of justice.⁷⁹⁹ Some procedures designed to help reduce the risk of convicting innocent persons doubtlessly would work at cross purposes with convicting the guilty.⁸⁰⁰ One example would be requiring proof of 100% certainty to support a conviction in criminal trials, an innovation that would insulate some guilty offenders from conviction just as it would spare some innocent defendants from wrongful conviction.⁸⁰¹ Other reforms, such as requiring two defense attorneys to be appointed to represent indigents charged with crimes, or mandating that crime labs exist independently of police agencies, might be considered unduly expensive. Still, a number of meaningful reforms are available that would have the net effect of enhancing the accuracy of justice systems. Measures that achieve greater reliability in criminal justice procedures not only fail to erect barriers to apprehending and prosecuting the guilty, they make those outcomes all the more attainable.⁸⁰²

Progress must be made in embracing those reforms, and then implementing cost-effective measures that will promote greater reliability in systems of criminal justice. This work is necessary not only to help avoid wrongful convictions but also to contribute to the urgent social policy objective of bringing the guilty to justice. The

⁷⁹⁸ See Ronald J. Allen & Larry Laudan, *Why Do We Convict as Many People as We Do?: Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 80, 83–86 (2008); Risinger, *supra* note 783, at 763–64; Givelber, *supra* note 784, at 1333–35.

⁷⁹⁹ See, e.g., N.Y. STATE BAR ASS'N: TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (Apr. 4, 2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf> (last visited Jan. 13, 2013) (offering numerous recommended reforms to New York law and practice to enhance the reliability of the criminal justice system and to help prevent wrongful convictions). See also James R. Acker & Catherine L. Bonventre, Perspective, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245 (2010) (same).

⁸⁰⁰ See Shawn D. Bushway, *Estimating Empirical Blackstone Ratios in Two Settings: Murder Cases and Hiring*, 74 ALB. L. REV. 1087, 1089 (2011) (citations omitted); Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1105 (2011).

⁸⁰¹ See BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES 64 (2004).

⁸⁰² See James M. Doyle, *Learning From Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 145–46 (2010); Findley, *supra* note 783, at 172–73 (citations omitted); Medwed, *supra* note 1, at 1565, 1567–68.

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modest aspiration advanced here is simply to reframe the issues under discussion so they are not skewed by the misleading notion that proponents of different crime control ideologies must somehow be divided in finding solutions to how to minimize miscarriages of justice.⁸⁰³ The most ardent law enforcement enthusiasts and the most passionate civil libertarians should have no disagreement about the desirability of disabling repeat violent offenders from claiming new victims, or of sparing innocent parties the pains and injustice of wrongful conviction and punishment.

IV. CONCLUSION

The hundreds of individuals who have been officially exonerated following wrongful conviction are commonly described as the tip of a much larger iceberg,⁸⁰⁴ the visible manifestation of an exponentially greater number of innocents who have been adjudged guilty and punished for crimes they did not commit. The iceberg metaphor is equally apt, if not even more ominous, when applied to the truly guilty parties; the wrongful conviction cases that come to light and culminate with the true perpetrator's detection certainly represent but a small fraction of their vastly greater number. When the guilty go free, not only do their past crimes remain unredeemed, but they too often engage in repeat acts of criminal violence, with irreparable consequences to countless future victims. The capsule descriptions offered in the twenty cases discussed in this article are hopelessly inadequate to capture the devastation worked on the lives of those known victims. They also are incapable of even hinting at the pain and suffering experienced by the multitude of unknown victims of offenders who have escaped justice in cases resulting in the wrongful conviction of others.

As consequential as the continuing predations are of offenders who elude conviction for crimes committed, it is a testament to the ideals embodied in our justice systems that commitment remains firm to Blackstone's maxim: "better that ten guilty persons escape, than that one innocent suffer."⁸⁰⁵ The guilty who do escape quite

⁸⁰³ See Findley, *supra* note 783, at 139–41; Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 337–38 (2002).

⁸⁰⁴ See *supra* note 1.

⁸⁰⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES *358. See generally Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (discussing and expanding on the implications of Blackstone's maxim).

clearly have the capacity to, and frequently do, inflict serious violence on new victims and cause continuing damage to the social order. There can be no disagreement that rather than allowing ten guilty persons to escape justice, it would be better if only nine did, and better still if the number were reduced as close as possible to zero. This simple truism should be embraced, unsullied by the misperception that measures designed to prevent the innocent from suffering must inevitably invite the trade-off of allowing more guilty parties to escape justice. The sooner that it is, the sooner the day will dawn that meaningful discussions will ensue and reforms will be enacted that simultaneously promote the twin objectives in the administration of justice, shared by all, of neither allowing guilty persons to escape nor innocent ones to suffer.