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Mike Ware

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ABOUT THE AUTHOR: Adjunct Professor of Law, Texas Wesleyan University School of Law; Supervising Attorney of Wesleyan Innocence Project; currently in private practice in Fort Worth, Texas. July 2007 through July 2011: Special Fields Bureau Chief; Head of Conviction Integrity Unit in the Dallas County District Attorney's Office. J.D., University of Houston School of Law in 1983; B.A., University of Texas in 1977. The author thanks his paralegal Jena Parker and his research assistant Marissa Warms.

I. INTRODUCTION

The "criminal justice system" in the United States is massive and complex. It consists of many different independent systems, which are themselves massive and complex. Everyday, the various systems resolve important fact issues that are often neither clear nor simple, but that profoundly impact the individuals involved. The laws applied to those fact issues are almost never clear or simple. Mistakes, sometimes bad ones, are inevitable and perhaps even prevalent.

Is this what John Adams had in mind when he advocated in favor of a government of laws, not men?[1] Maybe not. But, realistically, how often in the "land of the free" does our government of laws get it flat-out wrong? How often is a completely innocent person wrongly convicted, imprisoned, and perhaps even executed for a criminal offense that he or she did not commit?

In July 2007, after twenty-three years as a criminal defense attorney, I left private practice and my position as the supervising attorney of the Wesleyan Innocence Project at the Texas Wesleyan School of Law and was sworn in as a Dallas County criminal prosecutor. My primary responsibility was to form and supervise a Conviction Integrity Unit (CIU) in the District Attorney's Dallas County Office. The then newly elected district attorney, Craig Watkins,[2] and his first assistant, Terri Moore, brainstormed the concept of a CIU to address and correct historical problems that continued within the Dallas County criminal justice system—problems within the District Attorney's office itself and problems that also extended to other working parts of the criminal justice system, such as the law enforcement agencies that filed their cases with the District Attorney's office.[3] Among other things, the CIU would investigate post-conviction claims of actual innocence,[4] identify the valid claims, and take appropriate corrective action. The CIU would then follow up with an investigation to determine, if possible, what went wrong.

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1. JOHN ADAMS, *Novanglus; or a History of the Dispute with America, from its Origin, in 1754, to the Present Time, No. VII, in* 4 THE WORKS OF JOHN ADAMS 99, 106 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851) ("[Aristotle, Livy, and James Harrington] define a republic to be a *government of laws, and not of men.*"). In 1789, Adams authored the Massachusetts Constitution, which separated the legislative, executive, and judicial branches into separate departments "to the end that it might be a government of laws, not of men." JOHN ADAMS, *Report of a Constitution or Form of Government for the Commonwealth of Massachusetts, 1779, in* THE WORKS OF JOHN ADAMS, *supra*, at 230. That language, with slight modification, remains in the Commonwealth's constitution today. *See* MASS. CONST. pt. 1, art. 30.

2. Mr. Watkins took office January 1, 2007, after pulling off a surprising upset in the November election, defeating an opponent who had significantly outspent him. Ralph Blumenthal, *For Dallas, New Prosecutor Means an End to the Old Ways*, N.Y. TIMES, Jun. 3, 2007, § 1, at 28, *available at* http://www.nytimes.com/2007/06/03/us/03dallas.html.

3. Dallas County includes twenty-six cities and over sixty law enforcement agencies that file criminal cases with the District Attorney's office. *See* DALLAS COUNTY, TEXAS, http://dallascounty.org/cities.php (last visited Nov. 2, 2011).

4. The term "actual innocence," as used here, means that the defendant was convicted of a crime that was actually committed by someone other than the defendant, or that the defendant was convicted of a crime that never occurred at all.

DNA exonerations reveal that wrongful convictions of actually innocent defendants occur, and, most likely, continue to occur with disturbing frequency. How can such cases be identified and corrected? Once identified, how can they be effectively used to detect the causes, or at least the most common causes, of wrongful convictions and thereby lead to evidence-based changes in the systems that produced the wrongful conviction?

This article attempts to shed light on those questions by considering the recent history of Dallas County's experience in dealing with wrongful convictions, and by discussing some of the specific cases in which CIU investigations led to exonerations. Among the issues raised are: the relevant prosecuting authorities' legal and ethical obligations when a possible case of actual innocence prosecuted by that office comes to their attention; what role the government should take in identifying and correcting wrongful convictions in cases that they prosecuted; and, once identified, what role the government should take in investigating the causes of wrongful convictions in order to avoid repeating the mistake of prosecuting an innocent person and thus, ignoring the guilty perpetrator.

Part II of this article explains the historical context in the Dallas County District Attorney's Office that led to the creation of the CIU and the new approach that Mr. Watkins and Ms. Moore took in establishing the CIU. Part III summarizes some of the cases investigated by the CIU from July 2007 to July 2011, and the profound results of those investigations, including some of the investigative and procedural shortcomings our office discovered to be common in many of the wrongful convictions that were uncovered. Part IV concludes.

II. WHY A "CONVICTION INTEGRITY UNIT" WITHIN THE DISTRICT ATTORNEY'S OFFICE?

A. The Historical Context Leading to the Creation of the Dallas County CIU

When Mr. Watkins took office as district attorney, Dallas County had already seen nine post-conviction DNA exonerations, which was more than any other county in the United States. Exonerations ten, eleven, and twelve came during his first weeks in office.[5] In other words, there were an undisputed twelve cases where highly reliable post-conviction forensic testing definitively established that the wrong person had been convicted of a heinous crime. In most of those cases, the District Attorney's

5. *See, e.g.*, *Dallas County Records 12th DNA Case*, USA TODAY (Jan. 19, 2007, 10:40 PM), http://www.usatoday.com/news/nation/2007-01-19-texas-dna_x.htm. Quantifying "exonerations" at a specific point in time, however, is sometimes the subject of disagreement. Among other things, the exact definition of the term "exoneration" is disputed. The exact point in time when an "exoneration" actually occurs is likewise ambiguous. For example, is it when the exclusionary DNA test results come back? Is it the moment the State agrees, if it does, to the defendant's claim of innocence? Is it when the court of conviction recommends relief and sets bail? Is it when the defendant walks out of the jail or the courtroom free on bail pending a final decision from the Texas Court of Criminal Appeals and/or the governor, neither of which is necessarily guaranteed and both of which can take a year or more? Nine is my best good faith effort to put a number on the Dallas County DNA exonerations as of January 1, 2007. The first one occurred in 2001 when the Texas post-conviction DNA-testing statute became effective, TEX. CODE CRIM. PROC. ANN. art. 64 (West, Westlaw through 2011 Sess.).

office, under the prior administration, had resisted the defendant's motion for post-conviction DNA testing. For example, in one of those nine cases, the defendant was forced to seek relief from the state's highest appellate criminal court before he was permitted to test relevant, existing biological evidence in the possession of the State—evidence that he claimed would, and ultimately did, clear him of an aggravated sexual assault.[6] Notwithstanding any earlier resistance when the test results excluded the defendant, the State ultimately agreed to relief based on the defendant's proven innocence.[7]

Even in the 1970s and 1980s, prior to the time when DNA testing existed as a forensic science, Dallas County had its share of high-profile wrongful convictions. Examples include the cases of Joyce Ann Brown, Randall Dale Adams, and Lenell Geter, all of whom were eventually "exonerated" after the media took up their causes.[8]

From the time the Texas post-conviction DNA-testing statute first went into effect in 2001 until the time Mr. Watkins took office in 2007, the Dallas County prosecutors had approached convicted defendants' requests for post-conviction DNA testing no differently than other district attorney's offices throughout the nation. The Texas statute, codified in Chapter 64 of the Texas Code of Criminal Procedure, gives convicted defendants a limited post-conviction right to DNA test evidence, if such evidence was collected and stored as a part of the original criminal investigation.[9]

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6. Smith v. State, 165 S.W.3d 361 (Tex. Crim. App. 2005) (reversing the decisions of the trial court and the lower appellate court and remanding "to the trial court to order DNA testing under Article 64.03(c)").

7. *Ex parte* Smith, No. AP-75,573 (Tex. Crim. App. Dec. 13, 2006), http://www.cca.courts.state.tx.us/opinions/HTMLopinionInfo.asp?OpinionID=14838 ("The trial court concluded in its Chapter 64 findings [on remand] that the DNA testing excludes Applicant as a contributor . . . the State agreed that the DNA testing exonerates Applicant.").

8. Randall Dale Adams came within seventy-two hours of execution; his case was detailed in a documentary film. *See* THE THIN BLUE LINE (Miramax Films 1988); *see also Ex parte* Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989) (reversing a capital murder conviction due to prosecutorial misconduct); *Freedom for Another Dallas Prisoner*, N.Y. TIMES, Feb. 16, 1990, at A14, *available at* http://www.nytimes.com/1990/02/16/us/freedom-for-another-dallas-prisoner.html.

9. The statute was originally passed as a part of Senator Rodney Ellis's Senate Bill 3 in the 2001 legislative session. S.B. 3, 77th Leg. (Tex. 2001) (enacted). In order to get a test, the defendant must establish, in the court of conviction, inter alia, that identity was or is an issue in the case and that he or she would not have been convicted at trial if exculpatory results had been obtained through DNA testing of the evidence in question. TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(B), (a)(2)(A)–(B) (West, Westlaw through 2011 Sess.). The statute has been amended three times. In 2003, the legislature eliminated the provision requiring a defendant to establish that he would not have even been prosecuted had there been an exculpatory DNA test, leaving the provision requiring that a defendant only establish by a preponderance of the evidence that a jury would not have convicted him had there been exculpatory DNA test results. *See* H.B. 1011, 78th Leg. (Tex. 2003) (enacted); *Smith*, 165 S.W.3d at 363–64 (acknowledging the change in statutory law and incorporating that change in the decision to reverse the lower court and order that Smith be allowed a DNA test). In 2007, defendants who had pled guilty or who had "confessed" were explicitly given the right to a test, assuming they met the other requirements of the statute. *See* H.B. 681, 80th Leg. (Tex. 2007) (enacted). In 2011, further technical, albeit much litigated roadblocks, were eliminated and a provision was added which requires unknown profiles developed from a test performed pursuant to the statute to be entered into the Combined DNA Index System (CODIS), the DNA database. S.B. 122, 82d Leg. (Tex. 2011) (enacted).

Typically (or at least stereotypically), prosecutors in Texas and throughout the United States seek criminal convictions and harsh sentences, including the death penalty when deemed appropriate, against individuals accused of committing a spectrum of criminal offenses in their jurisdictions. After accomplishing that objective, the prototypical prosecuting authority aggressively protects their hard-earned convictions and harsh sentences when the defendant attacks them on direct appeal and in other post-conviction motions. Once DNA testing became available as a forensic science and post-conviction fact-finding tool[10]—and in some states DNA testing was codified as an available post-conviction procedure[11]—Dallas County fell in line with most prosecuting authorities that viewed claims of actual innocence accompanied by requests for DNA testing as any other post-conviction attack by a defendant: with skepticism, cynicism, and, sometimes, open disdain. Even now, more than twenty years after the first DNA exoneration, prosecutors often wage prolonged legal battles over whether a requesting defendant is entitled (statutorily, constitutionally, or otherwise) to DNA test available evidence at all. In other words, in the "best criminal justice system in the world," prosecutors routinely argue, often successfully, that a convicted defendant, even if innocent, does not have the legal right to conclusively prove his or her innocence by testing evidence controlled by the government.[12] And Supreme Court precedent supports that position.[13]

In Dallas, the nine DNA exonerees were members of an exclusive group of individuals who, in each instance, were able to navigate the procedural and substantive hurdles of the Texas DNA-testing statute. They also prevailed against resistance, and in some instances dogged opposition, from the District Attorney's office under the prior administration. Obtaining a favorable ruling from the court allowing them

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10. The first post-conviction DNA exoneration was in 1989 when Gary Dotson's 1979 rape conviction was vacated by the Cook County Circuit Court in Chicago. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005); *see also* Rob Warden, *The Rape That Wasn't—The First DNA Exoneration in Illinois*, NORTHWESTERN LAW: CENTER ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilDotsonSummary.html (last visited Nov. 3, 2011).

11. Forty-eight states now have post-conviction DNA-testing statutes. Only Massachusetts and Oklahoma have no statutes at all. *See Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php# (last visited Nov. 3, 2011).

12. *See, e.g.*, Shalia Dewan, *Prosecutors Block Access to DNA Testing for Inmates*, N.Y. TIMES, May 17, 2009, at A1; *see also* Michael Hall, *Why Can't Steven Phillips Get a DNA Test?*, TEX. MONTHLY, Jan. 2006, *available at* 2006 WLNR 25908563. A particularly egregious recent example is the Michael Morton murder case out of Williamson County, Texas. *See* Mark Benjamin, *In Perry's Texas a Well-Connected DA with a Knack for Blocking New Evidence*, TIME (Oct. 12, 2011), http://swampland.time.com/2011/10/12/in-perrys-texas-a-well-connected-da-with-a-knack-for-blocking-new-evidence/.

13. *See* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308 (2009) (holding that a convicted defendant claiming actual innocence has no Fourteenth Amendment due process right to DNA test evidence in the possession of the government, even if exclusionary results would absolutely prove his or her innocence). *But see* Skinner v. Switzer, 131 S. Ct. 1289 (2011) (holding that a convicted state prisoner seeking DNA testing of crime scene evidence may assert that claim as a civil rights action under 42 U.S.C. § 1983).

to test evidence last known to be in the possession of the government was only part of the arduous process. All nine exonerees were extremely fortunate that, in each of their cases, the Dallas County crime lab (the Southwestern Institute of Forensic Sciences or "SWIFS") had maintained the original evidence collected at the time of the original investigation and was able to find and retrieve it so that it could be tested years—sometimes decades—later.[14] Most of the cases were from the 1980s. One case, involving two defendants, was from 1979. The Texas evidence preservation statute was not passed until 2001.[15]

Each of the nine cases represented a separate, perfect storm of events and circumstances that began with the arrest and charge of an innocent man. Yet, typically, these wrongful convictions, even in light of 20/20 hindsight, seemed cookie-cutter ordinary. Trial transcripts, police reports, and other investigative materials revealed that these individuals were convicted much as thousands of individuals were convicted in Texas and across the rest of the country for decades. It is this author's opinion that if a control group were to "blindly" read the trial transcripts of five actual trials resulting in convictions, without knowing which one of the five defendants would ultimately be exonerated by DNA, the exoneration case would be spotted no more than twenty percent of the time.[16]

In short, the trials of the innocent, which resulted in wrongful convictions, in many instances look similar, if not identical, to the trials of the (presumably) guilty, which result in convictions. Based on this alone, and given the small percentage of cases in which there is relevant DNA evidence to test (pretrial or post-trial), it seems obvious that the number of DNA exonerees in Dallas County, in Texas, and in the nation do not represent and therefore should not define the entire universe of actually innocent individuals who have been wrongly convicted. The number of exonerees across the nation can be quantified, albeit subject to debate. But the number of innocent defendants wrongly convicted cannot be quantified. That number is unknown and probably unknowable.[17]

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14. Kevin Johnson, *Storage of DNA Evidence Crucial to Exonerations*, USA Today (Mar. 28, 2011, 9:05:19 AM), http://www.usatoday.com/news/nation/2011-03-28-crimelab28_ST_N.htm.

15. The original Texas evidence preservation bill was part of Senate Bill 3 in the 2001 Legislative Session, which also included what became Chapter 64 of the Texas Code of Criminal Procedure, i.e., the post-conviction testing statute. *See supra* note 9. The 2001 evidence preservation bill is now codified as Article 38.43 of the Texas Code of Criminal Procedure. It was amended again in the 2011 Session by Senator Royce West's (Dallas) Senate Bill 1616 and became law on September 1, 2011. The amended Article 38.43 requires the Texas Department of Public Safety to promulgate rules and standards consistent with best practices for the collection, storage, and retrieval of biological evidence. In doing so, the Department is required to take input from groups such as innocence projects as well as police organizations. Tex. Code Crim. Proc. Ann. art. 38.43 (West, Westlaw through 2011 Sess.).

16. The most interesting DNA exoneration cases are those in which there appeared to be "overwhelming" evidence of guilt—all of which unraveled when scrutinized under the light of a DNA exclusion and, in some cases, the identification of the actual perpetrator.

17. *See generally* Gross et al., *supra* note 10. *See also* Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. Times, Mar. 26, 2008, at A14.

It would, I believe, be fair and accurate to say that in Dallas County, the former administration considered the nine DNA exonerations as public relations embarrassments. Its public response to each exoneration (essentially silence) is probably typical of other district attorney's offices throughout the state and elsewhere. Likewise, it appears that within the Dallas County office, the unspoken policy was to acknowledge each wrongful conviction as an existent aberration in a system that worked 99.99% of the time or, as Justice Antonin Scalia would say, 99.973% of the time.[18] There was no need to encourage any unnecessary attention toward them, much less study or attempt to learn from them. As Justice Scalia said, "One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation."[19]

B. A New Approach

When Mr. Watkins took office on January 1, 2007, and hired Terri Moore out of private practice to become his first assistant, they decided to approach the DNA exonerations in a different manner.

First, rather than ignore the wrongful convictions, they wanted to learn as much as possible about what had gone wrong. The wrongful convictions were "airplane crashes" and should be investigated or studied just as the Federal Aviation Administration investigates a crash scene. Were the wrongful convictions aberrations (part of Justice Scalia's 0.027%) or were they symptomatic of a larger, systemic problem that was causing other, as yet undetected and perhaps undetectable, wrongful convictions? Logically, if the possible problems could at least be identified, rather than ignored, they could be addressed through changes in office-wide policy, as well as through more far-reaching actions such as proactive work with the legislature.

On January 2, 2007, one day after Mr. Watkins took office, wrongly convicted defendant Andrew Gossett had his exoneration court hearing. A DNA test had excluded him as the perpetrator of the sexual assault for which he was convicted. Mr. Watkins appeared at the hearing and publicly apologized to him—a gesture that no previous district attorney had ever made.

Second, why had the previous administration been so quick to oppose motions for post-conviction DNA testing? Obviously there were requests for testing that were legitimately opposed for any number of reasons, including the overtly frivolous nature of the request. But if there was relevant biological evidence to test and the test outcome was potentially dispositive on the issue of who committed the crime, why oppose it?

How could public safety possibly benefit from the continued incarceration of the wrong individual? Should not the right individual be identified and prosecuted if possible? What was the worst that could happen? If a post-conviction DNA test

18. *See* Kansas v. Marsh, 548 U.S. 163, 198 (2006) (Scalia, J., concurring) (quoting, as authority, Joshua Marquis, an Oregon district attorney, who puts the rate of wrongful convictions nationwide at exactly 0.027%); *see also* Liptak, *supra* note 17 (noting Justice Scalia's acceptance of Marquis's calculations).

19. *Marsh*, 548 U.S. at 199.

confirmed that the defendant requesting the test was the actual perpetrator and was falsely claiming innocence, was there not a benefit to having that information and using it to the State's advantage? At the very least, the parole board could be notified about the inmate's frivolous claims of innocence so that they could consider it in deciding whether the defendant should be granted parole.

The most cynical explanation for the resistance among prosecutors in any district attorney's office, not just those in Dallas County, to post-conviction testing is that the best way to avoid an embarrassing exoneration is to block the process that could eventually lead to one. In Dallas County at least, each case was different and the reasons for resistance in each case had been different, which is not to say that there was never some element of cynicism in the decisionmaking process.

An "audit" of the unsuccessful requests for testing could uncover cases in which the convicted requestor should have been allowed to test relevant evidence. It could also raise the credibility of the District Attorney's office and yield useful information about the system itself, perhaps in unanticipated ways.[20]

Mr. Watkins and Ms. Moore decided that the CIU should undertake such an audit as a collaborative effort with organizations or individuals from outside of the District Attorney's office who would actively participate in case reviews and decisionmaking. An outside collaborator would bring a different point of view to the process as well as add to its transparency. Who could know what the results of an "audit" would be? It was possible, for example, that a thorough "audit" would uncover no mistakes. If that turned out to be the case, however, such a finding would have much less validity if the "audit" only involved members of the District Attorney's office reaching that conclusion. The same would be true regarding the decision on each individual case. If representatives of an innocence project, for example, agreed that a request for DNA testing from a defendant had no merit, would not that case constitute a proper vetting? Mr. Watkins and Ms. Moore decided to include both the Dallas County Public Defender's office and the various innocence projects in the state (which were generally associated with law schools) to participate in the audit.

In the spring of 2007, Mr. Watkins and Ms. Moore approached the Dallas County Commissioners with their request that the Commissioners fund four new positions in the District Attorney's office, which would comprise the Conviction Integrity Unit: two prosecutors, an investigator, and a paralegal.[21] The hearings in the Commissioner's Court were contentious and spanned several meetings. One of the commissioners (an attorney) argued stridently that exonerating innocent, wrongly convicted defendants was strictly the job of the criminal defense bar. Exoneree Billy

20. For example, identifying additional perpetrators without necessarily exonerating the convicted defendant, which has turned out to be not that unusual.

21. Mr. Watkins and Ms. Moore first formally approached the Commissioners with their proposal in April 2007. At that time, 438 requests made between 2001 and 2007 had resulted in court-ordered testing in thirty-five cases. Twelve of the thirty-five led to exonerations (three more had occurred between the time Mr. Watkins took office in January 2007 and the time he and Ms. Moore addressed the Commissioners in April).

Smith[22] spoke passionately and eloquently in favor of Watkins's and Moore's proposal for the four new positions. Ultimately, it passed with a 3–2 vote. On July 12, 2007, the CIU began its work. Since then, there have been thirteen DNA exonerations in Dallas County (for a total of twenty-two), as well as four non-DNA exonerations and three defendants who obtained post-conviction relief because of *Brady* violations discovered during CIU investigations.[23] In addition, ten previously unknown actual perpetrators have been identified through investigations initiated by the CIU.

III. ILLUSTRATIVE CASES OF THE EXONERATED

This section will discuss some of the specific cases flagged by the CIU's audit, which led to exonerations. Though each case was different, common themes emerge, including: faulty witness identification procedures; failure of prosecutors to turn over exculpatory evidence to the defense in violation of *Brady*; "tunnel vision" on the part of investigators; and intransigence on the part of prosecutors who consistently (and tragically) opposed reasonable requests by convicted defendants to conduct DNA tests on existent, relevant evidence.

A. Patrick Waller

In 1992, two men abducted a couple at gunpoint in a parking lot in Dallas County. After a forced ATM stop, they drove the couple, in the couple's vehicle, to an abandoned house, tied them up, and one of the perpetrators—later identified by the victims as Patrick Waller—sexually assaulted the woman. This same perpetrator then left the house and returned with a second couple that had simply driven up to the abandoned house where the first couple was being held. The second couple was simply in the wrong place at the wrong time. The new victims were also beaten and tied up, but the two perpetrators fled without sexually assaulting the second woman.

A week later, for reasons that are still unknown, the police put Patrick Waller's photo in a photo spread and later put him in a live line-up. Three of the four victims, including the rape victim, eventually identified him as the rapist who had abducted the second couple.

Mr. Waller was arrested and, at trial, the three victims who had identified him in the pretrial photo spreads and line-ups testified against him and identified him in court. Mr. Waller's attorney attempted, unsuccessfully, to exclude testimony that Mr. Waller had sexually assaulted the first female victim, because the charge for which Mr. Waller was actually being tried was aggravated robbery and not sexual assault. The defense objections were overruled and the testimony was admitted along with

22. *See* Smith v. State, 165 S.W.3d 361 (Tex. Crim. App. 2005); *Ex parte* Smith, No. AP-75,573 (Tex. Crim. App. Dec. 13, 2006), *available at* http://www.cca.courts.state.tx.us/opinions/HTMLopinionInfo.asp?OpinionID=14838.

23. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that a prosecutor's withholding of favorable evidence from the defense violates due process "where the evidence is material either to guilt or to punishment." The *Brady* violations uncovered by the CIU included material evidence that crimes in question were committed by alternative suspects, and an unequivocal recantation by a complaining witness the day before trial.

forensic testimony that, based on seminal fluid collected from the sexual assault kit, both the rapist and Mr. Waller had the same blood type shared by about 14% of African American males.

The prosecutor argued at trial, among other things, that since African Americans made up 12% of the general population, and only 14% of African American males had the blood type detected by the forensic testing of the seminal fluid taken from the rape kit, Mr. Waller was part of 1.89% of the population that could have committed the crime.[24]

Mr. Waller testified on his own behalf, denying any knowledge of or involvement in the offense. He testified to an alibi and presented witnesses corroborating his alibi. Mr. Waller was nevertheless convicted and given a life sentence. No suspect was ever identified as the second perpetrator.

In 2001, Mr. Waller was one of the first defendants in Dallas County to apply for post-conviction DNA testing under the newly enacted Chapter 64.[25] The State opposed testing. After a full adversarial hearing in 2001, the trial court denied his request for a test and the appellate courts did not disturb the ruling. The crux of the State's winning argument to deny Waller his test was that the actual conviction was for aggravated robbery, not sexual assault. In other words, the argument was unsuccessful when made by the defense at trial to keep out evidence of the sexual assault, but was successful when made by the State to deny post-conviction DNA testing of the sexual assault kit (a moment of pitch-perfect sophistic irony). After the statute was amended in 2003,[26] Mr. Waller made a second request for a test and was again denied.

In 2007, the CIU, as part of its audit of past, unsuccessful post-conviction DNA testing requests, reviewed the Waller case. We then contacted Mr. Waller's last attorney and agreed to DNA test the sexual assault kit. The test results yielded a full male profile and excluded Mr. Waller. A Combined DNA Index System (CODIS) search by the Texas Department of Public Safety (DPS) identified a match to an individual in the database who was then located and interviewed. Under oath, the new suspect confessed, identified his coactor, stated that Mr. Waller was not involved, and passed a polygraph. The now-identified second actor was also located and confessed to his involvement in convincing detail. Finally, at the request of one of the victims, Mr. Waller took and passed a polygraph in which he denied any involvement in or knowledge of the crime. The court of conviction recommended "exoneration" on July 3, 2008, and the Court of Criminal Appeals confirmed on September 24, 2008.[27]

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24. These numbers are taken directly from the transcript of the prosecutor's argument. Regardless of whether or not they were accurate, the logic behind the argument is questionable at best.

25. *See* TEX. CODE CRIM. PROC. ANN. art. 64 (West, Westlaw through 2011 Sess.); *see also supra* text accompanying note 9.

26. *See supra* note 9.

27. *Ex parte* Waller, Nos. AP-76,000, AP-76,001 & AP-76,002, 2008 Tex. Crim. App. Unpub. LEXIS 656 (Tex. Crim. App. Sept. 24, 2008).

If Mr. Waller's request for a DNA test had been granted when he first made it in 2001, the ten-year statute of limitations for aggravated kidnapping and aggravated robbery would not have run and both actual perpetrators could have been identified and prosecuted. Moreover, in 2001, both of the actual perpetrators were in prison on other violent offenses. At the very least, evidence linking them to this crime could have been used to deny them parole.

The photo spread used in the Waller case could not be located. However, the investigator who conducted the photo spread procedures with the witnesses, as well as the live "line-up," knew which of the photos depicted the "suspect" (i.e., Mr. Waller). To this day, no one at the police department or otherwise can explain why Mr. Waller was a suspect, and that is most likely because there was absolutely no reason for him to be included as a suspect, at least until he was picked out in the photo spread. Because of this case and others investigated by the CIU in which faulty eyewitness identification played a significant role in a wrongful conviction, the Dallas Police Department instituted a policy of using double-blind, sequential photo spreads in which the administrator of the procedure is unaware of which photo actually depicts the suspect.

B. Thomas McGowan

In 1985 and again in 1986, Thomas McGowan was convicted of a brutal home invasion and sexual assault, which occurred in 1985. (One transaction, two crimes, two juries, two convictions, two life sentences—stacked.) Like Patrick Waller, it is not entirely clear why Mr. McGowan's photo was placed in the photo spread to begin with. He had no similar offenses or allegations in his past.

In September 2007, through his attorneys, Mr. McGowan requested that the Dallas County District Attorney's Office, through the CIU, agree to DNA testing of the original sexual assault kit. After reviewing the case, we agreed. The test identified a full, unknown male profile that was not Mr. McGowan's.

On April 16, 2008 the court of conviction, with the agreement of the District Attorney's office, recommended that Mr. McGowan be exonerated. On June 11, 2008, the Texas Court of Criminal Appeals concurred.

In May 2008, DPS hit a match on the CODIS database for the profile of the unknown rapist. He was located in a Texas prison where he was serving a plea-bargained, thirty-year sentence for another brutal home invasion sexual assault in Dallas County. He committed that subsequent offense after Mr. McGowan had been wrongly identified, arrested, and charged for the previous offense. When confronted with the DNA evidence, the actual perpetrator gave a detailed, audiotaped confession. He also authored a hand-written apology to the victim.

A postmortem review of the McGowan case revealed that the actual perpetrator's photo was included in the original photo spread along with Mr. McGowan's. For whatever reason, Mr. McGowan was selected instead of him. Furthermore, every individual depicted in the photo spread was a "suspect," all for unknown reasons. The statute of limitations had run and the actual perpetrator was not charged;

however, the parole board was notified and the District Attorney's office successfully pushed legislation to address such situations.[28]

As a result of the McGowan case, the Richardson Police Department, like Dallas, revamped the manner in which they conduct pretrial identification procedures. The Texas legislature also recently passed a bill, which became law September 1, 2011, that addresses the way in which the police may conduct pretrial identification procedures.[29]

C. Steven Phillips

In the spring of 1982, Steven Phillips was arrested for misdemeanor indecent exposure and released on bail. His photo was then displayed in a photo spread to the victim of a violent home invasion and sexual assault that occurred within a month of Mr. Phillips's misdemeanor arrest, and in the same general area of Dallas County as the indecent exposure incident. The victim of the home invasion and sexual assault identified Mr. Phillips as the perpetrator in her case, and a felony warrant was issued for his arrest. The media became involved. Mr. Phillips voluntarily surrendered himself.

The home invasion/sexual assault Mr. Phillips was charged with was considered to be one of a series of bizarre sex-related crimes, which occurred in Dallas County during March and April 1982, involving a partially masked gunman wearing a gray jogging suit (hood up) and wielding a pistol (sometimes described by victims as a German Luger), who entered establishments where women gathered and ordered them to disrobe and dance with each other. Authorities had publicly theorized that the same perpetrator committed all of the crimes, including the home invasion and sexual assault for which Mr. Phillips was identified. Mr. Phillips's photo was then published on the evening news and shown to other victims. He was placed in line-ups for the sex-related crimes committed by the hooded gunman. Some of the victims identified him, and Mr. Phillips was charged in all of the offenses (eleven altogether).

Mr. Phillips went to trial twice for the crime involving the last victim, which was the home invasion/sexual assault that occurred in April 1982. The State charged that crime as three separate offenses against the same victim. Mr. Phillips was tried and convicted of the burglary in 1982. He was tried and convicted by a second jury for the aggravated sexual assault in 1983. Both juries assessed thirty-year prison sentences to Mr. Phillips. In the first trial, Mr. Phillips testified and presented alibi witnesses

28. *See* TEX. GOV'T CODE ANN. §§ 411.0601–.0606 (West 2011).

29. TEX. CODE CRIM. PROC. ANN. art. 38.20 (West, Westlaw through 2011 Sess.). The Innocence Project reports that nine states have taken action to prevent eyewitness misidentification. INNOCENCE PROJECT, REEVALUATING LINEUPS 22 (2009), http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf; *see also* Tillman v. State, PD-0727-10, 2011 WL 4577675 (Tex. Crim. App. Oct. 5, 2011) (reversing capital murder conviction because the trial court excluded testimony of eyewitness identification expert). On November 2, 2011, the U.S. Supreme Court heard arguments about whether the Due Process Clause protects against all unreliable eyewitness identifications, or only those rendered unreliable by state action. Perry v. New Hampshire, 131 S. Ct. 2932 (2011) (granting petition for writ of certiorari).

who supported his alibi with testimony and documentation. Ultimately, he was convicted on the basis of the victim's eyewitness identification. In the second trial, Mr. Phillips neither testified nor presented his alibi defense. He was convicted on the same victim-eyewitness identification and was again sentenced by a jury to thirty years.[30] On the eve of his scheduled third trial, Mr. Phillips accepted a plea bargain on that case, as well as the "related" remaining eight cases involving the "hooded gunman," for which he had also been charged.

Mr. Phillips later applied for DNA testing after the 2001 statute was passed, but the Dallas County District Attorney's Office opposed the application and he was denied a test. Michael Hall wrote an excellent article in the January 2006 issue of *Texas Monthly* entitled, "Why Can't Steven Phillips Get a DNA Test?"[31] The thesis of the article was simple: Mr. Phillips says he did not commit the crime. The biological evidence from the original crime, for which two juries convicted him, is available to be DNA tested. Test results will either establish his guilt or innocence. Why can't he get a test? Excellent question.

After Craig Watkins took office as the Dallas County District Attorney in 2007, the office agreed with Mr. Phillips's attorneys to DNA test the sexual assault kit from the three original cases, for which he was tried and convicted. The test results excluded Mr. Phillips as the perpetrator. An attorney for the Innocence Project, Jason Kreag, then discovered that similar crimes of the same bizarre nature had been committed in the Kansas City area shortly after the Dallas crimes. A man named Sidney Goodyear, who had committed similar crimes in several states, was later charged and ultimately pled guilty to the Kansas City offenses. According to FBI reports and other sources, Mr. Goodyear had also committed similar crimes all over the country.

A post-conviction investigation by CIU investigator Jim Hammond revealed that at least one of the original Dallas County victims had identified a photo of Mr. Goodyear as the perpetrator in her case. At that time, a warrant was sought and issued for Mr. Goodyear's arrest, but was never acted on. That information was also never disclosed to the defense. This was an obvious *Brady* violation that may have played a substantial role in Mr. Phillips's wrongful conviction. Further investigation by Jim Hammond of the CIU revealed the information about Sidney Goodyear, who went by several aliases and died in a Texas prison in 1998, where he was serving a life sentence for a crime that was similar to both the crimes he committed all over the country and the crimes for which Mr. Phillips was convicted. Mr. Goodyear's various mug shots showed a sometimes striking resemblance to Mr. Phillips. Mr. Goodyear also was known to be a World War II Nazi aficionado, sometimes carrying a German Luger (as described in some of the original police reports). In fact, Mr. Goodyear's physical appearance (specifically his distinctive blue eyes) more closely matched the

30. Even though the jury only gave Mr. Phillips thirty years, the State was requesting that the jury sentence him to life in prison. It is only a coincidence that both juries assessed an identical number of years.

31. Hall, *supra* note 12.

repeated descriptions of the hooded perpetrator given to police by victims than did Mr. Phillips's characteristics.

Since Mr. Goodyear had died in prison in 1998, obtaining his DNA profile for comparison to the profile of the unknown perpetrator in the cases for which Mr. Phillips had been wrongly convicted was a problem. Fortunately, Mr. Hammond located a blood sample from Mr. Goodyear's 1998 autopsy, which had been preserved and was located in Galveston, Texas. The analysis revealed that Mr. Goodyear's DNA matched the male DNA profile found in the victim's sexual assault kit from the case for which Mr. Phillips had been charged, convicted, and served time after two jury trials.

On August 8, 2008, after a full reinvestigation and with the agreement of the District Attorney's office, the trial court recommended Mr. Phillips be exonerated on all charges—the two for which he went to trial as well as the nine for which he accepted plea bargains after being wrongly convicted twice in jury trials. On October 1, 2008, the Texas Court of Criminal Appeals concurred.[32]

The Phillips case illustrates the phenomenon of "tunnel vision" on the part of investigators even better than most cases do.[33] Police tunnel vision was undoubtedly a factor in the commission of the *Brady* violation in Mr. Phillips's case as well. The thinking must have been that the victim who identified Goodyear as her attacker must have made a mistake, so why turn over the information?[34]

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32. *Ex parte* Phillips, Nos. AP-76,010, AP-76,011, AP-76,012, AP-76,013 & AP-76,014, 2008 Tex. Crim. App. Unpub. LEXIS 714 (Tex. Crim. App. Oct. 1, 2008).

33. I believe "tunnel vision" is a factor in all wrongful convictions.

> Tunnel vision is a natural human tendency with particularly pernicious effects in the criminal justice system. Tunnel vision is the process that leads investigators, prosecutors, judges, and defense lawyers alike to focus[, often times very early in a criminal investigation,] on a particular outcome, and then filter all the evidence in a case through the lens provided by that outcome. Through that filter, all information that supports the adopted outcome is elevated in significance, viewed as consistent with other evidence, and deemed relevant and probative while evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable.

Keith Findley, *The Problem of Tunnel Vision in Criminal Justice*, INNOCENCE PROJECT, http://www.innocenceproject.org/docs/TunnelVision_WEB.pdf (last visited Nov. 4, 2011).

34. While not discussed in this article, the court's opinion in Antrone Johnson's case (another Dallas County exoneree) makes insightful observations about *Brady* violations in general. *See Ex parte* Johnson, No. AP-76,153, 2009 WL 1396807 (Tex. Crim. App. May 20, 2009). The Texas Court of Criminal Appeals reversed Mr. Johnson's conviction and life sentence on a *Brady* violation discovered during a CIU post-conviction investigation. In her concurring opinion, Judge Cochran wrote:

> I write separately because many prosecutors, acting in all good faith, may not realize that, under *Brady*, a prosecutor must always disclose information that the complaining witness has recanted her allegations of sexual molestation (or any criminal act) even when the defendant pleads guilty or has already agreed to plead guilty.

Id. at *1 (Cochran, J., concurring) (footnote omitted). Judge Cochran's concurring opinion goes on to give an excellent primer on the law of *Brady* and its progeny:

> After the habeas record was submitted to this Court, the original prosecutor submitted an affidavit to the habeas judge setting out her "usual and customary" practice concerning her understanding and fulfillment of *Brady* duties, as well as her belief that

D. Stephen Brodie

On September 20, 1990, a sleeping five-year-old girl was abducted from her bedroom in the North Dallas suburb of Richardson, Texas, at approximately five o'clock in the morning. The abductor covered the girl's face, carried her outside, sexually assaulted her, and released her after verbally threatening her not to tell anyone. Later that morning, a crime scene investigator lifted an unidentified fingerprint from the window screen where the perpetrator entered.

The Richardson case was one of several similar offenses committed in northern Dallas County during the same time period. Police believed it was the same perpetrator in each case and dubbed him the "North Dallas Rapist." The victims were young girls abducted in the middle of the night while adults slept in the next room.

Two months later, in November 1990, Richardson police investigators stopped Stephen Brodie while he was walking one afternoon in the general region where the September attack had taken place. Mr. Brodie was eighteen years old and a senior at Richardson High School. He had been deaf since infancy and put up for adoption by his biological mother.

When stopped by the police, Mr. Brodie attempted to answer their questions. The police obtained a fingerprint from Mr. Brodie, later compared it to the print taken from the window screen, and it was not a match.[35] They also checked his school records, which established that Mr. Brodie had attended school on the day of the attack.[36]

In August 1991, the Richardson case, as well as the multiple, similar "North Dallas Rapist" cases in the adjacent city of Dallas, were unsolved. On August 14, 1991 (ten months after the Richardson attack), Richardson police arrested Mr. Brodie for burglary of a coin-operated machine. He promptly confessed to the burglary. The police then spent approximately eighteen to nineteen hours over several days interrogating Mr. Brodie about the September 1990 sexual assault. At first, Mr. Brodie denied any involvement or knowledge.[37] He had no reason to recall the

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> she followed that customary practice in this case. The habeas judge found that "the recent information presented to the Court does not change the outcome of the Court's prior findings of fact and conclusions of law." The issue is not necessarily one of "good" or "bad" faith, or of one's customary practices. The issue is ensuring (and documenting) that all potential *Brady* material has been timely divulged. The experienced prosecutor and defense attorney will document, in their files, the production of all discovery materials, especially potential *Brady* material.

Id. at *3 n.12.

35. Throughout the investigation, the police compared the unknown window screen fingerprint to at least twenty-five different men. In other words, everyone they believed could be a suspect.

36. Since the offense occurred at about five o'clock in the morning, Mr. Brodie could have committed the offense and still attended school, but investigators believed that it was important enough to check.

37. Since Brodie was deaf, about half of the eighteen or nineteen hours of interrogation were spent passing written notes back and forth. The second half was conducted through different interpreters. All of the interrogation was captured on videotape. *See* Shawn P. Williams, *Conviction Integrity Unit Paves Way for Release of Stephen Brodie*, DALL. S. NEWS (Sept. 28, 2010), http:www.dallassouthnews.org/2010/09/28/conviction-integrity-unit-paves-way-for-release-of-stephen-brodie.

specific details of his life on the day the offense occurred eleven months prior. The police had no reason to believe he was involved. His prints did not match, and they verified that he was in school that day.

Ultimately, Mr. Brodie began to make purported admissions about knowledge of the location of the crime and of the victim. In fact, there was almost nothing Mr. Brodie communicated that established that he had any true independent knowledge about the offense. Videotapes and written notes from the interrogation showed that he had gotten almost all the facts wrong until prompted or led by the interrogator. He also recanted what admissions he did make.

After charging Mr. Brodie, Richardson officials tendered him to the Dallas Police Department for interrogation. During his interrogation, the Dallas detective asked Mr. Brodie about a crime the detective knew that Mr. Brodie did not commit. Mr. Brodie admitted to it anyway. The detective then invented a fantasy crime. Mr. Brodie admitted to it, too. When the detective asked Mr. Brodie about real unsolved cases, Mr. Brodie admitted to them, but knew no corroborating facts. The Dallas detective concluded that Mr. Brodie had no involvement in any of the offenses and tendered him back to Richardson officials. After months of pretrial incarceration, Mr. Brodie pled guilty to the Richardson case and received five years in prison.

While Mr. Brodie was locked up, yet another, almost identical offense was committed in the city of Dallas, less than a mile from the location of the Richardson crime for which Mr. Brodie was charged. Police identified a suspect near the scene, and that suspect was later positively tied to the abduction and sexual assault of the young girl through DNA. He later pled guilty. He was believed to be the "North Dallas Rapist," although he was not charged in any other cases.

A Richardson crime scene officer, having read about the arrest, was able to get the fingerprints of the Dallas arrestee and compare them to the print on the window screen from the Richardson case. It was a match to the arrested man believed to be the "North Dallas Rapist." The officer was instructed by his superiors to have the FBI make a comparison. The FBI also called it a match. He was instructed to have the Drug Enforcement Agency (DEA) make a comparison. The DEA called it a match as well. But Mr. Brodie had already pled guilty.

The Richardson police reinvestigated. The Dallas perpetrator who matched the print refused to talk to them. The police explored the possibility that Mr. Brodie and the "North Dallas Rapist" had committed the offense together. Eventually, the Richardson police decided, more or less, that it was just a coincidence that the fingerprint which they had originally believed key to their investigation actually belonged to a person, not Brodie, who had committed an almost identical offense less than a mile away. They determined, notwithstanding the extraordinary new evidence pointing to another guilty individual, that their original investigation had reached the right result and that Mr. Brodie was guilty. They did, however, turn the information over to the District Attorney's office in 1994, which then turned it over to Mr. Brodie's last attorney, who filed a writ. The writ was denied.

Mr. Brodie served his five-year sentence but continued to be sent back to prison for refusing to register as a sex offender. In 2010, his father wrote the Dallas County

CIU. The CIU's paralegal, Jena Parker, first read the letter and was struck by a number of potential red flags: for example, eighteen to nineteen hours of interrogation of a nineteen-year-old deaf person, about half of that time without an interpreter. The CIU undertook an extensive investigation. The Dallas perpetrator who matched the print was located; he again refused to be interviewed.

The CIU asked that Mr. Brodie be appointed an attorney, and the CIU obtained confession experts to analyze Brodie's "confession," which had been videotaped. All concluded that it was a completely unreliable confession for many reasons, and in many ways not even a confession but the result of miscommunications between a deaf person and his interrogator.[38] The original court of conviction heard evidence on September 27, 2010. Among other things, the Dallas offender was subpoenaed to the hearing and took the Fifth when asked if he had committed the offense for which Mr. Brodie was convicted. The confession experts testified. Former Richardson detectives testified. The court recommended exoneration. On November 10, 2010, the Texas Court of Criminal Appeals exonerated Mr. Brodie on all charges (including the failures to register).[39]

The CIU discovered a list of unsolved Dallas cases from 1989 to 1992, which we believed were committed by the Dallas offender. SWIFS still had biological evidence stored from two of the cases. At the CIU's request, SWIFS DNA tested the evidence. A new buccal swab was obtained from the Dallas offender, and DNA testing on his known buccal swab showed a match to those two unsolved cases. The Dallas offender was arrested and charged in those two cases. The Dallas offender was arrested and charged in those two cases. On January 19, 2012, a Dallas County jury sentenced Robert Warterfield to life imprisonment after finding him guilty of the 1989 aggravated sexual assault of a child.[40]

IV. CONCLUSION

Anecdotally, every exoneration case investigated by the CIU, except for the Brodie case, involved mistaken eyewitness identification. Likewise, in each of those cases, there was a pretrial identification procedure (conducted differently in every case) in which an eyewitness mistakenly identified an innocent person as the perpetrator. At some point before their testimony at trial, each mistaken eyewitness became certain that they had chosen correctly. In most cases, there was no articulated,

38. Efforts to pass a bill to require the police to video or audio record all interrogations, H.B. 218, 82d Leg. (Tex. 2011), failed in the most recent state legislative session. The biggest opponents of the bill were the police. *See* Scott Henson, *Police Arguments Against Recording Interrogations Allow Fear to Impede Self-Interest*, GRITS FOR BREAKFAST (Mar. 4, 2011, 8:06 AM), http://gritsforbreakfast.blogspot.com/2011/03/police-arguments-against-recording.html.

39. *Ex parte* Brodie, No. AP-76,449, 2010 Tex. Crim. App. Unpub. LEXIS 669 (Tex. Crim. App. Nov. 10, 2010).

40. Nomaan Merchant, *Suspect in Over a Dozen Sexual Assaults in Dallas Area Sentenced to Life in Prison*, STAR TELEGRAM (Jan. 19, 2012), http://www.star-telegram.com/2012/01/19/3673500/suspect-in-over-a-dozen-sexual.html. Because the cases involved a child and because of changes in the law, the statute of limitations was not a bar.

specific reason to believe the "suspect" in the photo spread or line-up had committed the offense until he was chosen by the eyewitness as the perpetrator. Then, being chosen in the line-up *became* the "evidence" against the defendants. Many times it was the only "evidence" against the defendants. In every case it was the most compelling "evidence" against the defendants—evidence that came into being during the five minutes to an hour it takes to conduct a pretrial identification.

The cases we came across in Dallas County suggest the need for some systemic reforms. It would make sense for investigating agencies, the courts, or even the legislature to establish some objective minimum threshold of probability that the "suspect" displayed in the photo spread or line-up actually committed the offense under investigation, rather than to rely on the selection itself as creating that probability.

Second, it seems that the pretrial identification process should be regarded more like a scientific forensic test. Like a scientific forensic test, if it is conducted in an unreliable fashion (i.e., in a way inconsistent with recognized best practices), the result should be regarded as unreliable (regardless of how certain the witness claims to be) and treated accordingly by the courts.

Brodie's case was similar to the eyewitness cases in that there was no reason to believe he was involved with the offense until eighteen or nineteen hours of interrogation produced "admissions," which then *became* the evidence against him at trial. Investigative agencies should videotape all interrogations. Ninety-nine percent of the time (or perhaps, to use Justice Scalia's estimation, 99.973% of the time) videotaping interrogations will work in favor of the police and prosecutor. The small percentage of times it works in the defendant's favor are the times it *should* work in the defendant's favor. Brodie's case is a good example.

The experiences of the CIU in Dallas County provide a foundation for influencing a change in the milieu of many prosecutors' offices. These experiences also firmly illustrate a need to rethink pretrial investigation and criminal procedure toward a system that focuses on further reducing wrongful convictions. There are reforms needed in every step of the justice system, as is exhibited in the illustrations above. Sometimes it is the police investigators, sometimes it is the prosecutors, and sometimes it is both. Fault does not lie in only one place in our system.

Each of these cases involves a totally innocent man wrongly convicted and punished for a heinous crime (or crimes) he did not commit. Each is an incredible story of both injustice and justice at many different levels. Each case is a tragedy. Each could be the subject of a book, a movie, or a year-long law school course. Each innocent man's story is a parable.