

# A FINE LINE BETWEEN CHAOS & CREATION: LESSONS ON INNOCENCE REFORM FROM THE PENNSYLVANIA EIGHT

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## I. INTRODUCTION

The values and passions, as well as the logic, stirred by wrongful convictions, have always pointed toward something beyond any individual's particular injustice.<sup>1</sup> The chaotic journeys of 175 post conviction DNA exonerees are prophecies of long-term upward pressures to create and sustain structural innocence reforms. Taken for what they truly are, these exonerations do not solve problems; they just make some solutions possible.

Only five states, Illinois, Texas, New York, Virginia, and Massachusetts, presently have more experience with post conviction DNA exonerations than Pennsylvania.<sup>2</sup> To read too much into this statistic would dilute the purpose of this article.<sup>3</sup> There is, however, one reasonable inference that is necessarily

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2. The current number of DNA exonerees by state: Illinois (25), Texas, (21), New York (17), Virginia (10), Massachusetts (9), with Pennsylvania, California, and Oklahoma registering eight each. These numbers will undoubtedly be changed before this article reaches publication. News accounts and advocacy groups suggest that Pennsylvania, Virginia, and Oklahoma will be adding to their numbers shortly. *See infra* note 16. *See infra* note 16. Of the remaining states, and including Washington D.C. their numbers are: Louisiana (6), West Virginia (6), Ohio (6), Missouri (5), Georgia (5), Florida (5), Indiana (4), North Carolina (4), Maryland (3), Montana (3), New Jersey (3), Wisconsin (3), Alabama (2), Arizona (2), Kansas (2), Michigan (2), Connecticut (1), D.C. (1), Idaho (1), Kentucky (1), Minnesota (1), South Carolina (1), Tennessee (1), Utah (1). The remaining nineteen states have none. Innocence Project (2006), [http://www.innocenceproject.org/case/display\\_cases.php?sort=year\\_exoneration](http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration).

3. The patterns of error that appear in these exonerations are complex issues that require a great deal of study. Public policy has not kept pace with the phenomenon of post-conviction DNA and the revelations of critical flaws in our criminal justice system. Pennsylvania is not unique in this regard. The purpose of this article is to aid in the development of an informed public policy that serves the interests of the wrongfully accused, victims, and law

drawn; Pennsylvania has had enough experience with wrongful convictions to warrant a forthright and systemic review of what *is* right and wrong with the Commonwealth's system of criminal justice.<sup>4</sup>

The unrealized promise of "liberty and justice for all" foreshadows a failure that may be worse than convicting a factually innocent individual. If we fail to recognize our errors as revealed in these post-conviction DNA cases, wherever we encounter them, and correct them as far as lies within our means, the moral force of our criminal law will continue its descent into chaos.<sup>5</sup> Inescapably, both at once and continuing over time, wrongful convictions diminish public confidence<sup>6</sup> in the rule of law by striking directly at that which imbues our criminal justice with its moral authority—our standard of proof.<sup>7</sup>

enforcement, through the creation of innocence reforms. Many of these reforms find their roots in human failures that are wholly correctable. While there are multiple and layered wrongful conviction indicia in these eight Pennsylvania cases, this article will highlight the principle errors appearing in each case.

4. See, e.g., Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003* (2004), available at <http://mindfully.org/Reform/2004/Prison-Exonerations-Gross19Apr04.htm>.

5. By way of an important example, Virginia will soon be the first state to systematically look through its State Crime Lab's files in old cases where physical evidence remains to be tested, rather than wait for inmates to stake their actual innocence claims based on DNA testing. While this may seem extreme in terms of its scope, Governor Warner's review order is predicated upon the very disturbing revelations of misconduct by a Virginia Crime Lab scientist (now deceased) who falsified test results that were used to convict at least three factually innocent individuals. Governor Warner's response is morally and legally sound and profoundly necessary. For more on reform efforts taking shape in the Commonwealth of Virginia, see *The Innocence Commission for Virginia* (2005), <http://www.icva.us>. For an interesting contrast in thought, see Pennsylvania Attorney General's view on whether Pennsylvania needs a compensation statute at *infra* note 25.

6. "Criminal justice in America today is a paradox of progress: While the fairness and effectiveness of criminal justice [is improving through DNA exonerations,] public trust and confidence apparently have not . . . Gallup polls over the past few years have consistently found that Americans have less confidence in criminal justice than in other institutions." Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 J. NAT'L INST. JUST. J. 23 (2005). Recognizing the potential harm these revelations create, in the summer of 2000, the Office for the District Attorney for the County of San Diego voluntarily began a review of past cases involving biological materials in order to determine if DNA evidence could provide exonerating information. This project, headed by Deputy District Attorney George W. ("Woody") Clarke, was one of the first of its kind ever undertaken in the nation. See Alex Roth, *San Diego DA To Use DNA Tests To Recheck Convictions: Bold Plan Aims To See None Are Wrongfully Imprisoned*, SAN DIEGO UNION-TRIB., June 4, 2000, at A-1. Since then, a number of prosecutors have voluntarily adopted similar conviction reviews. See, e.g., Stuart Pfeifer, *O.C. Pioneering a D.A.-Defender Project on DNA Law: As Innocence Projects To Root Out Wrongful Convictions Spring Up Nationwide, This One Pairs Traditional Adversaries*, L.A. TIMES, July 28, 2000, at A1.

7. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 114 (1999) ("Some legal principles, notably those of the criminal law, are plainly informed by the moral opinions of the community.") While throughout his book, Judge Posner takes to task a number of scholars who fail to recognize the imperfections in the overlap of law and morality, he does write that one fundamental reason for the common foundations is that "they are parallel methods . . . for bringing about the kind and degree of cooperation that a society needs in order to prosper." *Id.* at 108.

Pennsylvania's exonerations forewarn us that the criminal law's most celebrated and sacred guarantors of fairness, the "presumption of innocence" and "proof beyond a reasonable doubt," increasingly appear to be little more than formalistic metaphors. Indeed, they are in jeopardy of losing their moral force. Factual truth can be a difficult conquest in any criminal proceeding. We understand *a priori* that we will never achieve perfection in our criminal justice system. Our notion of justice accepts as much, in that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."<sup>8</sup> But, accepting this as true is not at all the same as countenancing the conviction of a factually innocent individual.

Wrongful convictions perpetually place at issue the question of whether public policy will nurture or injure confidence in our ability to separate those who are guilty from those who are not.<sup>9</sup> At a minimum, our approach to this question has the capacity to be paradigmatic of what *will be* right or wrong with Pennsylvania's criminal justice.<sup>10</sup>

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8. *Patterson v. New York*, 432 U.S. 197, 208 (1977).

9. *See In re Winship*, 397 U.S. 358 (1970). In its discussion of the bedrock principle "proof beyond a reasonable doubt," the Court writes:

[The] use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

*Id.* at 364. Justice Harlan, in his concurring Opinion, added:

In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

*Id.* at 372.

10. Federal public policy is driving many of the state reform efforts. The 2002 Senate Report on the Innocence Protection Act stated, in part, "[r]ecent exonerations of inmates awaiting capital punishment or serving lengthy prison sentences have cast doubt on the reliability of the criminal justice system." S. REP. NO.107-315, at 7 (2002). The Innocence Protection Act, 118 Stat. 2278 (2004), subsequently enacted as part of the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004) and codified at 18 U.S.C. 3600. ("Senate Report"), is often referred to as the most sweeping criminal justice reform measure in our lifetime. On October 10, 2004, H.R. 5107, the Justice for All Act ("JFAA"), passed both chambers of Congress and was signed into law on October 30, 2004.

H.R. 5107 includes the major components of the Innocence Protection Act (IPA), another piece of Congressional legislation which, among other things, grants any inmate convicted of a federal crime the right to petition a federal court for DNA testing to support a claim of innocence. It also encourages states—with the power of the purse—to adopt adequate measures to preserve evidence and make post-conviction DNA testing available to inmates seeking to prove their innocence, and to establish government

Science and reason have prescribed a clear course for innocence reforms.<sup>11</sup> It remains to be seen if we are willing to follow its lead into unfamiliar territory. Post conviction DNA applications resist the established criminal justice principle of finality much in the same manner that truth rebels against contradiction. Sir Alec Jeffreys' revolutionary information science<sup>12</sup> projects our "presumption of innocence"<sup>13</sup> beyond the trial and hauntingly into the realm of post conviction.<sup>14</sup> That is the nature of science; in these cases, DNA

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entities capable of conducting independent external investigations of state and local crime labs where there are serious allegations of misconduct or gross negligence.

Innocence Project Memorandum, available at [http://www.innocenceproject.org/docs/JFAA\\_Memo.pdf#search='H.R.%205107%20includes%20the%20major%20components'](http://www.innocenceproject.org/docs/JFAA_Memo.pdf#search='H.R.%205107%20includes%20the%20major%20components') (last visited Mar. 8, 2006).

11. Among many important studies and works, three contemporary sources have been influential as leading lights for the creation of innocence reforms. Edward Connors et al., *Convicted by Juries, Exonerated by Science, Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996), available at <http://www.ncjrs.org/pdffiles/dnaevid.pdf>; James S. Liebman et al., *A Broken System: Error Rate in Capital Cases, 1973 - 1995* (2000), available at <http://ccjr.policy.net/proactive/newsroom/release.vtml?id=18200>; BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED (2000).

12. In 1985, English geneticist, Sir Alec Jeffreys, found "that certain regions of DNA contained DNA sequences that were repeated over and over again next to each other." See Alec Jeffreys et al., *Hypervariable 'Minisatellite' Regions in Human DNA*, 314 NATURE 67 (1985); see also Alec Jeffreys et al., *Individual-specific "Fingerprints" of Human DNA*, 316 NATURE 76 (1985). In the above-stated process, Jeffreys also discovered that "the number of repeated sections present in a sample could differ from individual to individual," otherwise known as VNTR. *Id.* at 3. Also, see JOHN M. BUTLER, FORENSIC DNA TYPING (2001). Jeffreys' DNA identification methods were first employed in an English immigration case and were later used to solve the Narborough murders of two young teen girls. JOSEPH WAMBAUGH, THE BLOODING (1989).

13. A discussion of the ancient origins of our "presumption of innocence" appeared in the nineteenth century case of *Coffin v. United States*, 156 U.S. 432, 454-55 (1895). The Court, citing *Greenleaf on Evidence*, traced the origin of the presumption to *Deuteronomy*, and quoted *Mascardius Do Probationibus*, to show that it was substantially grounded in the laws of Sparta and Athens. *Id.* at 454. The *Coffin* Court also referenced Roman law traditions, citing the following extracts from the *Code of Justinian* and *Digest of Justinian*. It is noteworthy, too, that the Doctrine of Lenity, among other familiar due process considerations, appears to have its origins grounded in these ancient traditions: e.g., "Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day;" "The noble (divus) Trojan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent;" "In all case of doubt, the most merciful construction of facts should be preferred;" "In criminal cases, the milder construction shall always be preserved; and "In cases of doubt, it is no less just than it is safe to adopt a milder constructions." *Id.* (citations omitted). The *Coffin* Court also observed that many of the fundamental and humane maxims of Roman law are preserved in canon law. *Id.* at 455.

14. A person, when first charged with a crime, is entitled to a presumption of innocence and may insist that his guilt be established beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. *Cf. Ross v. Moffitt*,

delivers justice to its final angle of repose—where the innocent’s truth and freedom ultimately reside. And with each new arrival, we experience an unfortunate and perpetual paradox; with every celebration of an exoneration, we are sadly reminded that there are far more innocents who have lost their freedom than there are those who have found it.

The progress of science keeps us alert and inventive. But, the tempo of DNA’s arrival in criminal justice continues to be both welcome and worrisome, as we find ourselves trying to create policy reforms under the crushing weight of time that is not on our side.<sup>15</sup> What we can learn from the injustices suffered by the *Pennsylvania Eight*, and the injustices revisited upon the victims of these now unsolved crimes, provides the citizens of the Commonwealth with a profound and precious opportunity to act on our basic and decent instincts “to do justice.” Rather than wait any longer, Pennsylvania should join with other states, such as Wisconsin, Illinois, and North Carolina, among others, in leading the nation on the rising road to critical innocence reforms.

Often times, science will take us to that fine line between chaos and creation. But invariably, it leaves us with the choice on how or whether to proceed. Both the evidence for reform and the opportunity to choose has fallen on our watch. *Pennsylvania’s Innocents*, featured in this article, currently consists of eight individuals who were found guilty of various offenses and later exonerated by DNA.<sup>16</sup> Through their unimaginable journeys, this article

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417 U.S. 600 (1974). For a discussion of the doctrinal preclusion in federal courts from entertaining free-standing actual innocence claims on habeas corpus review, see Eli Paul Mazur, “I’m Innocent”: Addressing Freestanding Claims of Actual Innocence in Federal and State Courts, 25 N.C. CENT. L.J. 197 (2003).

15. The learning moment of DNA challenges us to prevail in at least four essential reform-driven tasks that are tantamount to race against time. First, we need to be sure to locate and preserve all biological materials in old and cold cases that may lead to the discovery of countless other wrongfully convicted individuals and perpetrators. Next, we need to transfer the lessons learned from these DNA exoneration cases, ideally through a commission constituted to review such matters, to cases where no biological materials are involved—which represent the vast majority of all violent felonies. See Greg W. Steadman, *Survey of DNA Crime Laboratories, 2001* (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sdnacl01.pdf>. Next, we have the race against time to transfer these lessons to the pre-trial setting in both DNA and non-DNA cases. Finally, and most importantly, we must move quickly and demonstrably, as in the creation of an innocence commission, to re-establish the moral force of our criminal law.

16. The Pennsylvania post-conviction DNA exonerees are Thomas Doswell, Bruce Godschalk, Barry Laughman, Vincent Moto, Willie Nesmith, Dale Brison, Nicholas Yarris, and Bruce Nelson. For case profiles, visit The Innocence Project, [http://www.innocenceproject.org/case/display\\_cases.php?sort=year](http://www.innocenceproject.org/case/display_cases.php?sort=year) exoneration (last visited Mar. 8, 2006). There are certainly more than eight wrongfully convicted individuals among Pennsylvania’s prison population of 42,000 inmates. These eight represent our data set of DNA exonerees. The Northwestern Law School website identifies a number of DNA and non-DNA Pennsylvania exonerees dating back to 1891. It is not suggested by the author that this list is complete or entirely accurate. See generally *The Exonerated: Pennsylvania* (2005), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/PennsylvaniaList.htm>. See also Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-US.pdf>.

will provide the reform-minded traveler with some perspective on the underlying causes of Pennsylvania's wrongful convictions and offers policy reforms to minimize their reoccurrence.<sup>17</sup>

## II. RECOGNIZING THE FINE LINE BETWEEN CHAOS AND CREATION

It was the year that Lady Justice looked in the mirror and blanched. Just as the Supreme Court was presented with the astounding question of whether it would be constitutional to execute a factually innocent individual,<sup>18</sup> the

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Post Script: On May 1, 2006, days before this article was published, Drew Whitley became the ninth Pennsylvanian exonerated by post-conviction DNA testing. By all accounts, more than one of the wrongful conviction indicia described throughout this article are present in Whitley's case. See Bill Moushey, *Prisoner Cleared of 1988 Slaying is Set Free*, PITTSBURGH POST-GAZETTE, May 1, 2006. In the interest of time, this article will refer to the Pennsylvania Eight, with no disrespect intended to Drew Whitley's recent exoneration.

17. It is rare when a wrongful conviction case will turn on a single "type" of error, such as misidentification, misconduct, snitch testimony, junk science, and false confessions, among others. Often times, multiple indicia appear in the case and are inseparable by their insidious nature. For example, false confessions almost always are the product of some degree of contamination visited upon the accused. Whether or not that contaminant amounts to misconduct is a fine line to distinguish. Flawed eyewitness testimony falls in this same category as do questions of misconduct and bad lawyering enter into the problem of junk science. These distinctions are made to simply call to the readers' attention that this article will attempt to focus on the particular indicia that result in each of the wrongful convictions of the Pennsylvania Eight. To be sure, these cases are complex and reveal multiple and layered causes that led to their confinement.

18. Twelve years after *Herrera*, Lady Justice might have her color restored. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding") (Freestanding claims of actual innocence are not constitutional in nature). *Id.*, at 404-405. The *Herrera* Court did not fully take up the question of whether the imprisonment of a factually innocent individual is a violation of the Fifth and Fourteenth Amendments' substantive due process guarantee. *Id.* In her concurring opinion, Justice O'Connor opined that the execution of an innocent individual would be unconstitutional. *Id.* at 419. In September 2005, The American Bar Association filed a Brief Amicus Curiae in a Tennessee case, currently before the United States Supreme Court, in which a death row defendant claims that new DNA evidence may vindicate him. Brief for the American Bar Ass'n as Amicus Curiae, *House v. Bell*, No. 04-8990 (*cert* granted June 28, 2005), available at <http://www.supremecourtus.gov/docket/04-8990.htm>. In *House*, the Court will decide, for the first time, the impact of DNA evidence on the constitutional right to a fair trial. The case, to be argued January 11, confronts the court with a genuinely novel question: Are federal judges empowered under the Habeas Corpus Act to overturn a state conviction based on new evidence that casts serious doubt on the defendant's guilt? *House* is asking the Court to identify or clarify the standards of review suggested in *Herrera* and *Schlup v. Delo*, 513 U.S. 298 (1995), for an actual innocence claim under federal habeas corpus "in light of now-acknowledged flaws in the criminal justice system that can cause erroneous convictions—flaws not well-recognized when *Schlup* and *Herrera* were decided." The ABA is urging the Court to adopt the standard of a "colorable claim of factual innocence." See *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986), in which a "colorable claim of factual innocence" is discussed as being tantamount to a "fair probability" standard. See Brief for the American Bar

trumpet blast arrival of DNA prevailed for the first time in a capital case, securing the release of a Maryland death row inmate who had served eight years, eleven months, and nineteen days for a crime he did not commit.<sup>19</sup> Science reawakened us to the sense that truth is a difficult and ongoing conquest.<sup>20</sup> The exoneration of Kirk Noble Bloodsworth was the clarion call for introspection and reconciliation of a criminal justice system that had lost its course.<sup>21</sup>

The confluence of science and law, particularly in a criminal setting, frequently reminds us that “life and liberty are our nation’s most precious and most vulnerable treasures.”<sup>22</sup> Yet remarkably, there is no public outcry or

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Ass’n as Amicus Curiae, *House v. Bell*, No. 04-8990 (*cert* granted June 28, 2005), available at <http://www.abanet.org/crimjust/news/houseamicus.pdf>.

19. Kirk Bloodsworth’s journey toward truth and freedom had two destinations—both of which are remarkably told in TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA* (2004). At first, we read how eyewitness accounts, bad lawyering, and prosecutorial misconduct combine to land Bloodsworth on death row for the 1984 brutal rape and murder of nine year old, Dawn Hamilton. After a second trial brought about by Brady violations, Bloodsworth was again convicted and sentenced to life without parole. Following his unimaginable journey toward release, Bloodsworth made his difficult re-entry into the community under the watchful and unforgiving eye of a prosecutor, among others, who were not quite ready to trust the science that set him free. Only under threat of a lawsuit in 2003, ten years after Bloodsworth’s release, did the Baltimore County DA upload the biological evidence in the case taken from Dawn Hamilton’s garments into Maryland’s CODIS (Combined DNA Index System). The result was a cold hit that not only brought true freedom for Bloodsworth, but also solved one of the most heinous crimes in Baltimore County’s history. Faced with irrefutable evidence, Kimberly Shay Ruffner, a convicted rapist already doing time, entered a plea of guilty. In a final twist worthy of a Stephen King novel, Ruffner had lifted weights with Bloodsworth and slept in the cellblock beneath him at the same Maryland correctional facility.

20. See *U.S. v. Sampson*, 275 F. Supp. 2d 49, 56 (D. Mass. 2003) (“[I]n the past decade, substantial evidence has emerged to demonstrate that innocent individuals are sentenced to death, and undoubtedly executed, much more often than previously understood.”); Also, see *Harvey v. Horan*, 285 F.3d 298, 305-306 (4th Cir. 2002) (Luttig, J., concurring) (“[T]hese scientific advances must be recognized for the singularly significant developments that they are. . .”).

21. “The process of justice is never finished, but reproduces itself, generation after generation, in ever-changing forms, and today, as in the past, it calls for the bravest and the best.” Benjamin N. Cardozo, *Law and Literature*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, THE CHOICE OF TYCHO BRAHE* 417 (Margaret E. Hall ed., 1947).

22. At the June 1, 2003 commencement address to the graduating class of Swarthmore College, Judge Jed Rakoff ended his speech with these words that no doubt reflected his concern over executing a factually innocent person. A year earlier, for these very reasons, Judge Rakoff declared the federal death penalty unconstitutional. See *U.S. v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002), *rev’d*, *U.S. v. Quinones*, 313 F.3d 49, 69 (2d Cir. 2002). In a case that will long be remembered for its moral foresight, rather than its disposition on appeal, Judge Jed Rakoff offered the following rationale for his decision that falls within the intellectual, if not moral, lineage of Judge Learned Hand in *U.S. v. Garsson*, 291 F. 646 (S.D.N.Y. 1923).

Traditional trial methods and appellate review will not prevent the conviction of innocent people. . . . What DNA testing has proved, beyond cavil, is the remarkable degree of fallibility in the basic fact-finding process on which we now rely in criminal cases. In each of the 12 cases of DNA-exoneration of death row inmate referenced in *Quinones*,

demand for public inquiries into these 175 post conviction DNA exonerations. The pathos of a society that thrives on chatter is one of the many obstacles keeping this profoundly important policy debate away from the center of our national conversation. But, the increasing weight of these exonerations, underscored by tales of gross injustices and patterns of failures, is forcing the innocence reform discourse from the alleys onto Main Street.<sup>23</sup>

Surely, an ordered society must have faith in the ability of its constitutional, evidentiary, and procedural safeguards to routinely and reliably impart justice.<sup>24</sup> However, such confidence is misplaced if it rests upon static conditions for criminal justice public policy-making. Innocence reforms are not “solutions in search of problems.”<sup>25</sup> On the contrary, our due process standards and safeguards for establishing proof, factual truth, and justice are in need of constant vigilance.<sup>26</sup> Criminal justice is necessarily a progressive construction; it is at its best when it is open and responsive to advances in the natural, applied, and social sciences as they bear on the central question of factual truth.<sup>27</sup> Judge Learned Hand understood the consequences of a static

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the defendant had been guilty by a unanimous jury that concluded that there was proof of his guilt beyond a reasonable doubt; and each of the 12 cases, the conviction had been affirmed on appeal, and collateral challenges rejected, by numerous courts that had carefully scrutinized the evidence and the manner of conviction. Yet, for all this alleged ‘due process,’ the result, in each and every one of these cases, was the conviction of an innocent person who, because of the death penalty, would shortly have been executed – some came within days of being so – were it not for the fortuitous development of a new scientific technique that happened to be applicable to their particular cases.

*Quinones*, 205 F. Supp. 2d at 264.

23. See *infra* notes 260-65.

24. For some examples of constitutional provisions that have the effect of ensuring against the risk of convicting an innocent person, see *Coy v. Iowa*, 487 U.S. 1012 (1988) (right to confront adverse witnesses); *Taylor v. Illinois*, 484 U.S. 400 (1988) (right to compulsory process); *Strickland v. Washington*, 466 U.S. 668 (1984) (right to effective assistance of counsel); *In Re Winship*, 397 U.S. 358 (1970) (prosecution must prove guilt beyond a reasonable doubt); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution must disclose exculpatory evidence); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel); *In re Murchison*, 349 U.S. 133, 136 (1955) (right to “fair trial in a fair tribunal”). In capital cases, the Court has required additional protections because of the nature of the penalty at stake. See, e.g., *Beck v. Alabama*, 447 U.S. 625, 633-38 (1980) (jury must be given option of convicting the defendant of a lesser offense). The Court has also observed “due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.” *Patterson v. New York*, 432 U.S. 197, 209 (1977).

25. “This is a solution in search of a problem.” Pennsylvania Attorney General Tom Corbett through his spokesman, Kevin Harley, on Pennsylvania’s lack of a compensation statute for wrongfully convicted exonerees. Harley goes on to say the law (compensation statute) isn’t necessary because exonerations are so rare in Pennsylvania, and the wrongly convicted can always pursue their claims through the federal court system. See Torstens Ove, *State Doesn’t Give a Dime to the Innocent*, PITTSBURGH POST-GAZETTE, Aug. 7, 2005, at 1.

26. See *supra* note 24.

27. If your subject is law, the roads are plain to anthropology, the science of man,

criminal justice policy when he made his now iconic observation that is as pertinent today as it was in 1923: “Our procedure has been always haunted by the ghost of an innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats prosecution of the crime.”<sup>28</sup>

The pursuit of innocence reforms in response to any circumstances, in any era or under any conditions, is an uneasy journey, especially if the passenger fails to anticipate the chance of rough seas of political indifference or outright contempt from a public with malleable values.<sup>29</sup> Our failure to fully understand what takes place at the intersection of science and law inhibits our ability to craft rules for more reliable fact-finding and resolution of our disputes.<sup>30</sup> Given their strong convictions on the importance of science and proof, one can only imagine how Dean Wigmore, Judge Learned Hand, or

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to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life. It would be equally true of any subject. The only difference is in the ease of seeing the way. To be master of any branch of knowledge, you must master those which lie next to it; and thus to know anything you must know all.

Oliver Wendell Holmes, *Profession of the Law*, in COLLECTED LEGAL PAPERS 30 (1920).

28. Judge Learned Hand captured the sentiment for the ages: “Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream.” U.S. v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (emphasis added). Also, see U.S. v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968) (quoting *Garsson*, 291 F. at 649); U.S. v. Smith, 179 F. Supp. 684, 686 (D.D.C. 1959), *aff’d*, 283 F.2d 607 (D.C. Cir. 1960) (same); U.S. v. Heideman, 21 F.R.D. 335, 340 (D.D.C. 1958), *aff’d*, 259 F. 2d 943 (D.C. Cir. 1958) (same); U.S. v. Potts, 57 F. Supp. 204, 206 (M.D. Pa. 1944).

29. See, e.g., EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (Garden City Publishing Co. 1932).

30. Dean John Henry Wigmore’s body of work repeatedly extols the virtue of law imbued by science. In his 1913 treatise, Dean Wigmore offers the following thoughts on the “science of proof” as he clearly envisioned and aspired to, in one form or another, the impact of science which we continue to weave, by statute and judicial opinions, into our body of criminal law:

[T]he process of Proof . . . is the ultimate purpose in every judicial investigation. The procedural rules for Admissibility are merely a preliminary aid to the main activity, viz. the persuasion of the tribunal’s mind to a correct conclusion by safe materials. This main process is that for which the jury are there, and on which the counsel’s duty is focused. Vital as it is, its principles surely demand study.

And for another thing, the judicial rules for Admissibility are destined to lessen in relative importance during the next generation or later. Proof will assume the important place; and we must therefore prepare ourselves for this shifting of emphasis. We must seek to acquire a scientific understanding of the principles of what may be called ‘natural’ proof—the hitherto neglected process. If we do not do this, history will repeat itself, and we shall find ourselves in the present plight of Continental Europe. There, in the early 1800s the ancient worn-out numerical system of ‘legal proof’ was abolished by fiat, and the so-called ‘free proof’—namely, no system at all—was substituted. . . . Only in recent times, under the influence of MODERN SCIENCE, are they beginning to develop a science of proof.

JOHN HENRY WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF 1-2 (1913).

Professor Edwin Borchard would have responded to the clarity of the issues and opportunities now before us. They would no doubt agree that if experience is the name we give our mistakes,<sup>31</sup> we have quite the résumé to handle what Justice Frankfurter referred to as “the eternal struggle of the law between constancy and change.”<sup>32</sup>

DNA presents us with a once unimaginable context to study our method for protecting the innocent and convicting the guilty. While its arrival has created a somewhat chaotic state, it has renewed our concerns for the moral legitimacy of criminal justice and rekindled an awareness of the value that science brings to the law as its suitor. If we can agree that change is part and parcel of the continuum in American criminal justice policymaking, then the Commonwealth must accept the weighty presence of the *Pennsylvania Eight* by acting upon the lessons they reveal.

### III. CASE REVIEW METHODS & LIMITATIONS

I should emphasize that my intention is solely to identify the patterns and conditions that contributed to the wrongful conviction of these eight Pennsylvanians, and to introduce several reforms and reform methods that are politically and scientifically ripe for consideration. These include the formation of a Pennsylvania Innocence Commission to study every aspect of the conditions that lead to wrongful convictions, and reforms in the areas of eyewitness identification, false confessions, and the use of snitch testimony.

I have reviewed these cases from a wide variety of sources to ensure, to the fullest extent possible, the facts relied upon for highlighting the wrongful conviction indicia in each of these cases. From the earliest available news reports of the crimes charged, trial and appellate court records, and records of post-conviction challenges, the information gathered to produce the material portions of these case summaries are corroborated by a variety of sources, including interviews and conversations with several exonerees, their legal counsel, journalists, and others directly and indirectly involved in these cases. I have also reviewed federal civil rights complaints filed in four of the eight cases, as well as information provided by the Cardozo Innocence Project, the Justice Project, and the Center for Wrongful Convictions at the Northwestern University School of Law. These organizations closely monitor DNA exonerations with the express purpose of providing researchers with accurate information while, as accurately as possible, attempting to provide important and credible information for innocence policy reforms.

My examination of the *Pennsylvania Eight* cases revealed the fatal effect of junk science and convincing evidence of misconduct involving certain police and one State police lab chemist. By way of a brief explanation of how

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31. Oscar Wilde, unattributed.

32. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE CONSTITUTION 40 (1927); *See also* EUGENE C. GERHART, QUOTE IT! MEMORABLE LEGAL QUOTATIONS 66 (1969).

pervasive these problems are throughout the country, a recent *Chicago Tribune* series exhaustively examined 200 DNA and Death Row exoneration cases, dating back to 1986. Their findings revealed that more than a quarter of the exonerations involved faulty crime lab work or testimony combined with some level or degree of misconduct. In recent years, incidents of misconduct ranging from negligence to outright deception have been uncovered at some of the nation's most prestigious crime labs in at least seventeen states.<sup>33</sup> Among the failures were faulty blood analysis, fingerprinting errors, flawed hair comparisons, and the contamination of evidence used in DNA testing. To one degree or another, complicity with law enforcement and the prosecutorial process is prevalent in many of these cases.<sup>34</sup>

For the purpose of this article, reforms in the areas such as junk science and the various forms of misconduct, along with such other issues as attempts to "streamline" collateral proceedings, preservation of evidence, statutes of limitations, compensation, CODIS expansion, and emerging shortcomings in Pennsylvania's Coroner's Act,<sup>35</sup> are all important innocence reform subjects for a fast approaching, but different day. The important solutions they call for, in the opinion of the author, are not nearly as politically viable, for the moment, as those that have become the focus of this article.

We are at a starting point for innocence reforms in Pennsylvania. Our canvas is relatively free of the policy and scholarly artwork that will eventually paint a new and important landscape for our criminal justice policies. With this review of the *Pennsylvania Eight*, and the promise of an Innocence Commission, our journey toward ending wrongful convictions in Pennsylvania is about to begin.<sup>36</sup>

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33. Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHIC. TRIB., Oct. 21, 2004, at C1.

34. *Id.*

35. The Coroner's Act of 1953 is found at PA. STAT. ANN. tit. 16, §4243 (2001).

36. Pennsylvania Senate Bill 1069 (Printer's no. 1519) has received unanimous approval of the Senate Judiciary Committee and the full Senate. It is currently in the State Appropriations Committee for a fiscal note. The Act, as amended February 24, 2006, provides:

PRIOR PRINTER'S NO. 1468

PRINTER'S NO. 1519

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 1069 Session of 2006

INTRODUCED BY GREENLEAF, LEMMOND, COSTA, O'PAKE, BOSCOLA,  
PIPPY, WONDERLING, FONTANA, BROWNE, KITCHEN, WOZNIAK, C.  
WILLIAMS, STACK, FERLO AND LAVALLE, JANUARY 24, 2006

SENATOR GREENLEAF, JUDICIARY, AS AMENDED, FEBRUARY 14, 2006

AN ACT

1 Establishing the Innocence Commission of Pennsylvania; providing

2 for its duties; and providing for the powers and duties of  
3 the Joint State Government Commission.  
4 The General Assembly of the Commonwealth of Pennsylvania  
5 hereby enacts as follows:

6 Section 1. Short title.

7 This act shall be known and may be cited as the Innocence  
8 Commission Act.

9 Section 2. Definitions.

10 The following words and phrases when used in this act shall  
11 have the meanings given to them in this section unless the  
12 context clearly indicates otherwise:

13 "Commission" or "Innocence Commission." The Innocence  
14 Commission of Pennsylvania.

15 Section 3. Innocence Commission.

16 (a) Establishment.--The Innocence Commission of Pennsylvania  
17 is hereby established.

18 (b) Membership.--The commission shall be composed of

1 approximately 30 members recommended by the Governor, the Chief  
2 Justice of the Pennsylvania Supreme Court and the members of the  
3 General Assembly. Using their recommendations, the Joint State  
4 Government Commission shall invite members to participate on the  
5 commission based on competence, experience and anticipated  
6 commitment. Invitations shall be further based on the need for  
7 the commission to be diversely representative of the criminal  
8 justice system AND GEOGRAPHICALLY REPRESENTATIVE OF  
9 PENNSYLVANIA. Representation must include at least one member  
10 from the following constituencies: prosecution, defense, law  
11 enforcement, corrections, judiciary and victim assistance. In  
12 addition, the commission may include representatives of  
13 academia, private and public organizations involved in criminal  
14 justice issues and other criminal justice experts.

15 (c) Chairperson and vice chairperson.--The members shall  
16 elect, by a majority vote of the voting members, a chairperson  
17 and a vice chairperson.

18 (d) Quorum.--A majority of members appointed THE MEMBERS  
19 PRESENT AND VOTING AT ANY ANNOUNCED MEETING shall constitute a  
20 quorum for the purpose of transacting business.

21 (e) Work of the commission.--The commission may establish  
22 subcommittees to conduct research, to consider and make  
23 recommendations on specific topics and to report back to the  
24 full commission. Whenever possible, members of a subcommittee or  
25 the commission shall reach a consensus on the findings and  
26 recommendations of the commission.

27 (f) Compensation.--The members shall not receive a salary or  
28 per diem allowance for serving as commission members but shall  
29 be reimbursed for actual and necessary expenses incurred in the  
30 performance of their duties.

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1 (g) Staff.--The Joint State Government Commission shall  
2 provide staff services to the commission. These services may

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3 include organizing meetings, conducting research and drafting  
4 reports and legislation.  
5 Section 4. Purpose and duties.  
6 (a) Purpose.--The purpose of the commission is to study the  
7 underlying causes of wrongful convictions so that it may make  
8 recommendations intended to reduce or eliminate the possibility  
9 that in the future innocent persons will be wrongfully convicted  
10 in this Commonwealth.  
11 (b) Powers and duties.--The commission shall have the duty  
12 to:  
13 (1) Review cases in which an innocent person was  
14 wrongfully convicted and subsequently exonerated.  
15 (2) Identify the most common causes of wrongful  
16 convictions.  
17 (3) Identify current laws, rules and procedures  
18 implicated by each type of causation.  
19 (4) Identify through research, experts and discussion  
20 potential solutions in the form of legislative, rule or  
21 procedural changes or educational opportunities for  
22 elimination of each type of causation.  
23 (5) Consider potential implementation plans, cost  
24 implications, INCLUDING POSSIBLE SAVINGS, and the impact on  
25 the criminal justice system for each potential solution.  
26 (6) Issue interim reports and/or a final report  
27 recommending solutions for each causation issue identified,  
28 including recommending implementation plans, identifying cost  
29 implications, INCLUDING POSSIBLE SAVINGS, and discussing the  
30 potential impact on the criminal justice system of the  
20060S1069B1519

1 recommendation.  
2 Section 5. Subpoena power, oaths and affirmations.  
3 On behalf of the Innocence Commission, the Joint State  
4 Government Commission may issue subpoenas duces tecum and other  
5 necessary process to compel attendance of witnesses and the  
6 production of any books, letters or other documentary evidence  
7 desired by the Innocence Commission. The chairman of the  
8 Innocence Commission may administer oaths and affirmations in  
9 the manner prescribed by law to witnesses who shall appear  
10 before the commission for the purpose of testifying in any  
11 matter about which the commission may desire evidence.  
12 Section 6. Subsequent proceedings.  
13 The findings and recommendations of the commission shall not  
14 be binding in any subsequent civil or criminal proceeding.  
15 Section 7. Expiration.  
16 The provisions of this act shall expire five years from the  
18 the General Assembly.  
19 Section 8. Effective date.  
20 This act shall take effect in 60 days.  
A3L42RLE/20060S1069B1519

A Bill analysis from the Senate of Pennsylvania Democratic Committee, dated February 15, 2006, reveals that SB 1069 was sponsored by Senator Greenleaf and provides the following:

## IV. INNOCENCE LOST: THE CHAOS

A. *Eyewitness Identification*

With reference to the narrative of events, far from permitting myself to derive it from the first source that came to hand, I did not even trust my own impressions, but it rests partly on what I saw myself, partly on what others saw for me, the accuracy of the report being always tried by the most severe and detailed tests possible. My conclusions have cost me some labor from the want of coincidence between accounts of the same occurrences by different eyewitnesses, arising sometimes from imperfect memory, sometimes from undue partiality for one side or the other.

Thucydides c. 460 – 400 B.V. *The History of the Peloponnesian War*, bk. I sec. 1. transl. By Sir Richard Livingstone.

Questions surrounding the accuracy of eyewitness testimony emanate from two sources: conditions contributing to the unreliability of the individual eyewitness,<sup>37</sup> and the procedures used by law enforcement to gather eyewitness accounts of crimes.<sup>38</sup> Witness and victim memory, especially with the passage of time, is influenced by individual bias, prejudice, “own group” and cross-racial bias, motives, stress, expectancy, mental capacity, environmental factors, the individual’s suggestibility, and the “manufacturing”

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The legislation establishes the Pennsylvania Innocence Commission. The purpose of the commission is to study and evaluate the underlying causes of wrongful conviction as they occur in the Commonwealth. The commission will be responsible for reviewing cases of wrongful conviction in which a person was convicted of a criminal offense and later found to be innocent of the crime for which the person was convicted. After identifying common causes of wrongful conviction, the commission will be responsible for identifying solutions in the form of legislative enactments, court rule or procedural changes.

The commission will be composed of approximately thirty (30) members recommended by the Chief Justice, Governor and members of the General Assembly. The legislation requires that the commission’s membership be geographically and professionally diverse. The Joint state Government Commission will serve as the professional staff of the Commission.

The Act takes effect in 60 days.

37. See BRIAN. L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995); See also Gary L. Wells & Amy L. Bradfield, *Distortions in Eyewitnesses’ Recollections: Can the Postidentification-Feedback Effect Be Moderated?*, 10 AM. PSYCHOL. SOC’Y 138 (1999).

38. United States Department of Justice Office of Research Programs, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>. Also, see Gary L. Wells et al., *Eyewitness Identification Procedure: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998).

influence of external misconduct, among other “falsifying pressures.”<sup>39</sup> Inadequate police procedures for conducting, documenting, and recording eyewitness interviews and identifications, contribute to the uncertainty of eyewitness accuracy based upon such practices and procedures as bias inducing photo arrays, live line-ups, and show up identifications.<sup>40</sup>

Each of the eight Pennsylvania post-conviction DNA cases contains multiple factors that have contributed to these wrongful convictions.<sup>41</sup> Not surprisingly, eyewitness or victim identification error is firmly among them.<sup>42</sup> The factual backgrounds in each of these cases are unremarkable on their face. But for the benefit of the hindsight provided by DNA, the identification errors they represent would be virtually undetectable.

*Thomas Doswell*

Eyewitnesses can make significant identification errors, but those errors can be difficult to detect, because most witnesses are sincere and have no motive to lie. When wrong, they usually are not being deceitful, but just simply

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39. *Supra* note 37.

40. *Supra* note 38.

41. While this article is focusing on Pennsylvania’s eight post conviction DNA exonerations, the Northwestern School of Law Center on Wrongful Convictions website identifies twenty-six non-DNA or DNA inconclusive exonerations that have occurred in Pennsylvania, with the first recorded wrongful conviction in the case of Samuel Greason dating back to 1905. Northwestern School of Law Center on Wrongful Convictions, *The Exonerated: Pennsylvania* (2005), <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/PennsylvaniaList.htm>. The basis for these exonerations, many if not most of which pre-dated the advent of DNA as an information science, included eyewitness error, false confessions, false statements, police and prosecutorial misconduct, and false informants. The names that appear on the Northwestern site are: Joseph Antoniewicz and his co defendants, William Hallowell and Edwards Parks, Edward Baker, George Bilger, Raymond Carter, Willie Comer, Matthew Connor, William Davis, Neil Ferber, William S. Green, Ernest Haines, Frank Harris, William Kelley, Thomas Kimball Jr. (death row), Calvin Lyons, William Nieves (death row), Anthony Piano, Edward Ryder, Rudolph Sheeler, Jay C. Smith (death row), Michael Sabol, Andrew Toth, Gerald C. Wentzel, and Robert Wilkinson. The Northwestern clinic offers the reservation that its site is not necessarily complete since, often times, trial transcripts and other pertinent court and case records are difficult to come by. The award-winning *Harrisburg Patriot News* reporter, Pete Shellem, identified two additional names for the author. They are Gerry Pacak and Steven Crawford. Mr. Shellem has devoted a great deal of his professional time writing about these cases and other cases of wrongful convictions. His extensive writings have been influential in uncovering error, particularly in the Crawford and Laughman cases. He may be reached at [pshellem@patriot-news.com](mailto:pshellem@patriot-news.com).

42. Over the past several decades, there have been a number of persuasive empirical studies and articles on the subject of eyewitness identification error and reform that consistently reveal similar data. See Wells et al., *supra* note 38; EDWARD CONNERS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE, CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, NATIONAL INSTITUTE OF JUSTICE (1996); Arye Rattner, *Convicted but Innocent: Wrongful Convictions and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283 (1988), Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395 (1987); and PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 25 (1965); BORCHARD, *supra* note 29.

mistaken or perhaps misled by manufactured evidence.<sup>43</sup> The latter was likely the case when in March 1986, a woman identified Thomas Doswell as the man who raped her.<sup>44</sup>

Within hours of the rape at the Forbes Health Center, Detective Herman Wolf went to the hospital where the victim was being examined to question her about her ordeal.<sup>45</sup> Doswell was no stranger to Detective Wolf. Two years prior,<sup>46</sup> Doswell was acquitted of one count of rape of his former girlfriend who had brought charges against Doswell as retribution for her unrequited affection. According to both Doswell and his mother, Detective Wolf approached them after the acquittal and warned Doswell that he “had not seen the last of him” and that he “was going to get him.”<sup>47</sup>

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43. Witness and victim misidentifications are often the product of either genuine mistake tied to any number of memory retrieval shortcomings possessed by the individual or some degree of post event contamination that may or may not be the product of purposeful conditions designed to “manufacture evidence.” Manufactured evidence has long been characterized as evidence that is not only physical in nature, but also testimonial. *See* *Mooney v. Holohan*, 294 U.S. 103 (1935) (knowing use of perjured testimony by the prosecution); *Napue v. Ill.*, 360 U.S. 64 (1959) (failure by the State’s Attorney to correct known false testimony of a witness); *Miller v. Pate*, 386 U.S. 1, 6-7 (1967) (prosecution knowing allowed witnesses to describe blood-stained shorts to the jury when the shorts were actually stained with paint); *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (prosecutions knowing use of perjured testimony); *Rowe v. City of Ft. Lauderdale*, 279 F.3d 1271, 1275, 1281 (11th Cir. 2002) (use of fabricated and false testimony); *Kingsland v. City of Miami*, 369 F.3d 1210, 1228 (11th Cir. 2004); opinion withdrawn and superceded, 2004 WL 2068362 (U.S. 2004) (discussing police officers who fabricate testimony in order to procure probable cause); *Limone v. Condon*, 372 F.3d 39, 44-5 (1st Cir. 2004) (describing law enforcement officers who developed a prosecution witness with knowledge that the witness would commit perjury). Such evidence manufactured by law enforcement officers deprives the accused of his liberty without due process of law. *See* MICHAEL AVERY ET AL., *POLICE MISCONDUCT, LAW AND LITIGATION* (3d ed. 2005). Often times, leading or coercive questions asked of an eyewitness can result in supplanting images and memories. *See* Kenneth R. Weingardt et al., *Misinformation Revisited: New Evidence on the Suggestibility of Memory*, 23 *MEMORY & COGNITION* 72-82 (1995). Also, *see* Kenneth R. Weingardt et al., *Reports of Suggested Memories: Do People Truly Believe Them?*, in *ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS* 3, 25 (David Frank Ross et al. eds., 1994) (“Witnesses can exhibit strong belief in their memories even when those memories are verifiably false.”).

44. The accounts of the events surrounding the arrest, trial, conviction, and post-conviction efforts of Thomas Doswell have been confirmed by conversations and interviews with Tom Doswell, Doswell’s attorneys, Peter Neufeld, local counsel James DePasquale, and his original trial counsel, Carl Marcus. *See also* Doswell’s profile at The Innocence Project: Thomas Doswell, available at [http://www.innocenceproject.org/case/display\\_profile.php?pid=163](http://www.innocenceproject.org/case/display_profile.php?pid=163) (last visited Mar. 8, 2006). Corroboration is provided from the author’s review of newspaper articles and court records. The author has made every effort to ensure the accuracy of the accounts of Thomas Doswell’s wrongful conviction. Much of this information is also taken or verified from court documents in Thomas Doswell’s possession. (on file with author).

45. *See* author materials, *supra* note 44.

46. *See id.*

47. *See id.*

The victim in this case was White.<sup>48</sup> She told Detective Wolf that her attacker had followed her into the hospital cafeteria.<sup>49</sup> She testified that Doswell locked the cafeteria doors behind her, threatened and forcibly raped her.<sup>50</sup> The victim and a co-worker, who came to her aid during the attack, picked Doswell from an eight-picture photo line-up on the day of the crime.<sup>51</sup> No procedural safeguards for presenting the array were taken to ensure the veracity of the identifications.<sup>52</sup> No special instructions were given.<sup>53</sup> The process was not documented in any great detail;<sup>54</sup> nor was there any helpful documentation taken of the eyewitness' initial responses.<sup>55</sup> None of the array photographs bore any special marking but for Doswell's;<sup>56</sup> his had a letter "R" written on it.<sup>57</sup> At trial, an officer explained that photographs codified with the letter "R" represented individuals who had been charged with rape.<sup>58</sup> Doswell had no such record, and it is uncontroverted that Detective Wolf had no reason to believe otherwise.

Oftentimes, the true test for the reliability of the identification of the accused is the process by which the perpetrator is identified.<sup>59</sup> It is noteworthy that the victim's initial description of her assailant did not fit Doswell.<sup>60</sup> It is also important to note that the victim told police within hours

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48. *See id.* Cross-racial identifications present a greater likelihood for misidentification than when the races are the same. *See generally* Hadyn D. Ellis, *Practical Aspects of Face Memory, in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 12, 17 (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972 (1988).

49. *See* author materials, *supra* note 44.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See* author materials, *supra* note 44.

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. A photographic identification procedure must be conducted so as not to be "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). Every identification procedure will be analyzed based on the facts surrounding or leading up to the circumstances of a particular case. "[T]he Commonwealth bears the burden of establishing that any identification testimony offered at trial is free from taint of initial illegality." *Commonwealth v. Moore*, 633 A.2d 1119, 1125 (Pa. 1994) (citing *Commonwealth v. Turner*, 314 A.2d 496 (Pa. 1974)). In making this determination, the Court should:

consider the manner in which the identification procedure was conducted, the witness' prior opportunity to observe, the existence of any discrepancies between the witness' description and the defendant's appearance, any previous identification, any prior misidentification, any prior failure of the witness to identify the defendant, and the lapse of time between the incident and the court identification.

*Moore*, 633 A.2d at 1125-26 (citing *Commonwealth v. Fowler*, 352 A.2d 17 (Pa. 1976); *United States v. Higgins*, 458 F.2d 461 (3d Cir. 1972)).

60. *See* author materials, *supra* note 44.

of her attack that during her struggle, she managed to bruise and scratch her assailant, at least on his forehead and forearms.<sup>61</sup> Within hours of this identification, it was established that Doswell had no such markings or injuries.<sup>62</sup>

At trial, the victim and her co-worker made in-court identifications of Doswell.<sup>63</sup> The physical evidence in the case was of little help to either the prosecution or the defense. No evidence had been found on the victim's clothing; but, spermatozoa were found on the vaginal swabs taken from the victim.<sup>64</sup> No definitive conclusions could be drawn from conventional serology, such as it was in 1986, however, the serologist did find A, B, and H antigens on the samples.<sup>65</sup> Because the victim was a type AB secretor, no conclusions could be made about the rapist's blood type, as the victim's blood type masked that of the perpetrator's.<sup>66</sup> The case went to the jury largely, if not entirely, on the two eyewitness identifications. In less than forty-five minutes of deliberation, the jury returned a verdict of guilty on all counts.<sup>67</sup> Doswell was sentenced to a term of thirteen to twenty-six years.<sup>68</sup>

In March of 2005, Doswell's petition for DNA testing was granted.<sup>69</sup> Based on these test results, Doswell was released from confinement on July 21, 2005 after serving nearly twenty years for a crime he did not commit.

#### *Vincent Moto*

Eyewitness identification can be the most important and convincing evidence in a case as well as the most unreliable. A shortcoming in mistaken identification cases of this nature is the failure to think of eyewitness evidence much like one would think of physical trace evidence,<sup>70</sup> both being subject to the same exigencies as degradation with passage of time depositing trace in the witness' memory.<sup>71</sup> Earlier, we noted that, typically, there are two types of

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61. *See id.*

62. *See* author materials, *supra* note 44.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See* author materials, *supra* note 44.

68. *See id.*

69. Doswell persisted with his challenge of the reliability of the eyewitness testimony against him, but he was unsuccessful in his direct appeals. In 1998, Doswell filed a petition for DNA testing that was denied because the motion was filed too late. Doswell persisted with his petitions, and through local counsel, James DePasquale, he succeeded in gaining access to have the biological materials from his trial submitted for examination. The test results revealed that Doswell was not the perpetrator.

70. *See* Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 240 (2000).

71. *See* Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 PSYCHOL. PUB. POL'Y & L. 726 (1995).

eyewitness error: a good faith mistaken belief or a false memory suborned by manufactured evidence. For Vincent Moto, the likely case is the former, though sadly, the result in his case was no different.<sup>72</sup>

Walking home from a local mini-mart, just after midnight on December 2, 1985, the victim in this case was approached by two men driving a Chevrolet Caprice.<sup>73</sup> The passenger, later identified by the victim as Vincent Moto, got out of the Caprice, pulled a gun on the victim, and forced her into the car.<sup>74</sup> The two men sped off to another location, where they proceeded to simultaneously sexually assault the victim.<sup>75</sup> Before pushing her out of the car half-naked, the two assailants robbed the victim of her money, glasses, and gold chain.<sup>76</sup>

In May of 1986, the victim saw Vincent Moto walking on a Philadelphia street with a woman and a young child.<sup>77</sup> Though five months had passed since the incident, the victim was convinced that Moto was one of her two attackers.<sup>78</sup> In response to her request for help, George Upshur detained Moto until the police arrived.<sup>79</sup> Moto was arrested and charged with multiple felonies. Despite the alibi testimony of Moto's parents, who testified that their son was at their home on the evening of the criminal incidents, Moto was convicted.<sup>80</sup> The prosecution's case hinged almost entirely on the strength of the victim's eyewitness testimony.<sup>81</sup> Moto was sentenced to a term of twelve to twenty-four years.<sup>82</sup> He served nearly nine years of his sentence before being released in July 1996, when PCR based DNA testing on material taken from the victim's underwear eliminated Moto as the source of the spermatozoa.<sup>83</sup> He served nine years for a crime he did not commit.

*Bruce Godschalk*

Many cases of wrongful convictions involve a calamity of error, purposeful and otherwise. In these cases, it is difficult to assign primacy to any one or more of the indicia that led to an accused's loss of liberty. It is particularly

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72. The widely reported account of Moto's case was derived and corroborated by the author from numerous newspapers articles, court records, and phone interviews with news reporters, a member of the state legislature working on behalf of Moto to pass a compensation statute, and information maintained by the innocence project at the Cardozo Law School. *See* The Innocence Project: Vincent Moto, [http://www.innocenceproject.org/case/display\\_profile.php?id=33](http://www.innocenceproject.org/case/display_profile.php?id=33) (last visited Mar. 8, 2006). The author has made every effort to ensure the accuracy of these accounts. (on file with author).

73. *See* author materials, *supra* note 72.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See* author materials, *supra* note 72.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See* author materials, *supra* note 72.

83. *Id.*

difficult to recognize failed eyewitness identification when it is bolstered by a detailed false confession and snitch testimony. These are the conditions that conspired against Bruce Godschalk and led to his wrongful conviction. His journey demonstrates that a confession or admission, much like an eyewitness's identification, or a snitch's testimony, is not always prompted by internal knowledge or guilt, but may be the product of external influences and outright deceit.

While it may be difficult to assess the recurrence rate of misconduct in the form of manufactured evidence, it is not unreasonable to suggest that leading questions or comments, inducements, or other tactics used by law enforcement, permissible or not, do take place in custodial and other settings. The misinformation effect of such conduct is a major source of legal error,<sup>84</sup> with nearly eighty percent of error assigned to misidentifications, twenty-seven percent to false confessions, and twenty percent related to snitch testimony.<sup>85</sup>

On July 13 and September 8, 1986, two rapes occurred at the Kingwood Apartment complex located in King of Prussia, Pennsylvania.<sup>86</sup> A rape test kit examination of both victims proved positive for seminal residua.<sup>87</sup> Although initially, both victims were unable to identify their perpetrator(s), the second victim subsequently aided police in creating a composite sketch of her assailant.<sup>88</sup> On December 30, 1986, in response to various print and television news reports containing the police composite sketch, police received a call from Godschalk's sister, who told them that Bruce Godschalk resembled the man in the sketch.<sup>89</sup> Godschalk's picture was one of an array of mug shots shown to one of the victims by police detective Bruce Saville from Montgomery County.<sup>90</sup> The second victim studied the array for nearly an hour before she picked Godschalk as her attacker.<sup>91</sup> The first victim could not

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84. Ronald P. Fisher, *Interviewing Victims and Witnesses of Crime*, 1 PSYCHOL. PUB. POL'Y & L. 732, 741 (1995). Dr. Fisher notes laboratory studies have determined that uninfluenced recollection is largely accurate with recall rates above ninety percent.

85. See The Innocence Project: Causes and Remedies, <http://www.innocenceproject.org/causes/index.php> (last visited Mar. 8, 2006).

86. The widely reported facts of Mr. Godschalk's case set forth herein were derived and corroborated from numerous newspapers articles, court records, phone interviews with reporters and others individuals familiar with the case, Peter Neufeld, and information maintained by The Innocence Project at the Cardozo Law School. See The Innocence Project: Bruce Godschalk, [http://www.innocenceproject.org/case/display\\_profile.php?id=102](http://www.innocenceproject.org/case/display_profile.php?id=102) (last visited Apr. 10, 2006); see also Seth F. Kreimer & David Rudovsky, *Double Helix: Double Bind: Factual Innocence And Postconviction DNA Testing*, 15 U. PA. L. REV. 547 (2002). The author has made every effort to ensure the accuracy of these accounts (on file with author).

87. See author materials, *supra* note 86. See also *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 367 (E.D. Pa. 2002)

88. See author materials, *supra* note 86.

89. See *id.*; Kreimer & Rudovsky, *supra* note 86.

90. See author materials, *supra* note 86.

91. See *id.*

make an identification.<sup>92</sup> Once again, there were no safeguards in place or followed when the eyewitness testimony was elicited.

On January 13, 1987, Godschalk was questioned by the Upper Merion Police, who subsequently arrested and charged him with both rapes.<sup>93</sup> Godschalk was additionally charged with two counts of indecent assault, stemming from two separate events occurring at the same apartment complex on April 15 and August 16 of that year.<sup>94</sup> During his interrogation, Godschalk gave a thirty-three minute taped confession that contained information that had not been made available to the general public.<sup>95</sup> Godschalk pleaded no contest to the lesser charges.<sup>96</sup>

The case's physical evidence was not at all helpful to either side at the time of trial. Conventional serology could not exclude Godschalk as the perpetrator.<sup>97</sup> The government's case in chief relied upon Godschalk's detailed confession, the identification by the second rape victim, and jailhouse snitch testimony which reported that Godschalk made inculpatory statements while being held for trial.<sup>98</sup> Despite his claim at trial that the detective had threatened him into confessing to the crimes,<sup>99</sup> Godschalk was convicted of both counts of forcible rape.<sup>100</sup> He served fifteen of his twenty years before being exonerated in 2002.<sup>101</sup> The eyewitness simply got it wrong.

*Willie Nesmith*

Following his second trial, with the first trial having ended with a hung jury, Willie Nesmith was sentenced to a term of nine to twenty-five years for the 1982 rape of a Dickinson college student.<sup>102</sup> His fate was sealed, almost entirely, by the eyewitness identifications of two individuals who placed Nesmith at or near the scene of the crime.<sup>103</sup> Nesmith had been a boxer who regularly worked out on Dickinson's campus.<sup>104</sup> Nothing in the trial suggested misconduct or any of the other complications or indicia that typically appear in wrongful conviction cases. Nesmith served eighteen years before his rape

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92. *See id.*; *see also* *Godschalk*, 177 F. Supp. 2d at 367.

93. *See* author materials, *supra* note 86.

94. *See* author materials, *supra* note 86.

95. *See id.* *See also* *Godschalk*, 177 F. Supp. 2d at 367.

96. *See* author materials, *supra* note 86.

97. *See id.*

98. *See id.*

99. Godschalk's false confession will be discussed later in this article.

100. *See* author materials, *supra* note 86.

101. *See id.*

102. The Innocence Project: Willie Nesmith, [http://www.innocenceproject.org/case/display\\_profile.php?id=67](http://www.innocenceproject.org/case/display_profile.php?id=67) (last visited Mar. 8, 2006).

103. *Id.*

104. George Strawley, *Cleared of Rape, He Pleads for DNA Bill*, PITTSBURGH POST-GAZETTE, Mar. 27, 2001, at B5.

conviction was overturned.<sup>105</sup> Often times, without malice or the slightest suggestion of bias or prejudice, an eyewitness makes a mistake. This appears to have been the case for Willie Nesmith, a pure example of simple eyewitness error.<sup>106</sup>

### B. False Confessions

It happens comparatively seldom that untrue confessions are discovered; but once this does occur, and the trouble is taken to subject the given evidence to critical comparison, the manner of adaptation of the evidence to the confession may be easily discovered. . . . Such examinations are so instructive that the opportunity to make them should never be missed.

Hans Gross, *Criminal Psychology* (transl. Kallen 1911).<sup>107</sup>

Confessions have the natural effect of transforming the presumption of the confessor's innocence to one of guilt.<sup>108</sup> As such, false confessions are prevalent<sup>109</sup> among the wrongful convictions of the 175 post-conviction DNA exonerations,<sup>110</sup> and they are particularly difficult to overcome.<sup>111</sup> Though it surely helps, we do not need DNA to understand the anomaly of false confessions. "An avidity to punish is always dangerous to liberty."<sup>112</sup> A confession obtained by any form of coercive force or violence to the individual "not only breaks the will to conceal or lie, but may even break the will to stand by the truth."<sup>113</sup>

105. The DNA evidence that cleared Nesmith included semen samples taken from the victim's underwear at the time of the assault. *The Innocence Project: Willie Nesmith*, *supra* note 102.

106. For a historical note, Nesmith's case was at the heart of the discussions that led to Pennsylvania's post conviction DNA testing statute.

107. Dean Wigmore dedicated his 1913 treatise, *Principles of Judicial Proof*, to University of Graz criminal law Professor Hans Gross, "who has done more than any other man in modern times to encourage the application of science to judicial proof." JOHN HENRY WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF: AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS* 537, 539 (1931).

108. Richard Ofshe & Richard Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DENVER U. L. REV. 979, 1118 (1997).

109. False confessions account for twenty-seven percent of the post-conviction DNA exoneration cases. *See The Innocence Project: Causes and Remedies*, *supra* note 85.

110. Typically, false confession cases involve one or more of the wrongful conviction indicia, such as police misconduct and snitch testimony. *See SCHECK ET AL.*, *supra* note 11.

111. *See* Editorial, *Guilty Innocents: The Road to False Confessions*, 334 THE LANCET 1447 (1994); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogation*, 6 B.U. PUB. INT. L.J. 719 (1997); Richard A. Leo, *False Confessions: Causes, Consequence, and Solutions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 36, 44-46 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

112. THOMAS PAINE, *DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT* 254 (Richard E. Roberts ed., 1945) (1795).

113. *Watts v. Indiana*, 338 U.S. 49, 60 (1949) (Jackson, J. concurring).

History reveals clear examples of persons, when faced with the certainty of incurring capital punishment, acknowledging crimes now recognized as impossible.<sup>114</sup> Consider the witchcraft trials where individuals freely confessed to imaginary offenses, in minute detail, to serious and heinous crimes.<sup>115</sup> The passage of time has not altered the human condition. Contemporary studies suggest similar brands of false confessions with a myriad of underlying causes.<sup>116</sup>

*Bruce Godschalk*

Godschalk's descent into a failed criminal justice system received a big push from his confession to a crime that he did not commit.<sup>117</sup> Following his arrest, and after several hours of unrecorded intense interrogation, Godschalk confessed on tape to Montgomery County detective Bruce Saville.<sup>118</sup> Only the

114. See Mary Smith, 2 HOW. ST. TR. 1049; *Three Devon Witches*, 8 HOW. ST. TR. 1017; *Bury St. Edmond's Witches*, 6 HOW. ST. TR. 647; and *Essex Witches*, 4 HOW. ST. TR. 817.

115. See T.B. Howell, *Proceedings Against the Essex Witches*, in STATE TRIALS 818, 856-57 (1816) (the examination of Anne Cate); *Id.* at 840-14 (the confession of Rebecca West); *Id.* at 852-53 (the examination of Rose Hallybread); *Id.* at 853 (the examination of Joyce Boanes); *Id.* at 854-55 (the examination of Rebecca Jones).

116. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998). In their study of sixty cases of police-induced confessions, thirty-four of them were subsequently deemed false due to exculpatory and/or inculpatory DNA evidence. *Id.* at 449. These cases were further defined as falling in one of the following four categories of false confessions; (1) confessions to a crime that did not happen; (2) confessions to a crime that the defendant could not have possibly committed; (3) cases in which the true perpetrators were identified; and (4) cases where DNA exonerated the false confessor. *Id.* at 449-455.

117. This case is reported at *Commonwealth v. Godschalk*, 679 A.2d 1295 (Pa. Super. Ct. 1996).

118. Convicted of rape, Godschalk brought a § 1983 action to obtain access to genetic evidence taken from the two rape victims for DNA testing. Godschalk moved for summary judgment, and the District Court held that Godschalk had a due process right of access to genetic material for the limited purpose of DNA testing. *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001). Godschalk's confession, which was taped and transcribed, appears in the Court's Opinion. *Id.* at 368-69. The Court noted that, at trial, Godschalk acknowledged that it was his voice on the tape. *Id.* at 368. Godschalk's confession revealed details of both rapes that were not available to the public. *Id.* In the case of Bednar (victim), Godschalk stated the following:

1. He watched the victim while she was in the recreation room reading a book. (pg. 7, lines 16 thru 22).
2. He said the victim was wearing a robe. (pg. 7, lines 23 thru 26).
3. He said he entered through a rec-room window. (pg. 6, lines 24 thru 28).
4. He waited until the victim went upstairs before entering the townhouse. (pg. 7, lines 27 thru 32).
5. He went up two sets of stairs before finding the victim's bedroom. (pg. 7, line 12).
6. He took a pillow from another room before entering her room. The room that the pillow was removed from was on the same level as the victim's bedroom. (pg. 8, lines 13 thru 20).

formal confession was tape-recorded.<sup>119</sup> In his post-trial motion, Godschalk claimed, *inter alia*, that the trial court erred in not suppressing his confession.<sup>120</sup>

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7. He said the victim told him other people lived in the home and that someone could come home. (pg. 9, lines 5 thru 7 and line 19).
  8. He said she was nude. (pg. 9, lines 10 thru 15).
  9. He said he had been drinking prior to the incident and that he normally drank beer. (pg. 7, line 14 and pg. 18, lines 16 thru 19).
  10. He said he had sex with the victim while she was on her back on the floor. (pg. 9, lines 17 thru 23).

These details, which were not released to the press, matched those in the statement given to the police by Bednar.

In the case of Morrissey (victim), [Godschalk] stated the following:

1. He was outside of the bedroom window watching the victim. (pg. 2 lines 10 thru 17).
2. He said the victim was reading a magazine while she was lying in bed. (pg. 2 lines 15 thru 22).
3. He said there was a light next to her bed, which was on, allowing him to see the victim. (pg. 2, line 23 and pg. 3 lines 2 and 3).
4. He had sex with the victim on her bed. (pg. 4, line 6).
5. He said the victim was wearing underpants. (pg. 6 lines 11 thru 14).
6. The victim was on her stomach during the intercourse. (pg. 4, lines 11 thru 14).
7. Prior to having sex, plaintiff removed the victim's tampon and tossed it to the side. (pg. 4, line 8 and lines 19 thru 24).
8. He described the victim as a brunette with a medium build. (pg. 5, line 6).
9. He said he was gentle with the victim. (pg. 5, line 18).
10. He said he left the apartment by going out the door. (Pg. 5, line 4).
11. He remembered being chased off the patio by a man prior to the assault. (pg. 5, lines 25 thru 28 and pg. 6, lines 1 thru 8).

Again, these details matched those contained in the statement given by Morrissey to the police: *See Godschalk*, 177 F. Supp. 2d at 369 (“There is absolutely no evidence in the transcript that plaintiff’s confession was obtained through coercion, undue pressure or other improper police interrogation techniques. There is no evidence that the interrogating detective put words in plaintiff’s mouth.”); *see also* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Blind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 547-48 (2002) (Godschalk argues that the detectives supplanted in his mind unpublished information about the crimes, including the positions the women were placed in by the rapist and the removal of a tampon from one of the victims.); Also, *see Godschalk*, 679 A.2d at 1296.

119. *See* Kreimer & Rudovsky, *supra* note 86.

120. The anatomy of a thirty-three minute false confession:

At his trial, Godschalk testified that he confessed because he was nervous and “under a great deal of pressure” as police began to question him immediately after picking him up. He testified that police asked him multiple-choice questions [during an intense three-hour interrogation] before taping his comments. Godschalk also testified that detective Saville did not put words in his mouth, but that his confession was the product of trickery. “No, he didn’t really put words in my mouth . . . .” “No, I was just saying the first thing that came to my mind.” “Basically, he told me what he wanted me to do.” . . . “He led me through it, step by step.”

Godschalk had recanted his “confession,” maintaining that the detectives had threatened him and provided him with inside information in order to make his confession appear more credible. The motion was denied.<sup>121</sup> On appeal, the Superior Court ruled that Godschalk’s confession was voluntary and that the trial court properly refused to suppress his inculpatory statements.<sup>122</sup> The Pennsylvania Supreme Court denied Godschalk’s subsequent petition for allocatur on August 15, 1989.<sup>123</sup>

Based upon the claim that his confession was the product of trickery and coercion,<sup>124</sup> Godschalk filed his petition for post-conviction DNA testing with the Pennsylvania Superior Court in 1995. Godschalk was seeking access to his previously untested DNA evidence that had remained in the custody of the District Attorney.<sup>125</sup> Citing the standards for relief set forth in *Commonwealth v. Reese*,<sup>126</sup> and *Commonwealth v. Brison*,<sup>127</sup> the Court denied Godschalk’s petition,

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Ralph Vigoda & Gauitra Bahadur, *Freed Man’s Lawyers Call for Inquiry into Police and His Arrest*, PHILA. INQUIRER, Feb. 16, 2002, at A01.

121. Sara Rimer, *Convict’s DNA Sways Labs, Not a Determined Prosecutor*, N.Y. TIMES, Feb. 6, 2002, at A14.

122. *Godschalk*, 177 F. Supp. 2d at 367 (citing 560 A.2d 826 (1989)). The absence of external conditions and protocols for custodial settings defeat any genuine belief that Pennsylvania’s test for whether a confession is voluntary is capable of unveiling a false confession.

When deciding a motion to suppress a confession, the touchstone inquiry is whether the confession was voluntary. Voluntariness is determined from a totality of the circumstances surrounding the confession. The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess. The Commonwealth has the burden to proving by a preponderance of the evidence that the defendant confessed voluntarily. . . . When assessing the voluntariness pursuant to the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person’s ability to withstand suggestion and coercion.

*Commonwealth v. DiStefano*, 782 A.2d 574, 581 (Pa. Super. Ct. 2001) (citing *Commonwealth v. Nester*, 709 A.2d 879, 882-83 (Pa. 1998) (citations and footnotes omitted)).

123. *Godschalk*, 177 F. Supp. 2d at 367 (citing *Commonwealth v. Godschalk*, 564 A.2d 915 (1989)).

124. Godschalk argued that the detectives supplanted in his mind unpublished information about the crimes, including the positions the women were placed in by the rapist and the removal of a tampon from one of the victims. Kreimer & Rudovsky, *supra* note 86, at 548; *see also Godschalk*, 679 A.2d at 1296.

125. *See Kreimer & Rudovsky*, *supra* note 86, at 549.

126. 663 A.2d 206 (Pa. Super. Ct. 1995) (established a defendant’s limited right to post-conviction DNA testing).

127. 618 A.2d 420 (Pa Super. Ct. 1992). The *Reese* and *Brison* opinions, taken together, establish a two-part threshold requirement that must be met before a defendant can have access to DNA evidence post-trial. First, the conviction must have related to eyewitness testimony. Secondly, the conviction must definitively support the defendant’s actual innocence claim. *See Reese*, 663 A.2d at 210.

writing that a petition for post conviction DNA testing<sup>128</sup> “will be granted where a conviction rests *largely* on identification evidence *and* where advanced technology could definitely established the accused’s innocence.”<sup>129</sup>

Godschalk brought a successful § 1983 action to obtain access to genetic evidence taken from the rape victims for DNA testing.<sup>130</sup> In its Order

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128. Pennsylvania’s statute actually has a number of conditional provisions. The statute applies to individuals “serving a term of imprisonment or awaiting execution” except individuals convicted after January 1995 who did not request DNA testing at trial, Postconviction DNA Testing, 42 PA. CONS. STAT. ANN. § 9543.(a)(1), thus excluding post 1995 convicted individuals and parolees. The petitioner must make a prima facie case showing that identity was at issue. § 9543.1(c)(3)(i). The Commonwealth and the applicant must mutually select the laboratory to conduct the test or, if they are unable to agree on one, the court will choose the lab. § 9543.1(e)(1)(i)-(ii). An applicant can file for post-conviction relief within sixty days from when the DNA test results were obtained. § 9543.1(f)(1). The applicant must assert “actual innocence of the offense” in order to meet the standard for post-conviction DNA testing. § 9543.1(c)(3)(ii)(A). In a capital case, the motion must assert “the applicant’s actual innocence of the charged or uncharged conduct constituting an aggravating circumstance . . . if the applicant’s exoneration of the conduct would result in vacating a sentence of death,” or must assert that the outcome of the DNA testing would establish a “mitigating circumstance.” § 9543.1(c)(3)(ii)(B)-(C). The costs of any testing must be paid by the applicant, unless indigent. § 9543.1(e)(2)(i)-(ii). A preservation of evidence requirement becomes effective upon the receipt or a motion of a notice of a motion requesting DNA testing. § 9543.1(b)(2). There are no provisions to overcome any procedural bars or provisions that address compensation, though several compensation Bills have been introduced by the State House. For instance, H.B. 2490 was introduced by State Rep. Howard Fargo in 2000 and died in the House Judiciary Committee in April 2000. H.B. 1442 suffered a similar fate in 2001. In 2005, Pennsylvania State Reps. Mike McGeehan and James Roebuck announced a new initiative to fashion a compensation Bill for the wrongfully convicted. State Rep. Thaddeus Kirkland said the following on behalf of the Pennsylvania Legislative Black Caucus:

This type of legislation has been long overdue. To incarcerate people is one thing. To incarcerate them for long periods of time is another. But to declare the same person innocent 10 years later, after they have drained themselves financially in legal fees and after they have been discredited by the system, only to be released back into society with just the cloths on there back, is criminal.

Press Release, House Democratic Communications Office, What is your freedom worth? (Apr. 11, 2005), available at <http://www.pahouse.com/pr/McGeehan/173041105.htm>. In September 2005, Pennsylvania State Rep. Mike McGeehan renewed his effort to compensate the wrongfully convicted with H.B. 1473. The Bill would provide “an award equal to lost wages or a legislator’s \$129 a day in expense money, whichever is higher,” as well as \$50,000 per year for inmates who sat on death row. Torsten Ove, *State doesn’t give a dime to the innocent*, PITTSBURGH POST-GAZETTE, Aug. 7, 2005, available at <http://www.post-gazette.com/pg/05219/549993.stm>.

129. Commonwealth v. Godschalk, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996).

130. Godschalk’s relief came from a successful civil rights action pursuant to 42 U.S.C. § 1983. See Godschalk v. Montgomery County District Attorney’s Office, 177 F. Supp. 2d 366, 368-70 (E.D. Pa. 2002), wherein the Court determined that the government had, in fact, withheld material evidence from Godschalk that could have been exculpatory and granted relief consistent with Brady v. Maryland, 373 U.S. 83 (1963).

granting summary judgment on Godschalk's § 1983 claim,<sup>131</sup> the Court concluded that DNA testing of the genetic material could indeed provide material exculpatory evidence for a jury to consider, and that Godschalk had a due process right of access to the genetic material for the limited purpose of DNA testing.<sup>132</sup> Godschalk won his release in 2002,<sup>133</sup> when "DNA testing confirmed that a single rapist had committed both assaults which absolutely excluded Bruce Godschalk as the assailant."<sup>134</sup> As compelling and detailed as his confession appears,<sup>135</sup> there is no question that baleful conditions were present to cause Bruce Godschalk to confess to a crime he did not commit.

*Barry Laughman*

On August 13, 1987, Edna Laughman was found raped and murdered in her home.<sup>136</sup> The eighty-five-year-old was a poor woman, who lived in a small

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Plaintiff's (Godschalk's) claims for relief in this action are that by refusing to release the biological evidence for DNA testing, defendants have: (1) deprived plaintiff of Due Process of Law; (2) deprived plaintiff of the opportunity to make a conclusive showing that he is innocent of the crime for which he is incarcerated, in violation of the Due Process Clause of the Fourteenth Amendment; (3) deprived plaintiff of the opportunity to make a conclusive showing of actual innocence, in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment; (4) deprived plaintiff of his right to present evidence of innocence in State Court, Federal Court, or before the Pennsylvania State Board of Pardons, in violation of the Confrontation and Compulsory Process Clauses of the Sixth Amendment; (5) deprived plaintiff of the opportunity to effectively litigate his claim that he is innocent of the crime for which he is currently incarcerated, thereby preventing plaintiff from access to the state and federal court to obtain legal relief, in violation of the Due Process and Equal Protection guarantees of the Fourteenth Amendment and (6) deprived plaintiff of his right to avail himself of the opportunity to apply for executive clemency and the function that executive clemency serves in preventing the violation of his constitutional rights that would arise from continued incarceration of an inmate who can make an actual showing of innocence.

*Id.* at 367-68.

131. *Id.* at 370.

132. *Id.*

133. Montgomery County District Attorney Bruce Castor initially, and several times thereafter, refused to accept Godschalk's innocence following the return of several independent and exculpatory DNA tests. Castor instead chose to believe his detectives and the taped formal confession. Eventually, Castor yielded to the laboratory reports. *See generally* Kreimer & Rudovsky, *supra* note 86, at 550-551; *see also* author materials, *supra* note 86.

134. *See* Kreimer & Rudovsky, *supra* note 86, at 550.

135. The fact that only Godschalk's "formal confession" was taped and not the entire interrogation logically suggests that earlier conversations with law enforcement, other individuals, or other sources, resulted in the supplanting of critical information in Godschalk's mind. Whether or not this conduct was wrongly purposeful, or within the limits of permissible interrogation tactics, is unresolved.

136. *Harrisburg Patriot News* reporter, Pete Shellem, has covered this case extensively. The author has had numerous conversations and written exchanges with Shellem in order to verify and otherwise confirm the widespread factual accounts of the Laughman case that appear in this article. Many of these accounts were taken from interviews and reviews of court records conducted by Shellem and relayed to the author. The author has also had several detailed conversations with Laughman's attorney, William Costopoulos. Costopoulos represents

broken down house in Oxford Township, Adams County, Pennsylvania.<sup>137</sup> Her house had no running water, a pot stove for heat, and no light but for a single bulb in her kitchen.<sup>138</sup> The widow had lived alone for the past twenty-five years, occasionally moving in with her niece in the winter months.<sup>139</sup> Most evenings, she would eat dinner two doors away from her own, at the home of her nephew, Barry Laughman, his parents, two brothers, and his sister.<sup>140</sup> When Edna failed to show up for dinner at the defendant's family home, Barry Laughman, his mother Madeline, her son David, and her son Larry and his wife Ruann, went looking for her.<sup>141</sup> Upon entering her home, Larry and his wife discovered the elderly woman's body.<sup>142</sup> Edna was found naked, except for a bra pulled up above her breast and a dress covering her face.<sup>143</sup> Her upper body was on the bed and her feet were on the floor.<sup>144</sup> Three safety pins were on her bra, and one was open. Edna had pills stuffed in her mouth, and a pill bottle was in her hand.<sup>145</sup> A Marlboro cigarette had been extinguished on the chair next to the bed.<sup>146</sup> Four more cigarette butts, plus a Marlboro box lid, were found in the home.<sup>147</sup> An autopsy showed that she tried to defend herself against the beating she received.<sup>148</sup> She was hit on the back of the head and had bruises on her arms, legs, and nose.<sup>149</sup> Vaginal lacerations established that she had been raped.<sup>150</sup> Semen remained on her body.<sup>151</sup> The pathologist determined that sex had been forced on her either while she was alive or after her death.<sup>152</sup>

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Laughman in his civil rights case against the Pennsylvania State Police and other named defendants. *See* Complaint at 1, *Laughman v. Commonwealth*, No. 1:05-cv-01033-YK (M.D. Pa. May 20, 2005). The author has in his possession a copy of Barry Laughman's statement and confession made at 21:35 hours on September 8, 1987 to State Troopers Donald G. Blevins and Jack Holtz at the Gettysburg barracks. In addition to the generous assistance of investigative reporter, Pete Shellem, and Laughman's counsel, William Costopoulos, the facts contained herein were derived and corroborated from numerous newspapers, articles, court records, court transcripts, and information maintained by the innocence project at the Cardozo Law School. *See* The Innocence Project: Barry Laughman, [http://www.innocenceproject.org/case/display\\_profile.php?id=151](http://www.innocenceproject.org/case/display_profile.php?id=151) (last visited April 10, 2006). The author has made every effort to ensure the accuracy of these accounts.

137. *See* author materials, *supra* note 136.

138. *See* author materials, *supra* note 136.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See* author materials, *supra* note 136.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *See* author materials, *supra* note 136.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

The pace of the investigation picked up significantly when Pennsylvania State Police Trooper Jack Holtz was assigned to the case. In Holtz's words, he solved the crime "in a single day."<sup>153</sup>

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153. See author materials, *supra* note 136. In Laughman's civil rights complaint against multiple defendants, Complaint, Laughman v. Commonwealth, No. 1:05-cv-01033-YK (M.D. Pa. May 20, 2005), he alleges a variety of claims of official misconduct that, if true, reflect a culture at the Pennsylvania State Police that is conducive to wrongdoing. Specifically, Laughman makes numerous allegations that question the veracity and practices of Trooper Holtz and State Police Chemist Roadcap, among others. These allegations appear below, in pertinent part, by selected verbatim paragraphs from Laughman's Complaint:

113. Plaintiff, Barry Laughman, has uncovered substantial evidence of the aforementioned misconduct of the PSP. A number of these incidents are set forth in a November 1986 Report of the Special Committee to Investigate the Pennsylvania State Police (the "Report"). The Report chronicles a non-exclusive list of instances of severe police misconduct that occurred over a 5-1/2 year period from January 1, 1981 to July 1, 1986.

114. The myriad of crimes and civil rights offenses that have become commonplace within the PSP and which were brought to light by the Report did not begin or end with the creation of the Report. For example, Jay C. Smith was convicted of first-degree murder and sentenced to death in 1986 in the Court of Common Pleas of Dauphin County, Pennsylvania for the murder of a woman and her two small children. Defendant Trooper Holtz was the affiant in that case and later admitted to agreeing to receive some \$45,000 during trial from a noted crime author for his assistance and cooperation. Payment had been made contingent upon Dr. Smith's arrest.

In 1992 a unanimous Pennsylvania Supreme Court overturned Dr. Smith's conviction and ordered his discharge on state double jeopardy grounds based on egregious police and prosecutorial misconduct. This misconduct consisted of the intentional withholding and suppression of exculpatory physical evidence and knowingly denying that it had a secret deal with the prosecution's chief witness, a jailhouse informant and disgraced ex-cop. See *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992).

115. More recently, there has been widespread media attention directed at the voluminous number of allegations of criminal behavior and wrongdoing by over 100 PSP troopers in the last several years.

116. For example, Stephen Crawford was thrice convicted of murdering a newspaper boy in Dauphin County. At his 1978 trial, two PSP officials - Trooper John Balsby and Defendant Chemist Roadcap - testified falsely that the blood on a certain palm print found on a car owned by Mr. Crawford's father was limited to the ridge area of the print. This was critical to the prosecution's case because the testimony that the blood was limited to the print and not diffused across the print was used to argue that Mr. Crawford's prints were not on the car prior to the murder and sprayed with blood from the injuries inflicted upon the victim as suggested by the defense but, rather, were placed there by Mr. Crawford shortly after the murder.

117. Many years later, copies of the original lab notes of Defendant Chemist Roadcap were discovered and they read in part as follows: "This reaction was greater along the ridges of the fingerprint, however numerous particles in the valleys also gave [positive] reactions." This statement was consistent with the theory advanced by Mr. Crawford's defense team, which included undersigned counsel, and contradicts the trial testimony of Trooper Balsby and Defendant Chemist Roadcap.

118. The disparity between Defendant Chemist Roadcap's exculpatory lab notes and her incriminatory report not only suggests that her trial testimony was false but that she and Trooper Balsby jointly suppressed this exculpatory evidence and hid it from Mr. Crawford and his lawyers.

119. Following the filing of a PCRA petition, the Dauphin County District Attorney's Office in June 2002 conceded that Mr. Crawford was entitled to a new trial and, on July 16, 2002, the Court granted the Commonwealth's motion to dismiss the charges; Mr. Crawford was set free after spending 28 years in prison for crimes he did not commit.

120. The misconduct of the PSP is not limited to central Pennsylvania. For example, the 1986 Fayette County conviction of David Joseph Muchiniski for murder was recently vacated on the intentional concealment of crucial, exculpatory statements by the PSP and the prosecution.

121. In 1984, a federal jury in Harrisburg found that Troopers Balsby, Dean Shipe and Joseph Van Nort (the original investigator in the Jay C. Smith case and Defendant Trooper Holtz's partner) had violated the civil rights of Gary Rank by planting a fingerprint at a murder scene and testifying against him at trial; he was awarded \$40,500 in compensatory damages and \$15,000 in punitive damages. *See Rank v. Balsby*, 590 F. Supp. 787, 789, 792-793 (M.D. Pa. 1984). Defendants Trooper Holtz and Chemist Roadcap were also involved in the underlying criminal case.

122. Moreover, a different PSP chemist recently resigned her position after it was discovered that she mishandled evidence in hundreds of cases.

123. Additionally, in 2000 and 2001, several women filed sexual harassment lawsuits in the United States District Court for the Eastern District of Pennsylvania against five PSP supervisors alleging that ex-Trooper Michael Evans, a convicted sexual predator, had sexually harassed and assaulted them on numerous occasions. Federal Judge Rufe in an opinion wrote that "[the record contains evidence which could support a finding that [the five supervisors] encouraged, condoned, tolerated and approved of Evans' pattern of sexual misconduct." The PSP, acknowledging its liability, publicly settled with these victims for some \$5 million.

124. These aforementioned acts are indicative of a pattern of corrupt behavior which has permeated the ranks of the PSP for at least 34 years while under the direction and control, and with the knowledge and consent of, the Defendant Commissioners.

125. The "doctoring" or modifying of the original lab notes by Defendant Chemist Roadcap, permitting exculpatory evidence to degrade, the obtaining of a false and fabricated confession by Defendant Troopers Holtz and Blevins, and all of their false and perjurious testimony at trial against Plaintiff, Barry Laughman, were consistent with a pattern and practice known and condoned by the Defendant Commissioners, the highest ranking PSP officials, and led directly to the arrest, conviction and imprisonment of Plaintiff for crimes he did not commit, all in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

126. Defendant Commissioners, having knowledge of the corrupt actions of their subordinates, which permeated the ranks of the PSP, failed to install and implement sufficient safeguards to prevent their agents and employees from altering evidence, concealing exculpatory evidence, permitting it to degrade, obtaining false and fabricated confessions, and from testifying falsely.

127. Defendant Commissioners, having knowledge of the corrupt actions of their subordinates, which permeated the PSP, failed to adequately train their employees so as to prevent them from altering evidence, concealing exculpatory evidence, permitting it to degrade, obtaining false and fabricated confessions, and testifying falsely.

128. Defendant Commissioners, having knowledge of the corrupt actions of their subordinates which permeated the PSP, failed to adequately supervise their agents and, in fact, fostered an environment that encouraged their agents to alter evidence, conceal exculpatory evidence, permit it to degrade, obtain false and fabricated confessions and to testify falsely.

Barry's father took his son to the Gettysburg barracks to be questioned by police about the murder.<sup>154</sup> Earlier, he declined a trooper's offer to pick Barry up, saying his son would have a "nervous breakdown" in a patrol car.<sup>155</sup> Laughman's boss described the twenty-four year-old man as a very nervous type.<sup>156</sup> Laughman, who had an IQ of 69.71 which is lower than 97.5 percent of the population, was classified as a "moron" under then existing mental health classifications.<sup>157</sup> Today, he would be considered mildly retarded.<sup>158</sup>

Upon his arrival at the barracks, Trooper Holtz took Laughman into an interview room. The two were alone.<sup>159</sup> Holtz told Laughman that his family said he had not been out in the yard drinking with his brother, David, as Laughman earlier claimed, and that his brother said he was taking medication and could not drink alcohol.<sup>160</sup> At trial, Holtz testified that Laughman changed his story to say that he had been drinking with his other brother, Tim.<sup>161</sup> As the interrogation continued, Holtz told Laughman that the killer smoked Marlboro cigarettes and that Marlboro box tops had been found in Laughman's yard.<sup>162</sup> In response, Laughman said that he smoked Marlboros and would frequently tear off the box tops.<sup>163</sup> Holtz then told Laughman that a fingerprint found on the flip top box that was left in Edna's house had a whorl pattern.<sup>164</sup> Barry was then told to look at his right index finger because it too, contained a whorl pattern.<sup>165</sup> Holtz said nothing to Laughman in terms of everyone having a "whorl" print pattern on his finger.<sup>166</sup> Holtz observed, and later testified, that Barry was nervous throughout the interview, constantly eyeing the Marlboro box top placed in his view.<sup>167</sup>

After about an hour of questioning, Holtz asked Trooper Blevins to come into the interview room, telling him that Laughman had something to say.<sup>168</sup> Laughman confessed to the crime in great and convincing detail.<sup>169</sup> His

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154. *See* author materials, *supra* note 136.

155. *See* author materials, *supra* note 136.

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.*

160. *See* author materials, *supra* note 136.

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* author materials, *supra* note 136.

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.* The following statement by Barry Laughman to Trooper Holtz, was recorded (in writing) by Trooper Blevins. The statement is largely the reason why this innocent man forfeited eighteen years of his life. The statement, taken verbatim, follows below:

1. Barry, do you remember what you did on Wednesday Evening, August 12, 1987?  
A. Yes
2. Did you see Edna Laughman that evening?  
A. Yes

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3. Was Edna Laughman alive when you saw her that evening?  
A. Yeah
4. Barry, are you responsible for the death of Edna Laughman?  
A. Yes
5. Barry, what happened on the evening of 12 Aug 87?  
A. I was home watching T.V. & decided to go for a soda. Tim was in his bedroom with his girlfriend. I had a flashlight & walked down the front way to Emersons (Shards Cars) to get a Pepsi. I started back home. I stopped at Edna's house. I knew she was there and I wanted to have sex. I went inside her home through the front window. She was there, she heard me coming in. She had her bra on. She started to run toward the kitchen. I chased after her and hit her on the head with the flashlight. I knocked her down and drug her back to a bed or pile of clothes. She had on a bra and I slipped it up. I was holding her around the arms. I asked her if I could have sex with her. She says no. Then I did it anyway. I had sex with her after. I put pills in her mouth. I dumped the whole bottle of pills in her mouth and was holding her nose. I then stroked her throat.
6. Barry, after you put the pills in her mouth and she stopped breathing, is this when you had sex with her?  
A. Yes.
7. Barry, by having sex with her, what did you do?  
A. I stuck my penis in her and started going up and down on her. I went up and down until I came. I then pulled my penis out and rubbed it all over her front.
8. Tell us what you did then?  
A. Then I went into the kitchen. I came back into where Edna was. I went to a shoe box & went through it & found the money.
9. How much money?  
A. \$400
10. Was money anywhere besides (sic) a box?  
A. In a blue cloth bag
11. What did you do then, Barry?  
A. I went up-stairs to look around. I was never up there and that.
12. What did you do next?  
A. Came back down the steps. That's when I went out the side door.
13. What door?  
A. In the back of the house, not the kitchen door.
14. When you went out, did you move anything?  
A. Yeah, the boards against the kitchen door.
15. Did you knock anything else over?  
A. I think a metal chair.
16. Did you set the chair back?  
A. Yeah, against the door.
17. What did you do then Barry?  
A. I went home.
18. Did you see or talk to anyone at home?  
A. Nope.
19. What did you do with the blue bag?  
A. The next day, I stuck it in a dumpster next to Value City.
20. Why?  
A. I knew the garbage man would come that day?
21. Where is the money that you took?  
A. I spent it.
22. Do you recall on what?  
A. On beer and food.

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23. While at Edna's house on 12 Aug 87, did you smoke any cigarett(s) (sic)?  
A. Yes.
24. About how many?  
A. 4 or 5 I think.
25. What did you do with the butts?  
A. Outened them out. Some on a chair & on the floor.
26. Where was the chair located?  
A. In her bedroom.
27. While there, did you leave part of a cigarett (sic) box there?  
A. Yeah, when I pulled it out of my pocket, the top fell off.
28. What brand were you smoking?  
A. Marlboro.
29. What color was the box?  
A. Red & White.
30. Where did you find the pills that you put in Edna's mouth?  
A. Layin (sic) on the floor.
31. Were the pills in anything?  
A. Yeah, in a pill bottle.
32. What did you do with the bottle?  
A. Tried to wipe my prints off with a white rag and put it in her hand.
33. Do you remember which hand?  
A. Right hand.
34. Why did you do this?  
A. I tried to make it look like an accident.
35. Do you remember what time you went into Edna's house?  
A. About 11:30 pm on 12 Aug 87.
36. How long were you in Edna's house?  
A. About 1/2 hour.
37. What time did you get home?  
A. Maybe 12:30 or before. Maybe 5 or ten minutes after 12:00 ---
38. What did you do then?  
A. Went to bed.
39. What were you wearing?  
A. Jeans, red shirt, sneakers, & black hat.
40. Barry, did you know that Edna was breathing before you put the pills in her mouth?  
A. Yes.
41. Barry, did you know that by putting those pills in her mouth, she would choke and stop breathing?  
A. Yes.
42. Barry, why did you do this?  
A. Cause she would have told on me.
43. After she stopped breathing, did you have sex with her?  
A. Yes.
44. Did you go to her house to have sex with her or to rob her?  
A. Have sex with her. Robbery was to cover up her death.
45. Why did you go to have sex with Edna?  
A. Cause I could never get a girl.
46. Was anyone with you?  
A. No, I was by myself.
47. Did you know that if Edna found you in her house and you had sex with her, she would tell you (sic) parents if you let her live?  
A. Yeah.
48. Barry, have you given this statement of your own free will?  
A. Yes I have.
49. Have you been threatened in any way?

statement consisted of responses to fifty-three questions put to him by Trooper Holtz. Trooper Blevins transcribed Laughman's responses as they were given to Trooper Holtz. Afterwards, Trooper Holtz got a tape recorder, but instead of having Laughman repeat his confession, Holtz read Trooper Blevin's transcription to him.<sup>170</sup> Following a recitation of the transcription, Laughman answered "yes" to whether the entire statement was true.<sup>171</sup> If only it were true.

On September 8, 1987, pursuant to a criminal complaint and affidavit of probable cause executed by Trooper Blevins, Barry Laughman was arrested and charged with first-degree murder, second-degree murder, third-degree murder, robbery, and burglary.<sup>172</sup> He was incarcerated without bail in the Adams County jail.<sup>173</sup>

Laughman testified at trial that he did not kill ["Aunt Edna"] Laughman, a neighbor and distant relative whom he had known and loved his entire life.<sup>174</sup> In fact, he often acted as her caretaker, regularly bringing firewood for her wood-burning stove as well as assisting her in other similar ways.<sup>175</sup> Laughman also testified that Trooper Holtz repeatedly told him that he did

A. Oh no!

50. Have any promises been made to you?

A. No.

51. Have you any complaints about how you have been treated by the Pennsylvania State Police?

A. No.

52. Have you any complaints about how you have been treated by Trooper Holtz or Trooper Blevins?

A. No.

53. Is there anything you wish to add?

A. No.

END

Barry James Laughman of 1580 Carlisle Drive, Hanover, PA 17331 gave this statement at 21:35 hours on September 8, 1987 at the Pennsylvania State Police Gettysburg barracks. The statement given by Laughman to Trooper Holtz was contemporaneously transcribed by Trooper Blevins. Each of the seven pages contains the initials of all three individuals.

170. See author materials, *supra* note 136.

171. At trial, Laughman was asked to read the Miranda warnings and his signed confession. He could barely make out every other word. According to the Court, it took him about eight minutes to read: "You have an absolute right to remain silent and that anything you say can and will be used." See author's materials, *supra* note 136.

172. See author materials, *supra* note 136.

173. See *id.*

174. The author is grateful for the assistance he received from Laughman's Attorney, William Costopoulos, and *Harrisburg Patriot News* reporter, Pete Shellem. Both individuals offered their first hand knowledge to characterize Laughman's conduct and thought processes as reflected in this article. See complaint, ¶47, *Laughman v. Commonwealth*, No. 1:05-cv-01033-YK (M.D. Pa. May 20, 2005); also, see author materials, *supra* note 136.

175. See Complaint, ¶48, *Laughman v. Commonwealth*, No. 1:05-cv-01033-YK (May 20, 2005); also, see author materials, *supra* note 136.

not believe his story, asking him instead: “[W]hy don’t you just tell us? We know you did it.”<sup>176</sup> His lawyer asked Laughman at trial: “What did you think was going to happen if you agreed with them (Troopers Holtz and Blevins)?” He responded: “That they would let me alone.”<sup>177</sup> Laughman testified at trial that he did not tell Troopers Holtz and Blevins that he killed Edna Laughman.<sup>178</sup>

In 1988, Barry Laughman was sentenced to life imprisonment for first-degree murder, fifty months to twenty years for rape, fifty months to twenty years for robbery, and eight months to twenty years for burglary.

As a result of the investigative reporting of *Harrisburg Patriot News* reporter, Pete Shellem, the misplaced DNA evidence in the *Laughman* case was located a continent away.<sup>179</sup> Laughman’s Post-Conviction DNA testing petition was unopposed. By a report issued November 5, 2003, Laughman was excluded as a source.<sup>180</sup> Laughman served sixteen years of imprisonment until DNA conclusively established that he was not the man who left semen on Edna Laughman’s body. Laughman “confessed,” in great detail, to a crime he did not commit.

#### *Nicholas Yarris*

Nicholas Yarris’ “confession” was the product of a broken man, who at the time he made the statement, feared for his sanity, if not his life.<sup>181</sup> Yarris was in jail on \$100,000 straight bond following an altercation with a police officer stemming from a traffic stop.<sup>182</sup> During the struggle, the police officer’s service revolver discharged into the ground.<sup>183</sup> This incident led to charges of attempted murder, kidnapping, and other felonies and misdemeanors. Yarris

176. See Complaint, ¶49, *Laughman v. Commonwealth*, No. 1:05-cv-01033-YK (May 20, 2005); also, see author materials, *supra* note 136.

177. See Complaint, ¶50, *Laughman v. Commonwealth*, No. 1:05-cv-01033-YK (May 20, 2005); also, see author materials, *supra* note 136.

178. See Trial N.T. 985-986.

179. In 2003, Pete Shellem of the *Harrisburg Patriot News* started looking into the Edna Laughman murder case. For ten years, critical DNA samples taken from the Edna Laughman crime scene were believed lost. Mr. Shellem tracked the location of the missing DNA samples to the Max Plank Institute for Evolutionary Anthropology, which is located in Leipzig, Germany. Apparently, Professor Mark Stoneking brought the samples to the Institute in 1998, where he was conducting research.

180. See author materials, *supra* note 136.

181. See Caz Dawson et al., *The Nick Yarris Story: An Innocent Lost in the Quagmire*, available at <http://www.justicedenied.org/nick.htm> (last visited Apr. 17, 2006). In addition to this source, the facts contained herein were derived and corroborated from numerous newspapers articles, court records, court transcripts, including information taken from Nicholas Yarris’ civil rights suit, *Nicholas Yarris v. County of Delaware County*, No. 04cv03804, 2004 WL 2007267 (E.D. Pa. Sept. 25, 2004), and information maintained by the innocence project at the Cardozo Law School. See The Innocence Project: Nicholas Yarris, available at [http://www.innocenceproject.org/case/display\\_profile.php?id=139](http://www.innocenceproject.org/case/display_profile.php?id=139) (last visited Mar. 8, 2006). The author has made every effort to ensure the accuracy of these factual accounts.

182. See author materials, *supra* note 181.

183. *Id.*

had been a drug user, and on the night of his arrest, he was high on methamphetamines.<sup>184</sup> By his own admission, Yarris was desperate to get out of the intake unit because he was experiencing severe “cold turkey” withdraw symptoms.<sup>185</sup> While in jail, he read about the Craig murder in a newspaper left in his cell. He decided to tell investigators Randy Martin and David Pfeiffer that the murderer was Jimmy Brisbois, a “drug buddy” of his.<sup>186</sup> Yarris told the investigators that Jimmy had died of an overdose, but the story failed to hold up when Brisbois turned up alive and with a solid alibi.<sup>187</sup>

Thereafter, police were said to have leaked that Yarris was a snitch to Pagan motorcycle gang members in the same intake unit.<sup>188</sup> Following a week of constant attacks, Yarris tried to hang himself, but failed.<sup>189</sup> Yarris had been stripped down to his boxer shorts and was put in a cell with only a mattress.<sup>190</sup> After three more days of being showered with urine and water by other prisoners, cold, scared, and beaten, Yarris asked to see prison guard, Sgt. Gerald Murphy, to ask for a blanket and some clothes.<sup>191</sup> The officer pressed Yarris to tell the truth about the crime to get himself out of the mess he was in.<sup>192</sup> Yarris did what he thought was best.<sup>193</sup> He told the officer that he had helped rape Craig, but the murderer was a person named “Mark.”<sup>194</sup> The next day, the officer went to the investigators, and on the basis of that statement, Yarris was charged with second-degree murder, rape, kidnapping, and robbery.<sup>195</sup>

The prosecution’s only physical evidence in the Craig murder was the killer’s semen left in and on the victim.<sup>196</sup> Tests were run for blood grouping, sub-grouping, and secretor status.<sup>197</sup> The results showed that the secretor was a B+ blood group member who was also a B+ secretor.<sup>198</sup> About twenty percent of the male population are B+ secretors.<sup>199</sup> The prosecution did no

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184. See author materials, *supra* note 181.

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.*

189. See author materials, *supra* note 181.

190. See *id.*

191. See *id.*

192. See *id.*

193. See *id.*

194. See author materials, *supra* note 181.

195. See *id.*

196. See *id.*

197. For a general review of blood typing processes, see JOHN M. BUTLER, FORENSIC DNA TYPING (2001).

198. A B+ secretor is one whose blood antigens will be secreted in his biological fluids. See Robert P. Spalding, *Identification and Characterization of Blood and Bloodstains*, in FORENSIC SCIENCE: AN INTRODUCTION TO SCIENTIFIC AND INVESTIGATIVE TECHNIQUES 181, 194 (Stuart H. James et al. eds., 2003).

199. *Id.* at 194.

other testing on the semen that could have more accurately established or eliminated suspects from the case.<sup>200</sup>

During the five-day trial, the government called Charles Catalino.<sup>201</sup> At the time, Catalino was being held pending a sentencing of four to ten years following a conviction for burglarizing Assistant District Attorney Ryan's home.<sup>202</sup> Catalino testified that while they were in jail, Yarris confessed to the rape and murder, and expressed concern that his blood would be discovered at the scene of the crime.<sup>203</sup>

The government's evidence overcame the alibi testimony of Yarris' mother and neighbor, who testified that he was at home in southwest Philadelphia on the night of the Craig murder.<sup>204</sup> Yarris' confession, coupled with the snitch testimony that reinforced his confession, the blood type Yarris shared with the perpetrator and twenty percent of the male population, and the eyewitness testimony of several individuals, caused the jury to return its verdict after only six hours of deliberations.<sup>205</sup> Yarris learned his fate on July 1, 1982, when he was found guilty on all charges.<sup>206</sup> Three and a half hours after finding Yarris guilty, the jury returned a verdict of death for the rape and murder of Linda Mae Craig.<sup>207</sup> Yarris' motions for a new trial were denied, and he was formally sentenced to death, plus thirty to sixty years, on January 24, 1983.<sup>208</sup>

In 2003, having spent more than one half of his life on death row, forty-two year-old Nicholas Yarris became the first Pennsylvania death row inmate to be exonerated by DNA. Yarris confessed to a crime that he did not commit.<sup>209</sup>

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200. The victim's husband's blood type was also B+. During the investigation, he stated that he and his wife had sexual intercourse the night before her murder. When it became clear that Yarris was a suspect in the case, Mr. Craig claimed to have worn a condom that night, even though the couple was incapable of having children. Author materials, *supra* note 181.

201. *See* author materials, *supra* note 181.

202. *See id.*

203. This statement is now known to be absolutely false in light of DNA evidence that conclusively showed that Yarris was not the rapist or murderer.

204. *See* author materials, *supra* note 181.

205. *See id.*

206. *See id.*

207. While Yarris' false confession, confirmed by snitch testimony, was the most compelling evidence used against him at trial, there were elements of eyewitness misidentification in the government's case. For instance:

While waiting alone in the courtroom prior to the [preliminary] hearing [in this case], Frank Kamanski, a co-worker of Craig, was asked to view Yarris through an open door with the purpose of identifying him as the individual Craig once complained had 'bothered' her where she worked in the mall. He so identified Yarras, sitting alone shackled hand and foot...At the preliminary hearing, witness Natalie Barr testified that Yarris was the 'suspicious individual' who had come around the mall a few days after Craig's murder and asked a series of questions about the murder.

*Yarris*, 2004 WL 2007267, at ¶46-7.

208. *Id.* at ¶ 60.

209. In his civil rights action against multiple defendants, the following averments from Yarris' Complaint regarding his post-conviction are worth noting. It remains to be determined whether the named defendants will be successful in their responses to any or all of

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Yarris' averments. In the interest of fairness and disclosure, the author has not reviewed the defendants' answer or response to Yarris' Complaint. *Yarris*, 2004 WL 2007267, at ¶46-7.

65. In March 1988, Yarris requested testing of the physical evidence in the case by newly developed DNA-fingerprint techniques.

66. Yarris sought the release of the material in the custody of the Office of the District Attorney, and was informed that all the evidence had been destroyed except for two stained slides.

67. Said slides were forwarded to Cellmark Diagnostics, who rejected the evidence as being of insufficient quantity for DNA testing in August, 1988.

68. After reviewing the transcripts of the trial, Yarris discovered that two additional slides of physical evidence had been submitted to National Medical Associates in Willow Grove, PA. It was discovered in 1988 that National Medical Associates still retained the evidence.

69. Upon discovery of the existence of two additional slides in Willow Grove, defendant Assistant District Attorney McAndrews dispatched two detectives, without court order, to retrieve the evidence, ostensibly to transport it to the coroner and then to Cellmark Diagnostics.

70. The two slides of evidence, however, were never delivered to the coroner, but instead, were retained in the personal possession of defendant David Pfeifer and one John Davidson, now deceased but, at the time, an investigator with defendant Criminal Investigative Division, who refused to relinquish custody of the evidence, kept the evidence in a paper bag, in a non-controlled environment, under a detective's desk, where it was allowed to rot and to be destroyed as useful evidence.

71. Additional evidence, in the form of the victim's clothing, was later discovered in the defendants' possession.

72. Yarris' petition for DNA fingerprinting was granted in November 1989, to be conducted by Cellmark Diagnostics.

73. Testing done by Cellmark was returned as inconclusive.

74. Yarris continued his requests for PCR-enhanced DNA testing, a more recent development in the field of DNA testing, from 1989 through 1991, to be conducted by Dr. Edward Blake, the developer of the technique.

75. In September 1992, the District Attorney stipulated to additional testing of the physical evidence, but only if said testing was conducted by Alabama Department of Forensic Sciences, a facility not demonstrated as competent in PCR-enhanced DNA testing.

76. Testing done by Alabama Department of Forensic Sciences was returned as inconclusive, with no accompanying report.

77. Yarris continued his efforts, by means of state Post Conviction Relief Act petitions and federal Habeas Corpus petitions, to be granted a new trial and proper DNA testing of the physical evidence.

78. In August, 2002, Yarris' Habeas Corpus petition was granted and he was subsequently granted a full evidentiary hearing on his PCRA petition for new trial.

79. On April 4, 2003, PCR-enhanced DNA testing on material in the gloves found at the scene of the crime established that Yarris was not the 'habitual user' of the gloves, that the 'habitual user' was another, unknown male.

80. On July 2, 2003, PCR-enhanced DNA testing on the remaining material found on the victim's underpants conclusively established that Yarris was not the producer of the semen and material and was not the rapist and, furthermore, the DNA analysis showed the material came from two different unknown males, one of whom was the 'habitual user' of the gloves.

*C. Police and Prosecutorial Misconduct*<sup>210</sup>

Why don't you . . . try defending some unfortunate innocent before the Mad Bull down the Old Bailey? You'd have a Judge who's longing to pot your client, and is prepared to use every trick in the book to get the Jury on his side, and a prosecutor who can afford to make all the enquiries and is probably keeping quite about evidence that's slightly favourable to the defence, and a Jury out for revenge because someone stole their car radios. Then you'd find out how much things are slanted in favour of the defence.

John Mortimer, *Rumpole And The Scales of Justice* 66 (2002).

Police and prosecutorial misconduct of the sort discussed under this heading is a difficult subject on several levels. Most individuals who serve in the roles of police and prosecutor feel the anger and understand the burden that comes from these exonerations. And yet, these sensibilities are in direct contrast with those relatively few individuals in these roles who are possessed by an adverse sense of high purpose to bring justice, through any means, to victims and perpetrators alike.<sup>211</sup> Author Scott Turow characterizes the

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81. At the District Attorney's insistence, PCR-enhanced DNA testing was done on fingernail scrapings found under the victim's nails. Testing results established the fingernail scrapings were from the 'habitual user' of the gloves.

82. Despite the overwhelming DNA evidence, the District Attorney chose to 'review' the matter further to decide whether to accept the evidence.

83. On August 19, 2003, the U.S. District Court ordered that, in light of the new evidence, a new trial for Yarris was to be granted within two weeks, or that Yarris would be set free.

84. On August 26, 2003, prosecution and defense filed a joint PCRA petition requesting vacation of the conviction, with a 90-day period granted to the prosecution to decide whether to retry Yarris on the charges.

85. On September 3, 2003, the Delaware County Court of Common Pleas, in compliance with the U.S. District Court Order of August 19, 2003, vacated Yarris' convictions and sentences.

86. On November 27, 2003, Deputy District Attorney Kovach requested an extension of the 90-day period granted by stipulation to the PCRA petition. The District Attorney chose to drop all charges against Yarris on December 9, 2003. Yarris was subsequently released from state prison on January 16, 2004.

210. Very simply, misconduct in the prosecution of any criminal case can come from many sources. Its insidious nature can make it difficult to detect regardless of whether the conduct is purposeful or the product of simple error. But in all cases, the impact of misconduct is rarely benign. Misconduct often triggers eyewitness failures, the use of junk science, false confessions, false witness statements, or other errors that impact the trial and are prevalent in wrongful convictions. *Supra* note 17. Police and prosecutorial misconduct are separate and distinct indicia in wrongful convictions. Instantly, there is no attempt to assign particular fault to either the police or prosecutors. Instead, the reader is left to draw reasonable inferences from the facts presented. For an insightful discussion of post-conviction prosecutorial misconduct, see Fred C. Zacharias, *The Role of Prosecutors In Serving Justice After Conviction*, 58 VAND. L. REV. 171 (2005).

211. Often times, wrongful convictions find their root source in the unbridled zeal with which police and prosecutors undertake their roles. In his dissenting opinion in *U.S. v. Wade*,

dilemma best in offering his observations on the case of Alejandro Hernandez<sup>212</sup> and Rolando Cruz, two individuals convicted and sentenced to death and eighty years respectively, but later exonerated of the brutal sexual assault and murder of ten year-old Jeanine Nicarico.<sup>213</sup>

As I saw it then . . . and see it even today . . . Cruz and Hernandez is a tale of good guys and bad guys. On one side was the cadre of virtuous defense lawyers, supported by earnest journalists and honest cops, who passed these cases to one another like a torch over more than a decade, convinced of the innocence of these men and working for little or no compensation. On the other side were a number of prosecutors and police officers whose reluctance to admit their

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388 U.S. 218 (1967) (White, J., dissenting in part and concurring in part), Justice White cautioned against such excess when he described the police function in a criminal case as follows:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, or so-called adversary system is not adversary at all; nor should it be.

*Wade*, 388 U.S. at 256.

In *Berger v. U.S.*, 295 U.S. 78, 88 (1935) the Court offered this view on the role of the prosecutor:

[He] is the representative . . . of a sovereignty...whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . He may prosecute with earnest and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

212. In 1991, Scott Turow was a partner in the Chicago office of Sonnenschein, Nath & Rosenthal, when he was asked to take on the *pro bono* appeal of Alejandro Hernandez. Hernandez and co-defendants, Rolando Cruz and Stephen Buckley, were indicted in the brutal sexual assault and murder of a ten-year-old girl. Turow listened to many members of the legal and law enforcement communities; however, he was ultimately persuaded by Professor Larry Marshall's brief for defendant, Rolando Cruz, which convinced him of Hernandez and his co-defendant's innocence. See SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 5-7 (2003).

213. See SCHECK ET AL., *supra* note 11, at 176-80.

Since 1963, at least 381 murder convictions across the nation have been reversed because of police or prosecutorial misconduct. A study by Ken Armstrong, the legal affairs writer for the Chicago Tribune found that not one of the prosecutors who broke the law in these most serious charges was ever convicted or disbarred. Most of the time, they were not even disciplined.

*Id.* at 175.

errors, for fear of the damage to their own self-esteem or ambitions, drove them to ever graver mistakes.<sup>214</sup>

Often times, and particularly in wrongful conviction cases, police or prosecutorial misconduct becomes evident long after the harmful conduct has been revealed and has taken its toll. Part of the problem in detecting misconduct stems from the broad discretion that lies within the decision-making province of police and prosecutors. It is virtually unseen or unreviewable—from investigating, immunizing, charging, plea-bargaining, allocating resources, and other forms of discretion, police and prosecutors have quasi-judicial responsibilities without much oversight.<sup>215</sup> The District Attorney is the chief law enforcement officer in their respective Pennsylvania counties. As a “minister of justice,” this constitutional officer<sup>216</sup> is charged

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214. TUROW, *supra* note 212, at 104. Mr. Turow expounded on these views with the author on October 13, 2003, at a private dinner following his presentation at the Drue Heinz Lecture Series, in Pittsburgh, PA. On the subject of the death penalty, and indirectly on the subject of wrongful convictions, Mr. Turow expressed a clear concern for the continuing loss of the moral authority of our criminal laws and pondered, openly, whether a system of justice can be constructed that reaches only the right cases, without also occasionally condemning the innocent. Scott Turow provided *pro bono* appellate representation services to Alejandro Hernandez. Hernandez, along with co-defendant Rolando Cruz, won release when DNA confirmed that one Brian Dugan was the perpetrator of the sexual assault and murder of Jeanine Nicarico. A judge who was extremely critical of the investigation and prosecution of the case acquitted Cruz. Cruz and Hernandez, both formerly death row inmates, were innocent men. The Hernandez case is, perhaps, one of the most egregious examples of official misconduct on record. For a detailed account of the case’s police and prosecutorial misconduct, see TUROW, *supra* note 212, at 41-46. (Three prosecutors and four sheriff’s office investigators were indicted for perjury and obstruction of justice, though ultimately, all officials were cleared of these charges.) Also, see SCHECK ET AL., *supra* note 11.

215. See *Commonwealth v. Walls*, 396 A.2d 419, 421 (Pa. Super. Ct. 1978). “It is true that the ‘prosecutor is a quasijudicial officer representing the Commonwealth . . . [whose] duty is to seek justice, not just convictions.’ Thus, where the prosecutor breaches his duty of fairness and acts in a manner that deprives the defendant of a fair trial, a mistrial should be declared.” (citations omitted). As for Rules of Professional conduct for the prosecutor, the Comment to Rule 3.8 of the ABA Model Rules (2002) provides:

[A] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions (including Pennsylvania) have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn, are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systemic abuse of prosecutorial discretion could constitute a violation of Rule 8.4 (Misconduct).

MODEL RULES OF PROF. CONDUCT R. 3.8 cmt. 1 (2003), PA. RULE OF PROF. CONDUCT R. 3.8 cmt. 1 (2004).

216. The elected office of District Attorney was created by the Pennsylvania Constitution. PA. CONST. art. 9 § 4. The Commonwealth Attorney’s Act, 71 PA. STAT. ANN. § 732-206 provides that the Attorney General “shall have the power to investigate any criminal

with the duty to not only seek convictions, but also to see that justice is done.<sup>217</sup> But what precisely does this mean?<sup>218</sup> At bottom, we know that the touchstone of due process analysis in prosecutorial misconduct cases is the fairness of the trial, not the culpability of the police or prosecutor.<sup>219</sup> Perhaps the lack of genuine consequences for purposeful wrongful conduct creates a dangerous sense of security. In any event, in real terms, the fairness of the trial and the culpability of the police or prosecutor are rarely, much less easily, divided so definitively.

There is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice.<sup>220</sup> Misconduct, to one degree or another, surfaces in no less than five of the eight cases reviewed in this article and in forty-five percent of exonerations.<sup>221</sup> The author's focus on three of these cases is not intended to validate the exonerees' civil rights misconduct

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offense which he has the power to prosecute...." By inference, the Attorney General's power to investigate "any criminal offense" statewide in certain classes of offenses is shared by District Attorneys in their own counties. The Second Class County Code provides

(a) The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions, in the name of the Commonwealth, or, when the Commonwealth is a party, which arise in the county, and perform all the duties which now by law are to be performed by deputy attorneys general, and receive the same fees or emoluments of office.

16 CONS. STAT. ANN. § 4402 (2001).

217. *Berger*, 295 U.S. at 88, *accord* *Dunn v. Collieran*, 247 F.3d 450, 451 (3d Cir. 2001). Justice Barry reiterated the following words taken from Justice Sutherland's opinion in *Berger*:

Our criminal justice system is bottomed on several unwavering principles. One of those principles was recognized long ago by Justice Sutherland when he stated that a prosecuting attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (citations omitted).

*Dunn*, 247 F.3d at 451.

218. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEF. FUNCTION (3d ed. 1993).

219. *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *accord* *United States v. Smith*, 319 F. Supp. 2d 527, 534 (E.D. Pa. 2004).

220. *U.S. v. Janotti*, 673 F.2d 578, 614-15 (3d Cir. 1982).

221. SCHECK ET AL., *supra* note 11, at app. 2. A study of the first sixty-two U.S. exoneration cases identifies police and prosecutorial misconduct as the third and fourth leading factors in wrongful convictions.

claims,<sup>222</sup> but to simply reveal the government's conduct as it is alleged to have been, and with the advantage of hindsight, allow the readers to draw whatever reasonable inferences they may.<sup>223</sup>

It is axiomatic that police or prosecutorial misconduct that deprives an individual of his right to a fair trial amounts to a deprivation of liberty without due process of law.<sup>224</sup> The variety of misconduct in wrongful conviction cases, which often takes the form of manufacturing evidence, includes, but is not limited to, obtaining false statements, coercing a confession, obtaining identifications through suggestive methods, and suppressing exculpatory information.<sup>225</sup>

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222. Four of Pennsylvania's eight exonerees have filed section 1983 actions in federal court: (1) *Brison v. Police Officer Tester*, No. Civ. A. 94-2256, 1994 WL 709401, at \*1 (E.D. Pa. Dec. 21, 1994); (2) *Bruce Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366 (E.D. Pa. 2001); (3) Complaint at 1, *Yarris v. County of Delaware*, No. 04CV03804 (E.D. Pa. 2004); and (4) Complaint at 1, *Laughman v. Commonwealth*, No. 1:05-cv-01033-YK (M.D. Pa. May 20, 2005).

223. In many ways, elements of misconduct can be found in any case where error has contributed to a wrongful conviction. The real question turns on whether the conduct was purposeful or simply the product of neglect. In either case, human error in the form of misconduct contributes to a great number of wrongful convictions. In the case of *Bruce Godschalk*, it would be difficult to suggest that police did not manufacture evidence given *Godschalk's* detailed confession that contained information known only by the investigating officers. See *The Innocence Project: Bruce Godschalk*, [http://www.innocenceproject.org/case/display\\_profile.php?id=102](http://www.innocenceproject.org/case/display_profile.php?id=102) (last visited Mar. 8, 2006).

224. The Federal Civil Rights Act, 42 U.S.C. §§ 1981-1988, provides the statutory basis for federal police abuse actions against state or local police officers. In addition, the Third U.S. Circuit Court of Appeals has ruled that the Philadelphia District Attorney's Office is not an "arm of the state" and therefore can be sued under civil rights laws for the conduct of its investigators. *Carter v. Philadelphia*, 181 F.3d 339, 358 (3d Cir. 1999).

225. *AVERY ET AL.*, *supra* note 43, at 594-95. Avery and his co-authors offer the following sample jury instructions for police misconduct cases. These samples capture the essence of the misconduct elements that are present in most wrongful conviction cases. *Id.* at 594.

#### 12:26 Obtaining False Statements

Where an officer knowingly induces or coerces a witness to make a false statement or to commit perjury, the officer has manufactured false evidence. The mere fact that a witness testified falsely does not by itself require a finding that the officer who identified or obtained that witness manufactured evidence. If, however, you find that an officer has rewarded or threatened a witness to encourage him to make a statement that the officer knows is false, you should conclude that the officer has manufactured evidence. Similarly, if you find that an officer has planted information in the mind of the witness that the witness in fact had no knowledge of, you should conclude that the officer has manufactured evidence. In addition, if you find that an officer used investigative techniques that were so coercive and abusive that he knew or should have known that those techniques would yield false information, you should conclude that the officer has manufactured evidence, even if he did not know that the evidence was false. (citations omitted).

#### 12:27 Coercing a Confession

*Barry Laughman*

The logic of truth demands some explanation of how and under what circumstances Laughman arrived at making his detailed but false confession. During the course of his interrogation, Troopers Holtz and Blevins must have observed that Laughman, at best, was mentally challenged.<sup>226</sup> Yet, no apparent safeguards were taken when he was interrogated for hours prior to making his statement.<sup>227</sup> It has been Laughman's position all along that the

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Manufacturing evidence may also include coercing a confession from one person that falsely implicates another person in a crime. The Constitution requires that confessions to crime must be made voluntarily. A confession is involuntary if, considering the totality of the circumstances present at the time of any questioning, the conduct of the officer has overcome the suspect's will. If you find that a law enforcement officer has threatened a witness with a severe sentence if he does not confess, and has promised leniency if he does confess, you may find that an officer has coerced a confession. A promise of leniency will render a confession involuntary if it is sufficiently compelling so that it could be said that the defendant's free will was overcome by the offer. (citations omitted).

#### 12:28 Obtaining Identifications Through Suggestive Methods

Identification procedures conducted during the investigation of a criminal case must conform to standards of fundamental fairness. An identification violates the requirements of due process of law if it was obtained in a manner so impermissibly suggestive as to give rise to substantial likelihood of mistaken identification.

Improperly suggestive procedures include coercing a witness to identify a particular suspect and displaying photos in a manner that suggests an officer desires the witness to select a particular photo. If a defendant obtained an identification of a plaintiff in an impermissible suggestive manner, you may hold the defendant liable for manufacturing evidence. (citations omitted).

#### 12:29 Suppressing Exculpatory Information

Exculpatory evidence is evidence which tends to suggest the innocence of a person suspected of or charged with a crime. It includes evidence which tends to prove that the defendant did not commit the crime, evidence which suggests that the crime might have been committed by someone else, and evidence which might be used to impeach witnesses who would testify against the person accused. A defendant has a constitutional right in a criminal case to be furnished with material exculpatory evidence in the hands of the prosecution and the police. Exculpatory evidence is "material" when it would undermine confidence in a conclusion that the defendant was guilty of the crime. (citations omitted).

226. See author materials, *supra* note 136.

227. See *id.* Anticipating such a challenge, it would have been prudent of Troopers Holtz and Blevins to video tape the entire interrogation process in order to remove any doubt about the fairness of the interrogation process, the knowing, voluntary and intelligent nature of Laughman's confessions, and the possibility of manufactured evidence.

troopers engaged in trickery, deceit, and coercion in supplanting manufactured evidence.<sup>228</sup>

There was, in addition to his false confessions and police misconduct, an element of scientific misconduct in the Laughman case. Laughman and the victim were among those individuals whose blood type is secreted into their bodily fluids, such as sweat, saliva, and semen.<sup>229</sup> Laughman's blood was drawn pursuant to the search warrant.<sup>230</sup> The State Police chemist, Janice Roadcap, determined that he was a type-B secretor.<sup>231</sup> The sperm on the victim's body was typed and identified as that of a type-A secretor.<sup>232</sup> After learning of the incongruous lab results, Roadcap went back to her original lab notes and added writing in the margins that swabs taken of the semen "were moist when placed in vials."<sup>233</sup>

Though highly unlikely, a breakdown of B antigens could have occurred,<sup>234</sup> but rather than re-testing all three samples, or testing them for bacteria or other contamination, Roadcap compounded her misconduct by doing nothing.<sup>235</sup> She returned the evidence back to Troopers Holtz and Blevins, who stored it in an evidence locker for eight months, where it degraded and was rendered useless for further testing by the defense.<sup>236</sup> In short order, theirs' was the type of conduct that creates chaos in our system of criminal justice.

*Thomas Doswell*

In many cases, police misconduct has less to do with prosecutorial zeal than it does with an investigator's personal bias or prejudice. In Doswell's case, a picture was worth much more than a thousand words. Years prior to his conviction for the 1986 rape of a Pittsburgh woman, Doswell was acquitted on rape charges involving his former girlfriend. Immediately after the jury returned its verdict of not guilty in that case, Detective Herman Wolf had warned Doswell that he "had not seen the last of him," and that he would "get him."<sup>237</sup> Less than two hours after the 1986 rape occurred, Detective Wolf was at the hospital, showing that victim an array of photos.<sup>238</sup>

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228. *Id.*

229. *See* Trial N.T. 144 - 148.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Trial N.T. 144-148. "The process of drying a sample preserves the genetic markers that allow the forensic serologist to identify, classify, and individualize the stain; however, when a sample is dried, bacterial contamination decreases since bacteria grow and multiply in a moist environment. In addition, chemical degradation is often enhanced in solution." INTRODUCTION TO FORENSIC SCIENCES 234-35 (William G. Eckert ed., 1997)

235. *See* author materials, *supra* note 136. *See also* Complaint at 14, Laughman v. Commonwealth, No. 1:05-cv-01033-YK (M.D. Pa. May 20, 2005).

236. *See* author materials, *supra* note 136.

237. The author's interview with Thomas Doswell and his mother confirmed that Detective Wolf uttered these words to Doswell while in the presence of his mother, immediately

Procedural reliability is an important consideration in assessing whether or not a photo array poses a substantial risk of misidentification.<sup>239</sup> In Doswell's case, the victim was shown a photo array with one that bore the conspicuous mark of the letter "R."<sup>240</sup> At trial, Detective Wolf indicated that the letter "R" represented individuals who had been previously charged with rape.<sup>241</sup> Beyond this, the method used by Wolf in presenting the array to the victim at the hospital, and any conversations he may have had with her, never have been developed.<sup>242</sup> Given that Doswell did not match the victim's initial identification of the perpetrator,<sup>243</sup> and in light of the fact that Dowsell did not have any of the physical markings or injuries that the victim said she inflicted upon her attacker,<sup>244</sup> the failure to identify the procedures followed by Detective Wolf, arguably, denied the jury its ability to fully weigh the eyewitness identification.<sup>245</sup> Without such information, there is no way to reconstruct the procedures or methods used to secure the eyewitness evidence

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after the jury returned its verdict of not guilty in a rape case involving his former girlfriend. Doswell's former girlfriend falsely testified to the charge of rape ostensibly as her angry response to Doswell is not committing to her and for dating other women.

238. We know that the identification of Doswell as the perpetrator of this particular crime was wrong. We can reasonably assume, though without certainty, that the photo array shown to the victim may well have posed a substantial risk of misidentification. If the array did, in fact, create a substantial risk of misidentification, the in-court identification would need to rest on independent grounds to overcome any impermissible suggestion. *Commonwealth v. Silver*, 393 A.2d 1239 (Pa. Super. Ct. 1978). The suspect's photo will not be deemed unduly suggestive if the suspect's picture does not stand out more than those of the others in the array. *Commonwealth v. Fisher*, 769 A.2d 1116, 1126 (2001). In this and all questions regarding a substantial risk of misidentification, the court will consider the totality of circumstances to determine whether the out of court identification was reliable. *Commonwealth v. Harris*, 888 A.2d 862, 866 (Pa. Super. Ct. 2005). Given the result in this case, the benefit of hindsight seems to suggest that the letter "R" could have created a substantial risk of misidentification. It is an open, but important question; however, what is not in question is that the presentation was seriously, if not materially, improper.

239. *See supra* note 237.

240. The Innocence Project: Thomas Doswell, [http://www.innocenceproject.org/case/display\\_profile.php?id=163](http://www.innocenceproject.org/case/display_profile.php?id=163) (last visited Mar. 8, 2006).

241. *See* author materials, *supra* note 44. *See also* *Commonwealth v. Doswell*, 547 A.2d 435 (Pa. Super. Ct. 1989), *aff'd w/o opinion* (Table case); *appeal denied*, *Commonwealth v. Doswell*, 558 A. 2d 531 (Pa. 1989).

242. *See* author materials, *supra* note 44. Court records from Doswell's case and conversations with Doswell and his trial counsel, Carl Marcus, Esquire.

243. *See id.*

244. *See id.*

245. *Commonwealth v. Blassingale*, 581 A.2d 183, 189 (Pa. Super. Ct. 1990) "With regard to the suggestiveness of an identification procedure, we have consistently held that only if the totality of circumstances shows that the identification procedure was 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification' will the evidence be suppressed." *Commonwealth v. Monroe*, 542 A.2d 133, 114-15 (Pa. Super Ct. 1988), *appeal denied*, 559 A.2d 36 (Pa. 1989) (*quoting* *Simmons v. United States*, 390 U.S. 377, 384 (1968)). *See also* *Commonwealth v. Fisher*, 769 A.2d 1116, 1126 (Pa. 2001).

in order to assess its reliability. We are left with nothing more than reasonable inferences.

*Nicholas Yarris*

A number of wrongful conviction indicia were aligned in the Yarris case, suggesting more than a colorable claim of official misconduct.<sup>246</sup> Critical exculpatory evidence, a pair of bloody gloves left at the scene of the crime by the killer, was concealed from Yarris.<sup>247</sup> Other potentially exculpatory evidence withheld from Yarris included numerous photographs, multiple witness statements that contradicted identification witnesses' description of the alleged perpetrator or the "suspicious person" who had been harassing the victim, as well as other statements taken during the investigation relating to the ownership of the killer's gloves.<sup>248</sup> During the trial, the prosecutor presented a slide of the bloody interior of the victim's car.<sup>249</sup> When the defense objected, contending that the slide was overly inflammatory, the prosecution argued that the slide showed a pair of men's leather gloves in the vehicle, which they believed belonged to the killer.<sup>250</sup> It was likely the prosecutor's intent to allow the jury to infer that the reason why Yarris' fingerprints were not found in the vehicle was because he wore those gloves.

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246. See author materials, *supra* note 181.

247. *Supra* note 209. Also, see *Commonwealth v. McGill*, 832 A.2d 1014, 1019-20 (2003):

To establish a *Brady* violation, a defendant must show that: (1) the evidence was suppressed by the state, either willfully or inadvertently; (2) the evidence at issue is favorable to the defendant; and (3) the evidence was material, meaning that prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-282, (1999). See *Commonwealth v. Copenhefer*, 553 Pa. 285 (1998), *cert. denied*, 528 U.S. 830 120 S. Ct. 86, 144 L.E. 2d 286 (1999) (requiring reference to the record to prove a *Brady* violation). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110 96 S. Ct. (1976). See also *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome").

Also, see *Commonwealth v. Burkhardt*, 833 A.2d 233, 241 (Pa. Super. Ct. 2003):

Where evidence material to the guilt or punishment of the accused is withheld, irrespective of the good or bad faith of the prosecutor, a violation of due process has occurred.) See *Brady*, 373 U.S. at 87. The *Brady* rule has been extended to require the prosecution to disclose exculpatory information material to the guilt or punishment of an accused even in the absence of a specific request. See *United States v. Agurs*, 427 U.S. 97, 107 (1976) (followed in *Commonwealth v. Moose*, 602 A.2d 1265, 1271-73 (Pa. 1992)).

248. See author materials, *supra* note 209.

249. See *id.*

250. See *id.*

On April 4, 2003, PCR-enhanced DNA testing on finger nail scrapings collected from the gloves found at the scene of the crime, established that Yarris was not the glove's "habitual user," revealing, instead, that the "habitual user" was another unknown male.<sup>251</sup> Neither Yarris, nor his attorney, knew of the existence of the gloves.<sup>252</sup> Therefore, they were never in a position to examine them prior to trial.<sup>253</sup> Proper disclosure would have enabled Yarris to demonstrate that the gloves could not have been his; they were too small to fit his hands.<sup>254</sup> On July 2, 2003, when PCR-enhanced DNA testing was done on the remaining material found on the victim's underpants and the gloves, it was again conclusively established that Yarris was not the producer of the semen and other biological material.<sup>255</sup> Yarris was not the rapist. The tests did establish, however, that the material came from two different unknown males, one of whom was the "habitual user" of the gloves.<sup>256</sup>

The circumstances surrounding Yarris' false confession, and the jailhouse snitch's false statements, are equally compelling predicates for inferring the presence of some level of misconduct in the form of manufactured evidence.<sup>257</sup> Yarris' interrogation yielded a confession consisting of facts not known by the general public, leaving little doubt that Yarris' mind was somehow contaminated.<sup>258</sup> At trial, Yarris' confession was bolstered by a jailhouse snitch, who received a reduced sentence and conjugal visits in exchange for his false testimony.<sup>259</sup>

#### *Bruce Nelson*

Bruce Nelson served nearly ten years of a mandatory life sentence for the robbery, rape, and second-degree murder of fifty-three-year-old Corrine Donavan.<sup>260</sup> His conviction rested almost entirely on the false testimony of his

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251. *See id.*

252. *See id.*

253. *See* author materials, *supra* note 209.

254. *See id.*

255. *See id.*

256. *See* author materials, *supra* note 209.

257. *See supra* note 43 on the subject of manufactured evidence. Also, *see* AVERY ET AL., *supra* note 43.

258. *Supra* notes 43 & 181.

259. *See* author materials, *supra* note 181. In terms of snitches and *Brady* disclosures, exculpatory evidence also includes evidence of an impeachment nature that is material to the case against the accused. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959). Any implication, promise, or understanding that the government would extend leniency in exchange for a witness' testimony is relevant to the witness' credibility. *See* Giglio v. United States, 405 U.S. 150, 154 (1972).

260. The accounts of the events surrounding the arrest, trial, conviction, and post-conviction efforts of Bruce Nelson have been confirmed by conversations and interviews with Nelson's attorney, Patrick Thomassey. Corroboration is provided from the author's review of newspaper articles and court records. The author has made every effort to ensure the accuracy of the accounts of Bruce Nelson's wrongful conviction. For Nelson's profile, *see* The Innocence

co-defendant, Terrence Moore. Moore, a convicted rapist, avoided a possible death sentence by agreeing to testify against Nelson.

Two men had stolen a van with the intent to commit a robbery. On August 3, 1981, they came upon their victim in a parking garage where they proceeded to rob, rape, and strangle the Bethel Park, Pennsylvania woman to death.<sup>261</sup>

Nelson had already been in prison when Moore identified him as the individual who initiated the crimes.<sup>262</sup> On November 11, without the benefit of counsel, investigators staged a confrontation between Moore and Nelson at which time Moore pressed Nelson with his confession.<sup>263</sup> Nelson asked Moore, "What did you tell them?" Moore responded, "I told them everything."<sup>264</sup> Subsequently, Nelson's query of Moore was characterized at trial as a confession.<sup>265</sup>

On August 17, 1990, after failing on several post-conviction challenges wherein Nelson argued that the staged confrontation with Moore deprived him of his Fifth<sup>266</sup> and Sixth<sup>267</sup> Amendment rights, the Third Circuit Court of Appeals granted Nelson's probable cause petition, and affirmed the district court's rejection of Nelson's Sixth Amendment claim, but reversed the trial court on its disposition of his Fifth Amendment claims.<sup>268</sup> The case was remanded for trial. In preparation for the 1991 trial, the prosecution tested the biological material taken from the victim's clothes and body.<sup>269</sup> The DNA results implicated Moore in the crimes, but excluded Nelson as one of the attackers.<sup>270</sup> False statements and misconduct had caused Nelson to serve nearly ten years for a crime he did not commit.

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Project: Bruce Nelson, [http://www.innocenceproject.org/case/display\\_profile.php?id=13](http://www.innocenceproject.org/case/display_profile.php?id=13) (last visited Mar. 8, 2006) (on file with author).

261. See author materials, *supra* note 260.

262. See *id.*

263. See *id.*

264. See *id.*

265. See *id.*

266. Nelson filed a habeas corpus petition stating that the submittal of his confrontation with the other defendant, Terrence Moore, violated his Sixth Amendment right to counsel. *Nelson v. Fulcomer*, 911 F.2d 928, 929 (3d Cir. 1990). Nelson also claimed a violation of his Fifth Amendment right to "restrictions on custodial interrogation of suspects who have invoked their right to silence." *Id.* at 931. The district court denied his petition and his certificate for probable cause for appeal. *Id.* at 928. The Pennsylvania Supreme Court declined to review the case. On August 17, 1990, The United States Court of Appeals for the Third Circuit granted Nelson's probable cause petition and reviewed his claims *de novo*. *Id.* The Court affirmed the district court's rejection of Nelson's Sixth Amendment claim, but reversed its Fifth Amendment decision and remanded the case to the district court for further review. *Id.* at 941.

267. *Id.* at 941. The third circuit court affirmed the district court's rejection of Nelson's Sixth Amendment claim.

268. *Nelson*, 911 F.2d at 941.

269. See author materials, *supra* note 260.

270. See *id.*

*C. Junk Science*<sup>271</sup>

Wisdom entereth not into a malicious mind, and science without conscience is  
but the ruin of the soul.

Francois Rabelais, *Gargantua and Pantagruel bk II, Rabeleais to the Reader* Ch. 8, [1534].

The misapplication of non-DNA forensic science has contributed to more than one-third of the first 150 wrongful convictions.<sup>272</sup> Indeed, one of the essential lessons we have learned from the recent wave of post-conviction DNA exonerations is that non-DNA sciences often produce erroneous results.<sup>273</sup> The verdicts in more and more cases are turning on forensic science in such areas as ballistics, handwriting analysis, hair comparisons, DNA matching, bite marks, and fingerprints.<sup>274</sup> Contributing factors to the unreliability of the science in all of these areas include questions about the validity of the underlying data sets, the absence of safeguards against fraud or mistake,<sup>275</sup> inadequate training or a lack of proper supervision of personnel, and inadequate quality control and best practices protocol for crime labs.<sup>276</sup>

*Dale Brison*

271. Fraud and misconduct are often close cousins of junk science. For an example, see *supra* note 209.

272. For details, see The Innocence Project: Causes and Remedies of Wrongful Convictions, available at <http://www.innocenceproject.org/causes/index.php> (last visited Mar. 8, 2006).

273. For a remarkable series on “junk science” see the following *Chicago Tribune* series of investigative reports: Flynn McRobert, Steve Mills & Maurice Possley, *Forensics under the Microscope, Unproven Techniques Sway Courts, Erode Justice*, CHI. TRIB., Oct. 17, 2004, at c18; Steve Mills & Flynn McRoberts, *Critics Tell Experts: Show Us the Science*, CHI. TRIB., Oct. 17, 2004; Maurice Possley, *Arson Myths Fuel Errors, Debunked theories plague fire probes, lead to wrongful arrests, prosecutions*, CHI. TRIB., Oct. 18, 2004; Flynn McRobert & Steve Mills, *From The Start, A Faulty Science, Testimony on Bite Marks Prone to Error*, CHI. TRIB., Oct. 19, 2004; Steve Mills, Flynn McRoberts & Maurice Possley, *When Labs Falter Defendants Pay, Bias toward prosecution cited in Illinois cases*, CHI. TRIB., Oct. 20, 2004; Maurice Possley, Steve Mills & Flynn McRoberts, *Scandal Touches Even Elite labs, Flawed work, resistance to scrutiny seen across U.S.*, CHI. TRIB., Oct. 21, 2004.

274. See, e.g., *id.*

275. See, e.g., *In re Investigation of the W. Va. State Police Crime Lab, Serology Div.*, 438 S.E.2d 501, 503 (W.Va. 1993); DEPARTMENT OF JUSTICE, THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1997); 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 (1997).

276. The Innocence Project: Causes & Remedies of Wrongful Convictions, *supra* note 272.

Brison's amended civil rights complaint chronicles his journey through the legal system.<sup>277</sup> On July 14, 1990, a thirty-seven year-old woman was kidnapped and raped in Oxford, Pennsylvania.<sup>278</sup> Shortly thereafter, the victim gave a description of her attacker to the police.<sup>279</sup> Chester County detectives Dampman and Gordon were in charge of the rape investigation, supervised to some extent by members of the district attorney's office.<sup>280</sup> Two weeks later, the victim allegedly saw her assailant in a crowd of people in Oxford.<sup>281</sup> The victim encountered Officer Phyllis Tester, told Tester that she had seen her assailant, and gave her a description.<sup>282</sup> Although Tester did not see anyone matching the description of the victim's assailant in the crowd at the time, she nevertheless identified Brison as the victim's attacker.<sup>283</sup> Tester's identification was based on an alleged observation of Brison earlier near the scene wearing clothing that matched those the victim described her assailant as wearing.<sup>284</sup> On the following day, Weaver prepared a search warrant for Brison's home to be executed in the early morning. Detectives Dampman and Gordon also prepared an arrest warrant for Brison, which was approved by the district attorney's office.<sup>285</sup> Subsequently, a judge issued both warrants.<sup>286</sup> Early on July 29, 1990, Brison was arrested and his home was searched.<sup>287</sup>

Once in custody, Detective Gordon, who allegedly tried to convince him to confess by informing him of DNA testing, "which was 99.9% conclusive as to whether or not the plaintiff ha[d] committed the rape in question," interrogated Brison.<sup>288</sup> Brison immediately requested DNA testing, so he could be exonerated.<sup>289</sup>

Material obtained from both Brison and the victim was available for DNA testing. No such testing was performed; however, despite the fact that the detectives and prosecutors knew that Brison had repeatedly requested it. On February 14, 1990, while in jail awaiting trial, Brison filed a *pro se* petition with the court, again requesting that DNA testing be done.<sup>290</sup> Brison's court-

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277. See *Brison v. Police Officer Tester*, No. Civ. A. 94-2256, 1994 WL 709401, at \*1 (E.D. Pa.1994). The accounts of the events surrounding the arrest, trial, conviction, and post-conviction efforts of Dale Brison are taken from various newspaper articles and court records. The author has made every effort to ensure the accuracy of the accounts of Dale Brison's wrongful conviction. Also, see *The Innocence Project: Dale Brison*, [http://www.innocenceproject.org/case/display\\_profile.php?id=04](http://www.innocenceproject.org/case/display_profile.php?id=04) (last visited Mar. 8, 2006). (Materials on file with author).

278. See author materials, *supra* note 277. See also *The Innocence Project: Dale Brison*, [http://www.innocenceproject.org/case/display\\_profile.php?id=04](http://www.innocenceproject.org/case/display_profile.php?id=04) (last visited Mar. 8, 2006).

279. See author materials, *supra* note 277.

280. See *id.*

281. See *id.*

282. See *id.*

283. See *id.*

284. See author materials, *supra* note 277.

285. See *id.*

286. See *id.*

287. See *id.*

288. See author materials, *supra* note 277.

289. See *id.*

290. See *id.*

appointed attorney also verbally asked the district attorney's office to have the tests performed; they refused.<sup>291</sup>

In addition to the victim's identification, the government's principle physical evidence at trial consisted of a hair sample<sup>292</sup> retrieved from the crime scene that was said to be consistent with Brison's hair.<sup>293</sup> Cellmark Diagnostics had earlier reported that no result was discernable from the vaginal swab taken from the victim.<sup>294</sup> Despite Brison's corroborated alibi that he was sleeping on his mother's couch, Brison was convicted.<sup>295</sup> On appeal, the Pennsylvania Superior Court vacated Brison's sentence because he had been denied DNA testing.<sup>296</sup> The case was remanded to the trial court so DNA analysis could be performed.<sup>297</sup> Testing was completed in June of 1993.<sup>298</sup> The results exonerated Brison when semen stains on the victim's panties yielded exculpatory results.<sup>299</sup> All charges were *nolle prossed* on January 14, 1994.<sup>300</sup> The junk science of hair comparisons substantially contributed to Brison's conviction. He had been incarcerated since his arrest in July of 1990 for a crime he did not commit.<sup>301</sup>

#### D. Snitch Testimony

"If you can't do the time, just drop a dime."

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291. *See id.*

292. In 1999, the reliability of hair comparison analysis was transformed by the emergence of mtDNA sequence comparisons (a.k.a. Anderson Sequence or the Cambridge Reference Sequence) which are "now utilized primarily in forensic cases where nuclear DNA markers fail to obtain results, such as hair shafts or skeletal remains." BUTLER, *supra* note 12, at 121-22. The process is especially helpful when working with materials that have been subjected to extreme environmental conditions and degradation. *Id.* at 122.

293. "If DNA technology is at one end of the spectrum – having been tested and proved, not only in crime scenes, but in laboratories and in clinical medicine – then hair evidence is on the other end." As reported in their book, *Actual Innocence*, the authors produced the results of a study in the early 1970's by the U.S. Law Enforcement Assistance Administration (LEAA), designed to test the proficiency of 240 crime labs that were providing evidence analyses in criminal cases. Glass, rubber, paint, and fiber comparisons all showed high rates of error. But, chief among the errors were those that came from hair analysis. The Innocence Project has determined from a study of microscopic hair comparison cases that subsequent DNA tests have shown that thirty-five percent of the wrongful convictions included evidence from hair analysis.

294. *See* author materials, *supra* note 277.

295. *See id.*

296. *See id.*

297. *See id.*

298. *See id.*

299. *See* author materials, *supra* note 277.

300. *See id.*

301. Brison filed an unsuccessful civil rights claim against multiple defendants for his 1990 conviction. Dale Brison v. Police Officer Tester, No. Civ. A. 94-2256, 1994 WL 709401, at \*1 (E.D. Pa.1994).

America's most famous snitch, Leslie Vernon White, as quoted in a phone interview on the television news program, *Sixty Minutes*.<sup>302</sup>

Rewarding snitch testimony has a long and rich tradition in the law.<sup>303</sup> Its legacy has produced a shameful record of injustice. According to a survey conducted by the Northwestern University School of Law's Center on Wrongful Convictions, snitch testimony is the leading cause of wrongful convictions in capital cases.<sup>304</sup> In sharp contrast to Canada's experiences that have led it to prohibit the use of jailhouse informant testimony,<sup>305</sup> the Federal Rules of Criminal Procedure permit federal prosecutors to engage in the highly unreliable practice by providing for the possibility of sentence reductions in exchange for substantial assistance in investigating or prosecuting another person.<sup>306</sup> More times than might be expected, the results can be disturbing.

*Nicholas Yarris*

Nicholas Yarris served more than one half of his forty-two years waiting to be executed for a rape and murder he did not commit. A significant portion of the government's case in chief against Yarris involved the snitch testimony of Charles Catalino, who occupied the cell next to Yarris while being held on charges stemming from a December 20, 1981 traffic violation in Chester, Pennsylvania.<sup>307</sup> During the traffic stop, Yarris and Officer Benjamin Wright ended up in a fight during which, the officer's pistol discharged into the ground.<sup>308</sup>

Catalino, the informant, was in prison having been accused of burglarizing Assistant District Attorney William H. Ryan Jr.'s residence.<sup>309</sup> ADA Ryan was

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302. A career criminal, Leslie White faked confessions in at least a dozen cases, learning details of the cases from newspapers and worming information out of police and prosecutors via telephone from jail. See NORTHWESTERN UNIVERSITY SCHOOL OF LAW: CENTER ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 4, available at <http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf> (last visited Mar. 8, 2006) [hereinafter THE SNITCH SYSTEM]; Also, see Ted Rohrlich—Los Angeles Times writer - White's story was first reported by Ted Rohrlich of the Los Angeles Times and proceeded to be picked up by *Sixty Minutes* and *Sixty Minutes* air dates.

303. See THE SNITCH SYSTEM, *supra* note 302, at 2.

304. False testimony by incentivised witnesses is the most prevalent factor in wrongful convictions in U.S. capital cases. At the time of the study, fifty-one of the 111 death row exonerations in cases identified by the Death Penalty Information Center had convictions based in whole, or in part, on snitch testimony. This leading wrongful conviction indicia is followed by eyewitness testimony (25.2%), false confessions (14.4%), and false or misleading scientific evidence (9.9%). See THE SNITCH SYSTEM, *supra* note 302, at 3.

305. See Kathryn A. Campbell, *Policy Responses to Wrongful Conviction in Canada: The Role of Conviction Review, Public Inquiries and Compensation*, 41 CRIM. LAW BULLETIN 4 (2005).

306. Rule 35(b) authorizes the court, upon the motion of the government made within one year of sentencing, to reduce the informant's sentence if the informant, after sentencing, provided substantial assistance in investigating or prosecuting another person. FED. R. CRIM. P. 35 (b)(1).

307. See author's materials, *supra* note 181.

308. See *id.*

309. See *id.*

assigned to prosecute the case against Catalino involving officer Wright, but prior to jury selection in that case, Ryan was replaced by Assistant District Attorney, Barry Gross.<sup>310</sup>

Charles Catalino was being held pending a sentencing of four to ten years after being convicted of burglarizing ADA Ryan's home. In his civil rights complaint,<sup>311</sup> Yarris contends that Catalino perjured himself at trial in exchange for promises of a reduced sentence and conjugal visits with his spouse.<sup>312</sup> Catalino subsequently testified that Yarris expressed concern that his blood would be found at the scene of the crime and that he confessed to committing the rape and the murder.<sup>313</sup> These statements are now known to be absolutely false in light of DNA evidence conclusively showing that Yarris was not the rapist or murder.

Catalino was released<sup>314</sup> from prison later in that same year. The government has not pursued perjury charges against Catalino.

## V. INNOCENCE REFORMS: THE CREATION

Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for morrow. It must have a principle of growth.

Benjamin N. Cardozo, *The Growth of the Law* 19-20 (New Haven: Yale University Press 1924).

Several years ago, in a ceremony marking the seventieth anniversary of the execution of Sacco and Vanzetti, the then Mayor of Boston, the Honorable Thomas Menino, accepted a design proposal for a memorial to be erected in a public park for two men who were convicted of a murder in a trial tainted by passions aroused by the defendants' politics and immigrant backgrounds. At the event, Mayor Menino remarked, "[o]ur acceptance of this work of art is a statement by the City that these men did not receive a fair trial."<sup>315</sup> Actually, what the Mayor should have said, and what in fact many Mayors before him refused to say, was that these two men were innocent. Perhaps when the jury spoke in the Sacco and Vanzetti trial, the country was not wired, so it was not

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310. *See id.*

311. Complaint, Nicholas Yarris v. County of Delaware, No. 2:04-cv-03804, 2004 WL 2007267 (E.D. Pa. 2004).

312. *Id.* at ¶43.

313. *Id.*

314. *Id.* at ¶44.

315. Thomas Grillo, *Sculpture to Remind of Sacco and Vanzetti*, BOSTON GLOBE, Aug. 20, 1997.

really listening. That was then. But a cold monument to innocence lost is not the kind of response that America needs today, much less in 1927.

There are strong indications of the ascendancy of innocence reforms<sup>316</sup>

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316. The following post conviction DNA testing statutes are emblematic of the growing awareness and success of innocence reform efforts.

State Citation:

- AR: ARK. CODE ANN. § 16-112-201 (2006).  
 CA: CAL. PENAL CODE § 1405 (2005).  
 CO: COLO. REV. STAT. § 18-1-411, 412, 413, 414, 416 (2005).  
 CT: CONN. GEN. STAT. ANN. § 54-102g, (2005).  
 DE: DEL. CODE ANN. tit. 11. § 4504 (2005).  
 DC: D.C. CODE § 22-4133 (2005).  
 FL: FLA. STAT. ANN § 925.11 (2006); FLA. R. CRIM. P. 3.853 (2005).  
 GA: GA. CODE ANN. § 5-5-41 (2005).  
 ID: IDAHO CODE ANN. § 19-4902 (2005).  
 IL: § 725 Ill. COMP. STAT. ANN. 5/116-3 (2005).  
 IN: IND. CODE ANN. § 35-38-7-1, to -19 (2005).  
 KS: KAN. STAT. ANN. § 21-2512 (2004).  
 KY: KY. REV. STAT. ANN. § 422.285 (2005).  
 LA: LA. CODE. CRIM. P. ART. 926.1 (2005).  
 ME: 15 ME. REV. STAT. TIT. 15 § 2136-38 (2005).  
 MD: MD. CODE ANN. CRIM. PROC. § 8-201 (2005).  
 MI: MICH. COMP. LAWS ANN. § 770.16 (2006).  
 MN: MINN. STAT. ANN § 590.01-.06 (2005).  
 MO: MO. ANN. STAT. §547.035 (2005)  
 MT: MONT. CODE ANN., § 46-21-110 (2005)  
 NE: NEB. REV. STAT. ANN. § 29-2101, 29-4120 – 29-4125 (2005)  
 NV: NEV. REV. STAT. § 176.0918 (2004).  
 NJ: N.J. STAT. ANN. § 2A:84A-32A (2004)  
 NM: N.M. STAT. § 31-1A-2 (2006).  
 NY: N.Y. CRIM. PROC. LAW § 440.30 (2005).  
 NC: N.C. GEN. STAT. § 15A-269 (2005).  
 OH: OHIO REV. CODE ANN. §§ 2953.21, 2953.23, 2953.71, 2953.82,  
 109.573 (2003).  
 OK: OKLA. STAT. ANN. TIT. 22 § 1371.1, 1371.2, 1360 (2003).  
 PA: 42 PA. STAT. ANN § 9543.1 (2002).  
 RI: R.I. GEN. LAWS § 10-9.1-10, 10-9.1-11, 10-9.1-12 (2005)  
 TN: TENN. CODE ANN. § 40-30-110, 40-30-301, 40-30-302 – 313 (2005).  
 TX: TEX. CODE CRIM. PROC. ANN. ART. 64.01- .05 (2003).  
 UT: UTAH CODE ANN. § 78-35A-301, § 78-35A-302, § 78-35A-303, § 78-35A-  
 304 (2002).  
 VA: VA. CODE ANN. § 19.2-327.1 (2005).  
 WA: WASH. REV. CODE ANN. § 10.73.170 (2005).  
 WI: WIS. STAT. ANN. § 974.02, 974.06, 974.07 (2005).

A particular problem with Pennsylvania's post conviction DNA statute is its failure to require any degree of reporting to track the entire range of activities surrounding the filing of the post conviction DNA petitions. For example, are petitions being denied for improvident reasons? (e.g. The court is free to determine that there was sufficient other evidence in the case indicating guilt such as several witnesses). Stated otherwise, the very indicia that lead to false convictions may be relied upon by prosecutors and the courts in denying a perfectly qualified petition for relief as contemplated under the 2002 legislation. 42 PA. STAT. ANN. § 926.1 (2002).

throughout our nation.<sup>317</sup> No doubt, these efforts are in response to the ballast of convincing content found in cases like the *Pennsylvania Eight*.<sup>318</sup>

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Two states, Louisiana and Maine, have anticipated this problem and created mandatory reporting requirements. Louisiana, LA. CODE. CRIM. P. art. 926.1 (2005) provides:

The petitioner, in addition to other service requirements, shall mail a copy of the application requesting DNA testing to the Department of Public Safety & Corrections, Correction Services, office of adult services. If the Court grants relief under this Article, the court shall mail a copy of the order to the Department of Public Safety and Corrections, Correction Services, office of adult services. The Department of Public Safety & Corrections, Correction Services, office of adult services shall keep a copy of all records sent to them pursuant to this Subsection and report to the legislature before January 1, 2003 on the number of petitions filed and the number of orders granting relief.

Maine, 15 ME. REV. STAT. tit. 15, § 2138(15) (2005) provides:

Beginning January 2003 and annually thereafter, the Department of Public Safety shall report on post-conviction DNA analysis to the joint standing committee of the Legislature having jurisdiction over criminal justice matters. The report must include the number of post-judgment of conviction analyses completed, costs of the analyses and the results. The report also may include recommendations to improve the post-judgment of conviction analysis process.

317. The following represents a non-exhaustive list of some of the legislative initiatives on several reform topics discussed in this article:

State Legislation: Eyewitness Identification Reform – Hawaii, HB 1748, SB 1707 (2005); Maryland, HB 973 (2005); Massachusetts, HB 734, SB 913, SB 942 (2005); Missouri, HB 557, SB 397 (2005); New York, AB 3483 (2005); Rhode Island, HB 5347, SB 185 (2005); Virginia, HB 2632 (2005). Mandatory Electronic Recordings of Interrogations - Arizona, HB 2614 (2005); California, SB 171 and analysis (2005); Connecticut, SB 1281 (2005); Florida, HB 1119, HB 1169 (2005); Illinois, SB 72 (2005); Indiana, HB 1708 (2005); Kentucky, HB 46 and fiscal information (2005); Maryland, HB 46 and analysis (2005); Massachusetts, HB 794, SB 916 (2005); Missouri, HB 557, SB 397 (2005); Nebraska, LB 112 (2005); New Hampshire, HB 636 (2005); New Jersey, A 3734 (2005); New Mexico, HB 382 (2005); New York, A 6541, S 3354 (2005); Oregon, SB 265 (2005); Tennessee, HB 204/SB 108, HB 1148/ SB 1679 and fiscal information (2005); Texas, HB 450, SB 662 (2005); Wisconsin, AB 648 (2005); Washington, D.C., B 15-1073 (2005). Crime Lab Reform – Missouri, HB 557, SB 397 Bill Summary (2005); Texas, HB 1068 (2005). Snitch Testimony - California HB 1121. For links to these various legislative efforts, visit the respective state government web sites or <http://www.truthinjustice.org>. (last visited Apr. 10, 2006).

318. The ABA House of Delegates has addressed many of the wrongful indicia appearing in the Pennsylvania exonerations. Four resolutions were submitted by the Ad Hoc Committee to Ensure the Integrity of the Criminal Process at the 2004 ABA Annual Meeting. These recommendations address crime laboratories, eyewitness identification, investigative procedures, and standards for prosecutors. The House of Delegates also approved the committee's recommendation on false confessions at the 2004 ABA Midyear meeting. The ABA House of Delegates at its Feb. 14-15, 2005 meeting in Salt Lake City, UT, approved the committee's recommendations on ineffective defense counsel, informants, and compensation for innocents. The ABA House of Delegates approved the committee's resolution on erroneous convictions at the 2005 ABA Annual meeting. See American Bar Association, *available*

Other than the post-conviction DNA testing statute, several failed efforts to enact a compensation statute for the wrongfully accused, and a moratorium on the execution of capital sentences,<sup>319</sup> Pennsylvania has been relatively silent on most of the major innocence reform initiatives.<sup>320</sup>

Fixing the problems revealed by these Pennsylvania exonerations will require a political wisdom that begins with recognizing that many of the causes and conditions leading to wrongful convictions have become ossified in our legal culture.<sup>321</sup> The bureaucracy of government, with its tendencies toward

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at <http://www.abanet.org/leadership/2005/midyear/daily/108C.doc>. (last visited Apr. 10, 2006).

319. Several attempts by the Pennsylvania legislature to create a moratorium on carrying out capital sentences have failed in recent years. A court-appointed, independent panel completed a two-year study on race and gender bias and prejudice in the Pennsylvania courts. See Sally Kalson, *Moratorium on Death Penalty Urged: Study Commission Finds Widespread Gender, Racial Bias in Pennsylvania Judicial System*, PITTSBURGH POST-GAZETTE, Mar. 5, 2003, at A1. Based on its findings, the panel, *inter alia*, recommended a death penalty moratorium. *Id.* One day after the report was issued, Pennsylvania Governor Edward Rendell, rejected the panel's position. See Sally Kalson, *Rendell Rejects Death Penalty Ban*, PITTSBURGH POST-GAZETTE, Mar. 6, 2003, at B3.

320. See *supra* notes 316 & 317.

321. For example, in most jurisdictions, the admissibility of eyewitness expert testimony is subject to the trial court's infrequently exercised discretion despite decades of empirical evidence and the forward aforementioned thinking on the fallibility of eyewitness testimony. See, e.g., *United States v. Hall*, 165 F.3d 1095, 1106-07 (7th Cir. 1999) (after noting that eyewitness expert testimony is strongly disfavored, the court rejected the petitioner's claims that the trial court had applied a *per se* rule of exclusion); *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993) ("Until fairly recently, most, if not all, courts excluded expert psychological testimony on the validity of eyewitness identification. But, there has been a trend in recent years to allow such testimony under circumstances described as narrow."); *Johnson v. State*, 526 S.E.2d 549, 552-53 (Ga. 2000)

Where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification;

Also, see *State v. Miles*, 585 N.W.2d 368, 371-72 (Minn. 1998). See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 286-89 (2003); Also, see DEPARTMENT OF LAW AND PUBLIC SAFETY, NEW JERSEY ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINE-UP IDENTIFICATION PROCEDURES (2001), available at <http://www.psychology.iastate.edu/faculty/gwells/njguidelines.pdf>. (Working with County Prosecutors and designated key members of law enforcement in each county, the New Jersey Attorney General established a training program that reflected the lessons of more than twenty years of scientific research on memory retrieval and interview techniques.) Also, see Wells et al., *supra* note 38. See BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995); see also Gary L. Wells & Amy L. Bradfield, *Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?*, 10 AM. PSYCHOL. SOC'Y 138 (1999); Pennsylvania follows a *per se* rule, excluding eyewitness expert testimony regarding reliability. *Commonwealth v. Simmons*,

inertia and conventional thinking, is simply the wrong measure for any critical response. Such blunting will dilute the public's stamina for creative politics at the very moment when the clarity of purpose provided by the sacrifices endured by these individuals could not be more transparent.

Primary responsibility for the creation of these reform efforts does not rest solely with any particular branch or level of state and local government. The legislature's authority to create innocence reforms is self-evident.<sup>322</sup> But the nature and scope of the problems identified by these wrongful convictions, along with the exigencies and political conditions involved, require more efficient steps toward reform under the rule-making and supervisory authority of the Court,<sup>323</sup> the governor's executive powers,<sup>324</sup> or perhaps best of all, the integrated and multi-lateral approach of all three political bodies. Not to be lost in this mix is the importance of local and voluntary reform efforts, carried out in a manner consistent with appropriate standards, as in the case of the voluntary adoption of eyewitness identification protocols by law enforcement agencies.<sup>325</sup>

The structural complexities underlying the causes of the wrongful conviction indicia require more than an anecdotal or spot response. The following proposals are simply intended to spur policy debate and call into action our resolve to restore public confidence, to the best of our abilities, in the fundamental due process values embodied in the Commonwealth's criminal justice system.

*Reform #1 A Pennsylvania Innocence Commission*<sup>326</sup>

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662 A.2d 621, 631 (Pa. 1995). Also, see UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF RESEARCH PROGRAMS, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>. For an analysis of the DOJ guidelines and how they are applied in Wisconsin, see Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WIS. L. REV. 529.

322. PA. CONST. arts. II, III (2001), available at [http://www.Paconstitution.duq.edu/PA\\_CONST.html](http://www.Paconstitution.duq.edu/PA_CONST.html).

323. The inherent rulemaking authority of the Pennsylvania Supreme Court dates back to the Colonial Act creating the Courts, Act of May 22, 1722 (1 Smith's Laws 140). These powers are otherwise known as the power of the Courts of Kings Bench at Westminster, Commonwealth *ex. Rel.* Duff v. Keenan, 33 A.2d 244, 248 n.5 (Pa. 1943); see ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 422 (1985). The Pennsylvania General Assembly expressly granted general rulemaking authority to the judiciary originally in the Act of June 21, 1937, Pa. 1982, No. 392, 17 P.S. sec. 61. See *In re:* 42 Pa. C. S. Sec. 1703, 394 A.2d 444, 446-47 (Pa. 1978). Within its rulemaking power, the Court has the exclusive authority to regulate the practice of law through Article V, Section 10 (c) of the Pennsylvania Constitution. See Commonwealth v. Lockridge, 810 A.2d 1191, 1195 n.5 (Pa. 2002); Lloyd v. Fishinger, 552 A.2d 303, 304 (Pa. Super. Ct. 1989), *aff'd*, 605 A.2d 1193 (Pa. 1992).

324. PA. CONST. art IV. (2001), available at [http://www.paconstitution.duq.edu/P.A\\_CONST.html#article4](http://www.paconstitution.duq.edu/P.A_CONST.html#article4).

325. Gary W. Anderson, President, Chief of Police, Town of McCandless: Draft Policy Recommendations of the Allegheny County Chiefs of Police Association (Oct. 2005).

326. At the time of this writing, Senate Judiciary Chairman, Stewart Greenleaf, the author of Pennsylvania's post conviction DNA testing legislation, has drafted, but not yet

The Pennsylvania Senate Judiciary Committee should offer a bi-partisan Concurrent Resolution directing the Joint State Government Commission to establish a Pennsylvania Innocence Commission to study and make recommendations for significant reforms to Pennsylvania's criminal justice system in order to avoid wrongful convictions and executions of factually innocent individuals.<sup>327</sup> Generally speaking, the Commission would have the authority to:

(1) Study, investigate, and review, at their own discretion and with all reasonably necessary resources, the administration of criminal justice in Pennsylvania to determine the extent to which that process has failed in the past, resulting in wrongful convictions or the wrongful executions of innocent persons.

(2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions.

(3) To make any recommendations and proposal designed to further ensure that the application and administration of criminal justice in Pennsylvania is just, fair, and accurate.

The Commission must be independent, transparent, publicly accountable, and composed of diverse, respected members of the criminal justice community and the public, including, but not limited to scholars, active and retired judges, prosecutors, law enforcement, private defense lawyers, public defenders, elected officials, corrections officials, victims, interested

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circulated, legislation to establish an Innocence Commission for Pennsylvania. The Short title of the Act will be the Innocence Commission of Pennsylvania Act.

327. Senator Greenleaf's proposed legislation sets forth the following purposes and duties of the Commission in Section 3 of the Act.

The purpose of the commission is to study the underlying causes of wrongful convictions so that it may make recommendations intended to reduce or eliminate the possibility that in the future innocent persons will be wrongfully convicted in [Pennsylvania]....The commission shall have the duty to: (1) Review cases in which an innocent person was wrongfully convicted and subsequently exonerated. (2) Identify the most common causes of wrongful convictions. (3) Identify current [Pennsylvania] laws, rules and procedures implicated by each type of causation. (4) Identify through research, experts and discussion, potential solutions in the form of legislative, rule or procedural changes or educational opportunities for elimination of each type of causation. (5) Consider potential implementation plans, cost implications, and the impact on the criminal justice system for each potential solution (6) Issue interim reports and/or a final report recommending solutions for each causation issue identified, including recommending implementation plans, identifying cost implications and discussing the potential impact on the criminal justice system of the recommendation.

Innocence Commission Act, S.B 1069, 2005-1006 Gen. Assem., Reg. Sess. (2006), *available at* <http://www.legis.state.pa.us/2005%5F0/sb1069p1468.htm>. If adopted as proposed, the Act "shall expire in five years unless further extended by act of the General Assembly." *Id.*

organizations, other authorities in the criminal justice system, and members of the public.<sup>328</sup>

The findings and recommendations of the Commission should not be binding in any subsequent civil or criminal proceeding, although the factual record created by the Commission will be a matter of public record.

The Commission should be required to file periodic public reports on their findings and recommendations, and the relevant branch of government to which these reports are submitted should issue a formal written response to the recommendations within a fixed period of time.

Any effort to stem the loss of confidence in our system of criminal justice will be tested by our ability to create innocence reforms against competing economic, social, and political conditions of the day.<sup>329</sup> Innocence reforms, like any public policy initiative, are tied to malleable public values; the key to success is that the initiatives must be both feasible and legitimate.<sup>330</sup>

The creation of an innocence commission is the crucible for forming innocence reforms. Its charge is to study, conceive, refine, and transmit the ideas and understandings that come from wrongful convictions so that, in the end, our thinking keeps our policy on a path that nourishes our core values. Its success may turn on such key features as subpoena powers, access to quality investigative resources, and political independence. It remains to be seen if such a composite is politically viable. But there is no doubt that the commission must be trusted to speak with complete candor about cases where the system fails. Beginning with the composition of the commission, it is vital that this body be comprised of members from all relevant perspectives in the criminal justice system.<sup>331</sup>

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328. Senator Greenleaf's proposed legislation calls for a membership consisting of approximately thirty members recommended by the Chief Justice, the Governor and the members of the General Assembly. *See* Innocence Commission Act, *supra* note 327.

Using their recommendations, the Joint State Government Commission shall invite members to participate on the commission based on competence, experience and anticipated commitment. Invitations shall be further based on the need for the commission to be diversely representative of the criminal justice system. Representation must include at least one member from the following constituencies: prosecution, defense, law enforcement, judiciary, and victim assistance.

*Id.*

329. For an example of a political condition, the *Ryan Report* contains many important and perfectly reasonable innocence reform measures; however, the joint consideration of innocence reforms, and their implications for the death penalty, tends to polarize (and perhaps paralyze) the innocence reform debate by casting it as a public referendum on the death penalty. *See* REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/chapter\\_14.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_14.pdf). Also, *see* TUROW, *supra* note 212.

330. For a critical discussion of the establishment of innocence commissions to study wrongful convictions, *see* Marvin Zalman, *Cautionary Notes on Commission Recommendations: A Public Policy Approach to Wrongful Convictions*, 41 CRIM. LAW BULL. 5 (2005).

331. At a minimum, such membership should consist of prosecutors, judges (retired), law enforcement, defense attorneys and public defenders, academics, crime lab and forensic specialists, members of the community, and corrections officials.

In an article written by Barry Scheck and Peter Neufeld, these distinguished reform proponents maintain that the following six elements are essential for operating an effective state innocence commission:<sup>332</sup>

1. Innocence commissions should be standing committees chartered to investigate, at their own discretion, any wrongful conviction and to recommend any public policy reforms they deem necessary;
2. Innocence commissions need the power to order reasonable and necessary investigative services, including forensic testing, autopsies, and other research services;
3. Innocence commissions must have the power to subpoena documents, compel testimony, and bring civil actions against any person or entity that obstructs its investigations;
4. The findings and recommendations of innocence commissions should not be binding in any subsequent civil or criminal proceeding, although the factual record created by the commission can be made available to the public;
5. Innocence commissions should be transparent, publicly accountable bodies, composed of diverse, respected members of the criminal justice community and the public;
6. Innocence commissions should be required to file periodic public reports on their findings and recommendations, and the relevant branch of government to which these reports are submitted should issue a formal written response to the recommendations within a fixed period of time.

No commission currently in operation or under design has wholly adopted these recommendations. Instead, they appear as quilt work in designs that are suited to the political dynamics of each state.

Consideration of the mission of several innocence commissions does, in fact, reveal some important lessons. The English<sup>333</sup> and Canadian<sup>334</sup>

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332. Barry C. Scheck & Peter Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 103-5 (2002).

333. See David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 100-06 (2000). The English equivalent of an Innocence Commission, the Criminal Case Review System (CCRC), was established by Parliament under the Criminal Appeals Act of 1995. *Id.* at 101. It followed a Royal Commission established in 1993 to investigate how effectively the English Criminal Justice system secured convictions of the guilty while ensuring acquittals of the innocent. For an interesting article on the subject, see Robert Carl Schehr & Lynne Weatherhead, *Should the United States Establish a Criminal Cases Review Commission?*, 88 JUDICATURE 122, (2004). The separate Scottish CCRC website is available at Scottish Criminal Cases Review Commission (2006), <http://www.sccrc.org.uk/>.

experiences with innocence commissions are thematically instructive, but fundamental structural differences and the lack of certain compatible features in our trial and judicial processes render the adoption of their practices infeasible.<sup>335</sup> Closer to home, commissions in North Carolina,<sup>336</sup> Connecticut,<sup>337</sup> California,<sup>338</sup> Virginia,<sup>339</sup> Illinois,<sup>340</sup> and Wisconsin<sup>341</sup> provide more amenable elements for review and adoption.<sup>342</sup>

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334. See Ministry of the Attorney General, Fred Kaufman, Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin (2005), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>.

335. See Horan *supra*, note 333. See also *id.*

336. The North Carolina Actual Innocence Commission, <http://www.law.duke.edu/innocencecenter> (last visited Apr. 19, 2006). On November 22, 2002, North Carolina Chief Justice I. Beverly Lake invited key representatives from the criminal justice system and legal academic community to meet with him to discuss the issue of wrongful convictions of the innocent. The impetuses for the meeting were the recent exonerations in North Carolina and the Chief Justice's continued concern regarding the general public's negative perceptions and decreasing confidence in the justice system. The Commission was organized to operate as a two year Commission. Recently, legislation has been introduced to make the Commission permanent (H.B. 1323). Organizing documents, including mission statement, problem summary, commission background, objectives, rules and procedures, composition, officers, funding and effective date, available at The North Carolina Center on Actual Innocence, P.O. Box 52446, Shannon Plaza Station, Durham, NC 27717-2446, or by email at [innocence\\_center@law.duke.edu](mailto:innocence_center@law.duke.edu).

337. For complete text, see An Act Concerning the Collection of DNA Samples From Persons Convicted of a Felony, The Preservation and Testing of DNA Evidence and The Review of Wrongful Convictions Act of July 9, 2003, ch. 242, 2003 Conn. Pub. Acts 1254. The pertinent statutory language for Connecticut's legislatively created commission reads:

Sec. 8. (NEW) (Effective October 1, 2003)

(a) The Chief Court Administrator shall establish an advisory commission to review any criminal or juvenile case involving a wrongful conviction and recommend reforms to lessen the likelihood of a similar wrongful conviction occurring in the future. The advisory commission shall consist of the Chief State's Attorney, the Chief Public Defender and the Victim Advocate, or their designees, a representative from the Connecticut Police Chiefs Association, a representative from the Connecticut Bar Association, and representatives from one or more law schools in this state and one or more institutions of higher education in this state that offer undergraduate programs in criminal justice and forensic science.

(b) Whenever a person who has been convicted of a crime is subsequently determined to be innocent of such crime and exonerated, the advisory commission may conduct an investigation to determine the cause or causes of the wrongful conviction. Such investigation shall include, but not be limited to, an examination of the nature and circumstances of the crime, the background, character and history of the defendant, and the manner in which the investigation, evidence collection, prosecution, defense and trial of the case was conducted. Notwithstanding any provision of the general statutes concerning the confidentiality, erasure or destruction of records, the advisory commission shall have access to all police and court records and records of any prosecuting attorney pertaining to the case under investigation. The advisory commission shall not further disclose such records.

(c) Upon the conclusion of its investigation, the advisory commission shall report its findings and any recommendations it may have for reforms to lessen the likelihood of

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similar wrongful convictions occurring in the future to the joint standing committee of the General Assembly on the judiciary, in accordance with the provisions of section 11-4a of the general statutes, and to other interested persons as deemed appropriate including the Chief Court Administrator, the Chief State's Attorney, the Chief Public Defender, the Commissioner of Public Safety and the chief of any local police department involved in the investigation of the case.  
Approved July 9, 2003. Effective October 1, 2003.

338. S. Res. 44, 2003-04 Cal. Reg. Sess., created the California Commission on the Fair Administration of Justice. In pertinent part, it reads:

WHEREAS, Thorough unbiased study and review in other states has resulted in recommendations for significant reforms to the criminal justice system in order to avoid wrongful convictions and executions, and California has not engaged in any such review of the state's criminal justice system, now therefore, be it

*Resolved by the Senate of the State of California*, That the Members hereby establish the California Commission on the Fair Administration of Justice; and be it further *Resolved*, That the commission shall have the following duties:

- (1) To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful convictions of innocent persons.
- (2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions.
- (3) To make any recommendations and proposal designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate; and be it further

*Resolved*, that the commission shall consist of members to be appointed by the Senate Committee on Rules, which shall also designate the chair. The commission shall meet regularly, establish a staff, hold public hearings, review existing research, commission new research, and solicit public comments from scholars, judges, prosecutors, law enforcement, private defense lawyers, public defenders, elected officials, victims, organizations, authorities in the criminal justice system, and members of the public . . . .

339. S. Res. 44, 2003-04 Cal. Reg. Session. The Innocence Commission for Virginia Mission Statement provides:

To assist in examining the problems that may lead to wrongful convictions, coalition, three organizations have created an Innocence Commission for Virginia (ICVA). Led by the innocence project of the National Capital Region, The Administration of Justice Program at George Mason University, and the Constitution Project, researchers will canvas the state to identify cases in which defendant's have been erroneously convicted of serious crimes. After reviewing these cases to understand the mistakes that led to conviction, the Commission will release a report of its findings in early 2004. That report will chronicle common errors in these cases, propose policy reforms to address the sources of those errors, and offer a series of best practices to improve the investigation and prosecution of serious criminal cases in Virginia. The ICVA is a non-profit, non-partisan organization, dedicated to improving the administration of justice in Virginia. ICVA's advisory board includes former prosecutors and defense counsel, notable public

It is noteworthy that all of these models have come into being either by executive order (“blue ribbon” committees created by the governor or attorney general (Illinois)),<sup>343</sup> legislation (Connecticut),<sup>344</sup> legislative resolution and academic partnership (Wisconsin),<sup>345</sup> the State’s highest court (North Carolina),<sup>346</sup> or a consortium of innocent projects in partnership with state government (Virginia).<sup>347</sup>

Though all of these models have had a substantial impact on the criminal justice reforms introduced in their states, the integrated Wisconsin model appears to have been especially effective and one that Pennsylvania should perhaps follow. The Avery Task Force, formed in 2002 by Wisconsin legislator Rep. Mark Gundrum after the exoneration of Steven Avery,<sup>348</sup> has now finished its work. In its wake is the Wisconsin Criminal Justice Study Commission that consists of four entities; the Wisconsin State Attorney General, the State Bar of Wisconsin, the Marquette Law School, and the University of Wisconsin Law School.<sup>349</sup>

Almost from its outset, Wisconsin’s reform movement has included academics, the Wisconsin Supreme Court, the State Attorney General, and the legislature. The political legitimacy and viability of this integrated approach has been clear in the product of its legislative and judicial responses. The Wisconsin Supreme Court has decided multiple cases with consequences for wrongful convictions, while the State Attorney General has implemented

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officials, and members of law enforcement and public interest groups, among others. ICVA’s work will take it across the Commonwealth, seeking input and feedback from the many individuals and offices involved in criminal investigations and prosecutions.

Additional information, including the Commission’s findings, and access to all supplemental research, visit the commissions website: The Innocence Commission for Virginia, <http://www.icva.us> (last visited Mar. 8, 2006).

340. To view the eighty-five innocence reform recommendations of the “blue ribbon” Ryan Commission, *see* REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT, GEORGE H., RYAN, GOVERNOR 4 (2002), *available at* [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/).

341. *See* Assemb. B. 648 2005-2006 Leg., Reg. Sess. (Wis. 2005), *available at* <http://www.law.wisc.edu/fjr/innocence/05-34921.pdf>.

342. The formation language of other commissions reviewed by the author, but not included in this article, are located in Texas, Indiana, Nebraska, and Arizona.

343. *See supra* note 340.

344. *See supra* note 337.

345. *See supra* note 341.

346. *See supra* note 336.

347. *See supra* note 339.

348. For a description of the Task Force’s work and a link to the legislation it introduced, *see* Avery Task Force Legislation, [http://www.law.wisc.edu/fjr/innocence/avery\\_taskforce.htm](http://www.law.wisc.edu/fjr/innocence/avery_taskforce.htm) (last visited Mar. 8, 2006).

349. For information about the commission, *see* Wisconsin Criminal Justice Commission (2005), <http://www.wcjsc.org/>. With appreciation for the help received from Commission staff member, Byron Lichstein, the author has been informed that his site will be soon updated to explain that the Commission has decided that the first issues it will consider are false confessions/interrogation techniques. Mr. Lichstein kindly invites any inquiries. He can be reached at (608) 265-2741.

cutting-edge guidelines for eyewitness identification.<sup>350</sup> The Attorney General also is in the process of implementing guidelines for the electronic recording of interrogations capping off several years of highly productive work on innocence reforms.<sup>351</sup> Pennsylvania would be well served to closely study the political and practical course of the Wisconsin experience.

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350. See The Wisconsin Criminal Justice Commission, *supra* note 349, for a link to cases and legislation.

351. *Id.* Also, see 2005 WIS. SESS. LAWS 60, available at <http://www.law.wisc.edu/fjr/innocence/05-34921.pdf>, which links to the Bill's text. The Wisconsin Commission is staffed by Byron Lichstein. The author's conversations and written exchanges with Mr. Lichstein, in large measure, are reflected in the following summaries that appear on the Wisconsin Innocence Project site:

In September 2005, Representative Mark Gundrum and Governor Jim Doyle introduced legislation designed to improve the accuracy and efficiency of Wisconsin's criminal justice system. The legislation is the result of months of work by the Avery Task Force, a legislative commission appointed by Representative Gundrum after the exoneration of Innocence Project client Steven Avery. The Task Force was created to examine the causes of wrongful convictions such as Avery's, and more broadly, other ways that the criminal justice system can be improved to ensure conviction of the guilty, and only the guilty. The Task Force was comprised of legislators (both Republicans and Democrats), judges, prosecutors, defense attorneys, police and sheriffs, academics, and a victim advocate.

The Task Force legislation includes:

*Electronic Recording of Interrogations.* The new legislation...requir[es] electronic recording of interrogations with juvenile suspects. In juvenile cases, failure to record when recording is feasible will result in suppression of evidence. For adult cases, the legislation makes electronic recording statewide policy. If law enforcement authorities fail to record adult interrogations when recording is feasible, juries will be instructed that electronic recording is statewide policy and that they can consider the failure to record in evaluating the evidence. The legislation also provides that law enforcement authorities can apply for grant money to help finance the purchase and use of digital recording equipment.

*Eyewitness Identification Reform.* The new legislation requires each law enforcement agency in the state to adopt policies or guidelines on eyewitness identification procedures that are designed to minimize the risks of eyewitness error. After considerable study and after hearing from national experts and reviewing policies and guidelines from other jurisdictions, the Task Force adopted a set of model guidelines designed to ensure that police obtain the most reliable eyewitness identifications possible. The guidelines address issues such as proper selection of lineup or photospread fillers, proper instructions to witnesses, double blind testing, and sequential presentation of suspects or photographs . . .

*DNA Preservation Legislation.* The new legislation clarifies the kinds of biological evidence that law enforcement agencies must retain as long as anyone remains in custody in connection with the offense for which the evidence was collected. The legislation reduces the amount of material law enforcement agencies must retain, and is designed to clarify and ease the burden on law enforcement agencies, while ensuring that necessary biological material is preserved.

*Reform #2 Eyewitness Identification*<sup>352</sup>

In order to avoid wrongful convictions and executions of factually innocent individuals, the Pennsylvania Senate Judiciary Committee and the Supreme Court should jointly establish a Pennsylvania Eyewitness Identification Task Force. The objective of the Task force would be to study and make recommendations for significant reforms to Pennsylvania law enforcement's eyewitness identification policies and practices and a fundamental reconsideration of the Court's current views and treatment of eyewitness testimony, in light of the credible body of scientific evidence that casts serious doubt over the conventional thinking on the subject.

New policies and procedures, such as those recommended by the National Institute of Justice are readily available and have proven effective in other jurisdictions. The Task Force would create and monitor pilot field studies of these recommendations to test their effectiveness and practicability.

An Eyewitness Identification Reform Task Force, consisting of the Attorney General, the District Attorneys Association, the Public Defenders Association, the State Police, the Chiefs of Police Associations state-wide, and academic or social scientists with expertise in the field, or their designees, shall develop guidelines for policies, procedures, and training with respect to the collection and handling of eyewitness evidence in criminal investigations by law enforcement agencies.

Such guidelines shall include procedures for the "blind" administration of live and photo lineups and instructions that will increase the accuracy of eyewitness identifications. The guidelines shall include recommendations

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*DNA Testing Legislation.* The legislation 1) clarifies which laboratories are responsible for postconviction DNA testing, 2) clarifies who pays for the testing, and 3) requires that testing that might prove innocence shall be given priority by the laboratories. The legislation will also provide additional funding to the laboratories to enable them to give the postconviction DNA testing priority.

*Statute of Limitations Legislation.* Under current law, when police develop a DNA profile of a sexual assault perpetrator but cannot find the person who matches that profile, the state may prosecute the perpetrator, without regard to the statute of limitations, whenever the state finds a person who matches the DNA profile of the perpetrator. The legislation allows the state also to prosecute the perpetrator for any other crimes committed at the same time and as part of the same course of conduct as the sexual assault, without regard to the statute of limitations, when the DNA profile of the perpetrator is matched to an individual.

Avery Task Force Legislation, [http://www.law.wisc.edu/fjr/innocence/avery\\_taskforce.htm](http://www.law.wisc.edu/fjr/innocence/avery_taskforce.htm) (last visited Mar. 8, 2006). Also, see WIS. LAW J., Avery Legislation—Part I, available at [http://www.law.wisc.edu/fjr/innocence/avery\\_taskforce.htm](http://www.law.wisc.edu/fjr/innocence/avery_taskforce.htm) (last visited Mar. 8, 2006) (roundtable discussion - including comments of Rep. Mark Gundrum who established the Task Force).

352. The author is pleased to reference the companion piece in this Volume on eyewitness identification by my colleague, Professor Epstein, a strong advocate of innocence reforms.

regarding (1) the use of “blind” administration of live or photo lineups; (2) specific instructions to be given to the witness before and during the identification procedure to increase the accuracy of any identification, including that the purpose of the identification procedure is to exculpate the innocent as well as to identify the actual perpetrator; (3) the inclusion of not less than five individuals in any live or photo lineup who resemble the description of the suspect in all significant respects; (4) the use of sequential lineups; (5) the inclusion of only one suspect in any live or photo lineup; (6) the investigator seeking eyewitness reports of confidence levels in their own words and refraining from providing any confirmatory information until after those initial confidence levels have been recorded; (7) the photographing or other visual recording of the lineup; and (8) what training, if any, should be made available for law enforcement personnel in the use of these procedures.<sup>353</sup>

At a date certain, the Attorney General shall submit a report on the guidelines developed and recommendations concerning their use to the Governor, the Chief Justice, and the standing committees of the Legislature having cognizance of matters relating to criminal law and procedure, in accordance with the appropriate provisions of the general statutes. It shall terminate on the date that it submits its report or on a date certain, whichever is earlier.

Perhaps no other area of social science research has garnered as much credibility among policy makers, law enforcement, and innocence reform proponents than the work being done on eyewitness identification.<sup>354</sup>

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353. Many of these concepts are contained in the seminal NIJ law enforcement guide on eyewitness identification procedures. See *infra* note 354.

354. See Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 HUM. LAW & BEHAV. 581 (2000); Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002); Neil Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. EXPERIMENTAL APPLIED PSYCHOL. 44 (2002); Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW. & HUM. BEHAV. 233 (1987); Kenneth Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything about their Relationship*, 4 LAW. & HUM. BEHAV. 243 (1980); David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10- to 12-Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, 87 J. APPLIED PSYCHOL. 951 (2002); Alvin G. Goldstein et al., *Does Fluency of Face Description Imply Superior Face Recognition?* 13 BULL. PSYCHOLOGICAL SOC'Y 15 (1979); R.S. Malpass & P.G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482 (1981); Connie Mayer, *Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays*, 13 PACE L. REV. 815 (1994); Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996), available at <http://www.ncjrs.gov/pdffiles/-dnaevd.pdf>; Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCH. PUB. POL. & LAW 817 (1995); Melissa Pigott & John C. Brigham, *The Relation-ship Between the Accuracy of Prior Description and Facial Recognition*, 70 J. APPLIED PSYCHOL. 547 (1985); Siegfried Ludwig Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and*

Essentially, the research focuses on two considerations; reliability of the eyewitness and the reliability of the identification procedures. The seminal government report in this regard is the Department of Justice's NIJ Guide for Eyewitness Identification Reform.<sup>355</sup>

Generally speaking, most eyewitness identification reforms find their homes in pre-trial identification practices employed by law enforcement,<sup>356</sup> issues of admissibility, and jury instructions regarding the consequences of failing to follow proven identification procedures.<sup>357</sup> Underlying these reform measures

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*Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22 (1993); Siegfried Ludwig Sporer, Don Read, Steven Penrod & Brian Cutler, *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315 (1995); Gary L. Wells & Elizabeth Loftus, *How Adequate Is Human Intuition for Judging Eyewitness Testimony*, in *Eyewitness Testimony*, PSYCH. PERSPECTIVES 256 (1984); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998); Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": *Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998); Gary L. Wells & Michael R. Leppe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identification? Using Memory for Peripheral Detail Can be Misleading*, 66 J. APPLIED PSYCHOL. 682 (1981); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277 (2003), available at [http://www.psychology.iastate.edu/faculty/gwells/annual\\_review\\_2003](http://www.psychology.iastate.edu/faculty/gwells/annual_review_2003).

355. United States Department of Justice Office of Research Programs, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

356. See, e.g., *supra* note 38.

357. In a column for *Champion Magazine*, December 23, 2004, Professor Barry Scheck demonstrates this principle wherein he writes:

Soon, the single greatest cause of the conviction of the innocent—mistaken eyewitness identification—will be significantly redressed by a series of historic reforms: We will see photo arrays and lineups conducted by a blinded examiner (the person running the procedure doesn't know the identity of the suspect); proper admonitions to witnesses that the real perpetrator may not be present; proper selection of fillers so they meet the description of the perpetrator, not the suspect; confidence statements from witnesses at the time of identification in their own words; and sequential presentation at identification procedures with an adequate number of fillers (at least five). Based on strong scientific proof that these reforms substantially reduce error and increase the capacity of police to find the real assailant, courts, legislatures, and prosecutors will adopt them because it's just good law enforcement. But they will also act because there is a constitutional imperative at work: The heart of the Supreme Court's due process jurisprudence in this area is to prohibit systemic practices that unnecessarily increase error.

These reforms will move on three different tracks simultaneously. On one track, state and federal courts will reverse and revise *Manson v. Braithwaite*, instructing juries that failure to follow procedures that demonstrably reduce error must be held against the prosecution. Similarly, courts at pre-trial hearings will consider expert testimony and assess the taint from improper suggestiveness in light of new scientific evidence. On a second track, where trains are already in motion, police and prosecutors will voluntarily implement these reforms, following the lead of New Jersey, North Carolina, Minneapolis, Boston, Santa Clara (Calif.), and Northhampton (Mass.). And finally, state legislatures and Congress will follow the lead of Illinois, as well as suggestions from the American Bar Association, and enact bills funding pilot projects, research, and training.

is a credible body of empirical evidence; more than twenty-five years of research which serves to minimize convictions based upon the multi-faceted problem of misidentifications.<sup>358</sup> The seminal law enforcement response came from New Jersey, where State Attorney General John J. Farmer, Jr. introduced pioneering eyewitness identification reforms in April 2001. New Jersey was the first state to adopt<sup>359</sup> the NIJ Eyewitness Guidelines.<sup>360</sup>

*Judicial Attention to Eyewitness Identification Reforms*

In *Neil v. Biggers*, the Court articulated a five-factor test for assessing the reliability of eyewitness identifications.<sup>361</sup> Since that time, however, scientific research has demonstrated that one of those factors—the level of certainty a witness demonstrates in his identification of a suspect—has very little correlation with the accuracy of that identification.<sup>362</sup>

Barry Scheck, *Mistaken Eyewitness Identification: Three Roads to Reform*, CHAMPION MAGAZINE, Dec. 23, 2004, at 4.

358. See generally *supra* note 354; Also, see, e.g., Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 LAW & HUM. BEHAV. 581, 592 (2000); Wells et al., *supra* note 38, at 622; M. Leippe, "Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence," 4 LAW & HUM. BEHAV. 261, 262 (1980). The research suggests that, at the same time, this factor seems to have a significant impact on the reliability analysis. S. Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22, 23 (1993) ("both professionals and lay people [jurors] alike put particular faith in the confidence a witness displays when making a lineup decision.").

359. See NEW JERSEY ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINE-UP IDENTIFICATION PROCEDURES (2001), available at <http://www.psychology.iastate.edu/faculty/gwells/njguidelines.pdf>. Working with County Prosecutors and designated key members of law enforcement in each county, the New Jersey Attorney General established a training program that reflected the lessons of more than twenty years of scientific research on memory retrieval and interview techniques. See Wells et al., *supra* note 38; See also CUTLER & PENROD, *supra* note 37; Gary L. Wells & Amy L. Bradfield, *Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?*, 10 AM. PSYCHOL. SOC'Y 138 (1999).

360. UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF RESEARCH PROGRAMS, *supra* note 355.

361. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

362. *Id.* The *Biggers* test was reaffirmed in *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977), and remains the law of the land today. However, the empirical research conducted in the decades since *Biggers* and *Manson* establishes beyond reasonable dispute that the *Biggers* factors simply do not work. In particular, at least one of the *Biggers* factors, the certainty with which a witness makes identification, has been conclusively shown to have little or no correlation with the accuracy of that identification. See *infra* note 370. Also, see Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 HUM. LAW & BEHAV. 581 (2000). Finally, see Petition for Writ of Certiorari, *Perez v. U.S.*, available at [http://www.appellate.net/briefs/Perez\\_cert\\_petition\\_final.pdf](http://www.appellate.net/briefs/Perez_cert_petition_final.pdf) (last visited Apr. 10, 2006). Jose Antonio Perez's pending Petition for a Writ of Certiorari to the United States Supreme Court from the Court of Appeals for the Second Circuit presents the following question: In light of the *Biggers* factors, whether the level of an

A number of state courts of last resort have concluded that the current scientific evidence on the reliability of eyewitness testimony renders the *Biggers* factors untenable under state constitutional laws for adequately protecting the accused's due process rights.<sup>363</sup> Numerous other state courts of last resort have addressed many underlying issues on eyewitness error in a manner that will have a significant impact on law enforcement and trial practices in those jurisdictions.<sup>364</sup> On several grounds, Pennsylvania would be well served to follow their perfectly reasonable thinking.

In Connecticut, while the Supreme Court refused to overturn the robbery conviction of Laquan Ledbetter, it did invoke its supervisory authority to require trial courts, in future trials, to incorporate a jury instruction informing the jury of the risks inherent in certain eyewitness identifications.<sup>365</sup> Taking judicial notice of the scientific research on such procedures on the subject of eyewitness identifications, the *Ledbetter* Court strongly suggested that police adopt the practice of telling future witnesses, who are about to view a suspect

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eyewitness' certainty should be removed from the list of factors to be considered in determining whether an identification made during an unnecessarily suggestive procedure is nonetheless sufficiently reliable to satisfy the requirements of due process. *Id.* at 2.

363. *See* State v. Long, 721 P.2d 483, 488-92 (Utah 1986) (Trial courts must give cautionary instructions to the jury when the prosecution has presented evidence of a pre-trial eyewitness identification, recognizing that "there is no significant division of opinion" in the psychological literature on the unreliability of eyewitness identifications, but noted that juries routinely fail to understand the unreliability of such testimony); State v. Ramirez, 817 P.2d 774, 779-81 (Utah, 1991) (*Biggers* test is an insufficient guarantee of due process under the Utah Constitution); Commonwealth v. Johnson, 650 N.E.2d 1257 (Mass. 1995) (Rejecting the *Biggers* test stating "a real threat to truth-finding process of criminal trials" is posed by suggestive eyewitness identifications. *Id.* at 1261-62. The state constitution requires a *per se* exclusion of unnecessarily suggestive identifications. *Id.* at 1260; State v. Dubose, 699 N.W.2d 582 (Wis. 2005) (Abandoning thirty years of following *Biggers*, the Court acknowledges the unreliability of eyewitness identifications and excludes evidence obtained from out of court show-ups as inherently suggestive unless based upon totality of circumstances) *Id.* at 584.

364. *See* State v. Ledbetter, 881 A.2d 290, 316-18 (Conn. 2005); also, *see, e.g.*, Jones v. State, 749 N.E.2d 575, 586 (Ind. 2001) (Recognizing "the growing body of scientific work which has challenged many commonly held beliefs on eyewitness credibility."); Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997) (rejecting a jury charge to take into account the particular strength of an identification); Rimmer v. State, 825 So. 2d 304, 336-9 (Fla. 2002) (recognizing the body of scientific evidence that reveals the fallibility of eyewitness identification).

365. *Ledbetter*, 881 A.2d at 316.

Because of the importance of eyewitness identifications in the criminal justice system and the risks of failing to warn the witness that the perpetrator may or may not be present in the identification procedure, we deem it appropriate to exercise our supervisory authority to require an instruction to the jury in those cases where the identification procedure administrator fails to provide such a warning, unless no significant risk of misidentification exists.

Also, *see* UNITED STATES DEPT. OF JUSTICE NCJ PUB. NO., 2 178240 (1999). The guide suggests that, prior to a line-up, the witness should be instructed "that the person who committed the crime may or may not be present in the group of individuals." *Id.* at 2. The guide also recognizes, however, the uniqueness of individual investigations and that "local logistical and legal conditions may dictate the use of alternative procedures." *Id.* at 4.

or a photo array, that the perpetrator of the crime “may or may not” be present.<sup>366</sup> If police fail to do so, the court ruled, the trial judge must instruct the jury that the approach taken ‘tends to increase the probability of misidentification.’<sup>367</sup> The warning that the criminal “may or may not” be present is designed to reduce that tendency.<sup>368</sup> The colloquy proposed in *Ledbetter* is included in the *Draft Eyewitness Identification Procedure* circulated by the Allegheny County Chiefs of Police Association,<sup>369</sup> which appears to be one of the Commonwealth’s first coordinated efforts, and the first effort by a local government agency, to voluntarily bring about eyewitness identification reform for a broad geographic and jurisdictional area.<sup>370</sup> The success of its

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366. *Id.* at 315-16.

367. *Id.* at 319.

Therefore, unless there is no significant risk of misidentification, we direct the trial courts of this state to incorporate an instruction in the charge to the jury, warning the jury of the risk of misidentification, in those cases where: (1) the state has offered eyewitness identification evidence; (2) that evidence resulted from an identification procedure; and (3) the administrator of that procedure failed to instruct the witness that the perpetrator may or may not be present in the procedure. We adopt the following language for use by our trial courts in such cases in the future.”

*Id.* at 318.

368. *Id.* at 315.

369. *See supra* note 325, and *infra* note 370; Appendix “B” in the “Draft” contains the Instructions For Sequential Live Presentations. In pertinent part, it reads:

In a moment, I am going to show you a series of individuals. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. Even if you identify someone during this procedure, I will continue to show you all individuals in the series.

370. This “unofficially” released October 2005 report of the Allegheny County Chiefs of Police Association and the Office of the District Attorney is in the author’s possession. By the time of publication, the report will have been released for public review. The Draft policy states:

In order to implement the most reliable method for the collection of eyewitness evidence, this draft policy recommends that law enforcement officials conduct sequential photo arrays and lineups with non-suspect fillers chosen to minimize suggestiveness, non-biased instructions to eyewitnesses, and assessments of confidence immediately after identification. The following recommendations are embodied in the draft guidelines:

(1) Photo arrays and lineups should be constructed with non-suspect fillers chosen to minimize any suggestiveness that might point toward the suspect.

(2) If adequate staffing is available and safety measures are not compromised, photo arrays and lineups are considered by some experts to be the most reliable using a double blind procedure, in which the administrator is not in a position to unintentionally influence the witness’s selection. However, individual agencies are free to devise methods for lineups consistent with their own staffing and resource constraints.

implementation may suggest that which is an inherent condition precedent for all innocence reforms; in order to be sustained as politically viable, they must be embraced at the local levels.

The Georgia case portends to be a hard lesson for Pennsylvania. Citing to the persuasive body of scientific research on the fallibility of eyewitness testimony, the Georgia Supreme Court overturned an armed robbery conviction and cautioned the trial court to refrain from informing the jury to consider the witnesses' "level of certainty" when instructing them on factors that may be considered in deciding the reliability of that identification.<sup>371</sup> Pennsylvania's standard jury instruction has a similar "level of certainty" charge that is given when the accuracy of the eyewitness identification is not in doubt. In pertinent part, the charge provides:

1. In [his][her] testimony, [name of witness] has identified the defendant as the person who committed the crimes. In evaluating [his][her] testimony, in

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Obviously, taking safety concerns and staffing shortcomings into account, a double blind procedure may not be practical.

(3) Witnesses viewing photo arrays and lineups should be instructed that the actual perpetrator may or may not be present and that the administrator does not know if the person is a suspect.

(4) Witnesses viewing photo arrays and lineups should view the suspect and fillers one at a time (sequentially) rather than all at once (simultaneously).

(5) Eyewitnesses' confidence should be assessed immediately after identification. To protect against artificially inflated confidence levels, it is imperative that the witness's confidence in identification be recorded *immediately* [emphasis added] after an identification procedure to prevent influence from information learned after the procedure.

(6) Avoid multiple identification procedures in which the same witness views the same suspect more than once.

371. Brodes v. State, 614 S.E.2d 776, 771 (Ga. 2005).

Appellate courts have a responsibility to look forward, and a legal concept's longevity should not be extended when it is established that it is no longer appropriate. When identification is an essential issue at trial, appropriate guidelines focusing the jury's attention on how to analyze and consider the factual issues with regard to the reliability of a witness's identification of a defendant as the perpetrator are critical. In light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification, and the critical importance of accurate jury instructions as 'the lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict,' we can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification. Accordingly, we advise trial courts to refrain from informing jurors they may consider a witness's level of certainty when instructing them on the factors that may be considered in deciding the reliability of that identification. (internal citations omitted).

addition to the other instructions I will have provided you for judging the testimony of witnesses, you should consider the additional following factors:

e. "Was [his][her] identification positive, or was it qualified by any hedging or inconsistencies?"<sup>372</sup>

As a jurisdiction that applies a *per se* rule excluding expert eyewitness testimony, this charge possesses an inherent risk for creating error. Pennsylvania perpetuates eyewitness identification mistakes by ignoring nearly three decades of highly credible government and private scientific research.<sup>373</sup> In light of its prevailing use in other jurisdictions, can it not be said that expert eyewitness testimony, at least in a certain or narrowly drawn line of cases, in fact will assist the trier of fact under *Frye*?<sup>374</sup> Certainly, at a minimum, the Connecticut and Georgia cases illustrate the complexity of eyewitness identification and the precision with which the issue must be approached. In the alternative, it would be a proper exercise of judicial notice if the value of the scientific research under the Court's supervisory or rule-making powers.<sup>375</sup>

In the cases of Thomas Doswell and Bruce Godschalk, other wrongful conviction indicia may have overshadowed any benefits these safeguards would have provided. However, in the cases of Vincent Moto and Willie Nesmith, cases that can be characterized as "pure" misidentification cases, the results may have been completely different.

### *Reform #3 False Confessions: A Judicial Remedy*

False confessions are among the most disturbing causes of wrongful convictions because they are so often accompanied by misconduct.<sup>376</sup> In order to improve the certainty of judicial decision-making, promote truth in the courtroom, protect the innocent, and increase the certainty and accuracy of criminal convictions and verdicts, the Court should create a rule and encourage protocols under its supervisory authority that requires law

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372. THE CRIMINAL JURY INSTRUCTIONS ADVISORY COMMITTEE FOR PROPOSED STANDARD JURY INSTRUCTIONS, PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 4.07A at 1.e. (Identification Testimony—Accuracy Not In Doubt) (2d ed. 2005). In the event identification is at issue, *see id.* at 4.07B.

373. *See Commonwealth v. Simmons*, 662 A.2d 621 (Pa. 1995). Short of abandoning its position in *Simmons*, the Court should at least take judicial notice of the value of the scientific research and apply it, where appropriate, under its supervisory or rule-making powers.

374. *Frye v. United States*, 293 F. 1013 (1923). The *Frye* standard is applied to the admissibility of scientific theory or method in court based upon the general acceptance of that theory or method by the scientific community in the particular field offered. Pennsylvania is a *Frye* jurisdiction.

375. *Supra* note 321.

376. Edward Connors et al., *Convicted by Juries, Exonerated by Science, Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, NAT'L INST. OF JUSTICE RESEARCH REPORT (1996).

enforcement to electronically record all custodial interrogations in which the accused is suspected of a serious felony. Such a rule will enhance the quality of the prosecution of those who may be guilty while affording protection for the innocent by creating a verbatim record of the entire custodial interrogation. Such a recording will minimize, if not eliminate, disputes in court as to what factually occurred during the interrogation.

To the extent possible under the Court's rule-making and supervisory authority, and supplemented by legislation where necessary or preferred, the following conditions should be imposed:

An oral, written, or sign language statement of a defendant made during a custodial interrogation shall be presumed unreliable as evidence against a defendant in a criminal proceeding unless: (1) the interrogation is electronically recorded in its entirety; (2) prior to the statement, but during the recording, the accused is given the requisite Miranda warnings and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning; (3) the recording device was capable of making an accurate recording, the operator was competent, and the recording has not been altered; (4) all voices on the recording that are material to the custodial interrogation are identified; and (5) after a reasonable period of time, but prior to any proceeding in which the accused's statement would be introduced or otherwise used, the attorney representing the defendant will be provided with a true, complete, and accurate copy of all recordings of the defendant.

The State may rebut a presumption that a statement is unreliable and inadmissible by producing clear and convincing evidence that: (1) the statement was both voluntary and reliable; and (2) law enforcement officers had "good cause" not to tape the entire interrogation. Examples of "good cause" include but would not be limited to (i) the interrogation took place in a location not identified by the protocols, and where the requisite recording equipment was not readily available; (ii) the accused refused to have his/her interrogation electronically recorded, and the refusal itself was electronically recorded; or (iii) the failure to electronically record an entire interrogation was the result of equipment failure and obtaining replacement equipment was not feasible.

At trial, the court will instruct the jury at trial that any statement found admissible is presumed to be unreliable because it was not electronically recorded and should not be considered by them unless the prosecution can prove the statement was reliable and was made voluntarily.

Notwithstanding any other provision of such a Rule or statute, a written, oral, or sign language statement of the accused made as a result of a custodial interrogation is admissible against the accused in a criminal proceeding if: (1) the statement was obtained in another state and was obtained in compliance with the laws of that state or this state; or (2) the statement was obtained by a federal law enforcement officer in this state or another state and was obtained in compliance with the laws of the United States.

Every electronic recording made of a custodial interrogation must be preserved until such time as the defendant's conviction for any offense relating

to the interrogation is final and all direct and *habeas corpus* appeals are exhausted, or law bars the prosecution of such offenses. Nothing in this Rule would preclude the admission of a statement made by the accused at his/her trial or other hearing in open court, before a grand jury, or of a statement that is the *res gestae* of the arrest or the offense, or of a statement that does not stem from custodial interrogation (as defined by this statute).<sup>377</sup>

In the interest of due process, the court has a duty, in certain cases, to carefully consider the admission of expert testimony on the characteristics of false confessions.<sup>378</sup> Various studies have clearly identified the positive influence of videotaped interrogations on deliberations by juries and judges in their fact-finding roles.<sup>379</sup> Certain classes of individuals, such as juveniles, the mentally challenged, drug and alcohol users, and individuals who are unusually trusting of authority, are prone to give false confessions in response to police conduct that does not legally qualify as coercive or fundamentally unfair practices.<sup>380</sup> This broad category of intellectually or culturally deficient suspects may provide particularly unreliable statements in response to the isolation, fear, and intimidation of police interrogations settings; especially, if they receive such explicit or implied promises or threats as being freed to go home or getting a better or worse result at trial.<sup>381</sup>

The Minnesota<sup>382</sup> and Alaska<sup>383</sup> Supreme Courts, among others,<sup>384</sup> have recognized these conditions and have exercised their authority to create these

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377. Many of these provisions, based upon experience and research in the field, have been developed by the policy group at the Innocence Project. They also reflect the rules and statutes of a number of jurisdictions and organizations calling for reforms. *See, e.g.*, mandatory recording statutes at Arizona, HB 2614 (2005); California, SB 171 and analysis (2005); Connecticut, SB 1281 (2005); Florida, HB 1119, HB 1169 (2005); Illinois, SB 72 (2005); Indiana, HB 1708 (2005); Kentucky, HB 46 and fiscal information (2005); Maryland, HB 46 and analysis (2005); Massachusetts, HB 794, SB 916 (2005); Missouri, HB 557, SB 397 (2005); Nebraska, L 112 (2005); New Hampshire, HB 636 (2005); New Jersey, A 3734 (2005); New Mexico, HB 382 (2005); New York, A 6541, S 3354 (2005); Oregon, SB 265 (2005); Tennessee, HB 204/SB 108, HB 1148/ SB 1679 and fiscal information (2005); Texas, HB 450, SB 662 (2005); Wisconsin, AB 648 (2005); Washington, D.C., B 15-1073 (2005). Also, available at <http://www.thejusticeproject.org> (last visited Mar. 8, 2006).

378. For a leading article on this subject, *see* Steve Drizin & Richard A. Leo, *The Problem of False Confessions in a Post DNA World* (2003), available at <http://aals.org.cnchost.com/am2005/saturdaypapers/130drizin.pdf>.

379. Steve Drizin & Richard A. Leo, *The Problem of False Confessions in a Post DNA World* 992-1004, available at <http://aals.org.cnchost.com/am2005/saturdaypapers/130drizin.pdf>; Saul Kassin & Rebecca Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211 (2004).

380. *Id.*

381. C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST. 15, 17 (2003). CRIMINAL INTERROGATIONS AND CONFESSIONS (Fred E. Inbau et al. eds., Aspen 4th ed. 2001).

382. *State v. Scales*, 518 N.W.2d 587, 592-93 (Minn. 1994).

383. *State v. Stephan*, 711 P.2d 1156, 1157 (Alaska 1985).

reforms. Many other jurisdictions have declined to require tape-recorded custodial interrogations, but did so outside of the current culture of post conviction DNA exonerations.<sup>385</sup>

In the cases of Barry Laughman, Nicolas Yarris, and Bruce Godschalk, mental impairment, severe drug problems, abject fear, and mental instability generally, undoubtedly played well into the taking and making of their incriminating statements. Given the frequency of the occurrence of false confessions,<sup>386</sup> what devices do we have to detect such error? The short answer is, none. Despite apparent safeguards,<sup>387</sup> Pennsylvania's various standard jury instructions<sup>388</sup> on the voluntary nature of confessions have little value, or perhaps, are incapable, of providing any real value for detecting false confessions.<sup>389</sup>

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384. For mixed views and general trends on mandated recordings, see Mark K. Matthews, *States tell police to turn on the camera* (2005), available at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=29455>.

385. See *Stoker v. State*, 692 N.E. 2d 1386, 1389 (Ind. Ct. App. 1998).

386. See generally *The Innocence Project: False Confessions*, available at <http://www.innocenceproject.org/causes/falseconfessions.php> (last visited Mar. 8, 2006).

387. Despite the Fifth Amendment's protection against being compelled to be a witness against oneself and standard cautionary jury instructions, see *infra* notes 388, 389, certain factually innocent individuals are uniquely prone to succumb to police interrogation methods, properly conducted or otherwise. See THOMAS P. SULLIVAN, *POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS* (2004), available at <http://www.law.northwestern.edu/depts./clinic/wrongful/documents/sullivanreport.pdf>.

388. The Criminal Jury Instructions Advisory Committee for Proposed Standard Jury Instructions, *Pennsylvania Suggested Standard Criminal Jury Instructions* § 3.04B (2d ed. 2005) (Defendant's Confession or Admission: Voluntariness, Basic Standard), provides two alternative charges:

[First Alternative]

To be voluntary, a defendant's statement must be the product of an essentially free will and choice. If a defendant's will and ability to choose are overborne through physical or mental pressure, any statement that he or she then makes is involuntary.

[Second Alternative]

To be voluntary, a defendant's statement must be the product of a rational mind . . . capable of reasoning about whether to make a statement or say nothing and [he] [she] must be allowed to use it. The defendant must have sufficient will power to decide for [himself] [herself] whether or not to make a statement and [he] [she] must be allowed to make that decision. This does not mean that a statement is involuntary because the defendant made a hasty or poor choice. It might have been wiser to say nothing. Nor does it mean that a statement is involuntary merely because it was made in response to certain questions. It does mean, however, that if a defendant's mind and will are confused or burdened by promises of advantage, threats, physical or psychological abuse, or other improper influences, any statement he or she makes is involuntary.

389. See generally *THE CRIMINAL JURY INSTRUCTIONS ADVISORY COMMITTEE FOR PROPOSED STANDARD JURY INSTRUCTIONS, PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS* § 3.0-3.05. (2d ed. 2005) (Defendant's Confession or Admissions). For suppression purposes:

The false confessions of Barry Laughman, Nicholas Yarris, and Bruce Godschalk are particularly disturbing because they are as convincing as they are damaging. The chilling fact is that, according to some researchers, “placing a confession before a jury is tantamount to an instruction to convict.”<sup>390</sup> But, most disturbing of all, is the high likelihood that their confessions were the product of wrongfully manufactured evidence<sup>391</sup> collected in such a manner as to be virtually undetectable.<sup>392</sup>

A special report, presented by the Northwestern University School of Law Center on Wrongful Convictions, sheds a great deal of constructive light on the problem of false confessions.<sup>393</sup> The *Sullivan Report* surveyed 238 law enforcement agencies in thirty-eight states that, in 2004, recorded custodial interviews of suspects in felony investigations.<sup>394</sup> Many interviews were conducted without following any particular set of protocols.<sup>395</sup> Though there appeared to be a will, there was no consensus for the creation of institutionalized guidelines.

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[T]he touchstone inquiry is whether the confession was voluntary. Voluntariness is determined from a totality of the circumstances surrounding the confession. The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess. The Commonwealth has the burden of proving by a preponderance of the evidence that the defendant confessed voluntarily.

*See also* Commonwealth v. Nester, 709 A.2d 879, 882 (Pa. 1998):

When assessing the voluntariness pursuant to the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person’s ability to withstand suggestion and coercion. (internal citations omitted).

390. Saul M. Kassim & Katherine Keichel, *The Social Psychology of False Confessions: Compliance, Internalization and Confabulation*, 7 PSYCHOL. SCI. 125 (1996).

391. *See supra* note 135.

392. One conclusion reached by the American Judicature Society’s January 2003 Conference on Wrongful Convictions of the Innocent was that “police misconduct, including suggestive, coercive, or misleading theories as well as subconscious biases, is a primary systemic cause of wrongful convictions.”

393. THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/sullivanreport.pdf> [hereinafter SULLIVAN REPORT]. Mr. Sullivan served as co-chair of Illinois Governor George H. Ryan’s Commission on Capital Punishment from 2000 until it completed its work in 2002. *See id.* at recommendation 4. (All custodial questioning in police facilities regarding homicide should be electronically recorded). *See* SB 72 (2005) (Illinois).

394. SULLIVAN REPORT, *supra* note 393.

395. *Id.*

The very first post conviction DNA exoneration was a 1989 Virginia case involving a false confession.<sup>396</sup> What have we learned since then?<sup>397</sup> If any progress is to be made on the problem of false confessions, police interrogators need to be trained “to recognize their own biases, to initially treat admission statements as neutral hypotheses to be tested against objective case facts, and to systematically analyze the probative value of a suspect’s confession.”<sup>398</sup>

As necessary as these reforms are, and until such time as these practices become standard, the most efficient method for reducing the likelihood of false confessions is through the sweeping authority of the Court.

#### *Reform #4 Snitch Testimony*

Given the demonstrated unreliability of incentivised witness testimony, by Rule of Court or by statute, its use should be strictly limited to cases in which it has been corroborated by substantial evidence. If, for instance, it leads to the discovery of a murder weapon or items taken in a robbery, it should be admitted into evidence. However, it should never be allowed simply because it purports to be self-corroborating—that is, because it contains information that might comport with the facts of the crime. Police and prosecutors should use informants only in the way that responsible news media use confidential sources—as a starting point that may lead to solid information. (It is ironic that the news media—at least in general—have a higher standard for publishing information that might damage someone’s reputation than the criminal justice system has for presenting information in court that might result in a wrongful death sentence.) Interrogations of informants by investigators should be recorded—preferably videotaped, but if that is not possible, audio taped—and the tapes should be accessible to the defense under normal discovery rules. Prosecutors must disclose to defendants whether snitches have been promised leniency, immunity, cash, or anything of value. Sworn statements should be taken from prospective informants, and when such statements are shown to be false, an independent special prosecutor should be appointed to pursue prosecuting the prospective witness for perjury.<sup>399</sup>

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396. David Vasquez falsely confessed to the rape and murder of a woman five years after the event. See, e.g., SCHECK ET AL., *supra* note 11, at 244.

397. For a very informative article revealing lessons learned from police interrogation methods, see Steven A. Drizin, *Defending a False or Coerced Confession Case in the Post DNA Age: What Do You Need To Know To Represent Your Clients Effectively?* 12 WIS. DEFENDER 4 (2004).

398. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 1003 (2004).

399. This reform proposal is contained in the Center on Wrongful Convictions influential report, NORTHWESTERN UNIVERSITY SCHOOL OF LAW: CENTER ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 17, *available at* <http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf>. (last visited Mar. 8, 2006) (quoted language not completely taken verbatim).

Without intending to make the investigation process more difficult, it must be observed that the use of jailhouse informants, especially in return for deals, special treatment, or the dropping of charges, has proven to be a hollow form of evidence. The case for the inherent unreliability of snitch testimony was made clear in a *Chicago Tribune* investigative story, reported in 1999, that revealed all too well the dangers that snitch testimony creates.<sup>400</sup> The article indicates that Illinois prosecutors used snitch witnesses to help convict at least forty-six of the 285 defendants sentenced to death.<sup>401</sup> It further explored the role of snitches and other incentivised witnesses in ninety-seven post conviction cases of individuals released from death row. Their findings, reported as follows, are startling:

- Prosecutors used incentivised witnesses in the cases of thirty-eight (39.2%) of the ninety-seven innocent persons whose cases were examined for this report.
- The thirty-eight persons wrongfully convicted in whole or part based on incentivised witness testimony served a total of 291 years in prison before they were released; the median time was 8.1 years, the mean 7.7 years.
- False testimony by incentivised witnesses is the second most prevalent factor in wrongful convictions in U.S. capital cases, exceeded only by incorrect or perjured eyewitness testimony, found in (53.5%) of cases. The next most prevalent factors were false or fabricated confessions, found in fourteen percent of the cases, and incorrect or fabricated forensic evidence, found in (10.5%).
- Of the thirty-eight defendants wrongfully sentenced to death, sixteen were convicted in whole or in part on the testimony of jailhouse informants, all but two of whom appear to have simply fabricated confessions. The other twenty-two were convicted in whole or part on the testimony of other incentivised witnesses.
- Incentivised testimony was the sole basis of the conviction in eighteen cases (8.6%) of all documented wrongful convictions in capital cases and (47.4%) of the cases involving incentivised testimony.
- The factor that was most prevalent in concert with incentivised testimony was police and/or prosecutorial misconduct, which was

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400. The *Chicago Tribune* report by Ken Armstrong and Maurice Possley is available at <http://www.ndsn.org/JANFEB99/www.chicagotribune.com/news/nationworld/>. Also, to obtain the PBS Frontline documentary "Snitch," contact Frontline, WGBH-TV, 125 Western Ave., Boston, MA 02134-1008, Tel: (617) 492-2777, Fax: (617) 254-0243, E-mail: [frontline@pbs.org](mailto:frontline@pbs.org), Web: [www.wgbh.org/frontline](http://www.wgbh.org/frontline).

401. Armstrong & Possley, *supra* note 400.

documented in fourteen cases, or 36.8% of the cases in which incentivised testimony was used.

- Three factors, eyewitness error or perjury, false confessions, and faulty forensic evidence, were present in four cases (10.8%).
- In twelve cases, more than one additional factor contributed to the wrongful conviction.
- Wrongful convictions involving incentivised testimony occurred in seventeen to the thirty-eight states that practice capital punishment. The leading states were Illinois with nine wrongfully convicted prisoners, Oklahoma with five, and Florida and New Mexico with four each.
- The most prevalent factor involved in the exoneration of prisoners wrongfully convicted in whole or part by incentivised testimony was recantation of the incentivised witnesses. Recantations occurred in seventeen cases (44.7%) of the cases in which prosecutors used incentivised testimony.
- Other factors leading to exonerations included news media investigations in fourteen cases (36.8%), apprehension of the actual killer or killers in ten cases (26.3%), DNA testing in five cases (13.2%), the discovery of new witnesses in five cases (13.2%), miscellaneous new evidence in ten cases (26.3%), and investigations by anti-death-penalty activists in two cases (5.3%).<sup>402</sup>

Additional stories of “snitch abuse” and prosecutorial misconduct were revealed following a two-year investigation by *Pittsburgh Post-Gazette* writer, Bill Moushey, who uncovered numerous examples of cover-ups, payments for perjured testimony, concealment of evidence, lying, and the prosecution of innocent people to win guilty pleas and convictions.<sup>403</sup> As these findings suggest, any individual who bears false witness represents a mockery and slander to the judicial process. And those who engage them, either knowingly or reliably suspecting their lack of integrity and honesty, are guilty of something much worse.<sup>404</sup> To purposefully allow such a witness to testify is

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402. *See supra* note 400.

403. In November and December 1998, the *Pittsburgh Post-Gazette* published an award-winning ten-part series by veteran investigative reporter Bill Moushey on prosecutorial misconduct and corruption. The investigative report alleges that Federal agents and prosecutors across the United States repeatedly break the law in pursuit of convictions. Bill Moushey, *Win at All Costs: Government Misconduct In The Name Of Expedient Justice*, PITTSBURGH POST-GAZETTE, reprint of articles from November 22, 23, 24, 29, and December 1, 6, 7, 8 and 13, 1998. The PITTSBURGH POST-GAZETTE report is available at <http://www.post-gazette.com/win/default.asp>. Bill Moushey heads the journalism-based Innocence Institute at Point Park University in Pittsburgh.

404. *Id.* Also, *see* Rob Warden, *The Snitch System: How Incentivised Witnesses Put 38 Innocent Americans on Death Row*, NORTHWESTERN CENTER ON WRONGFUL CONVICTIONS (2004),

tantamount to complicity in advancing an injustice that, all too often, has landed an innocent person in jail.<sup>405</sup> The specious, if not downright dangerous nature of snitch testimony is apparent. But it remains in our criminal justice system as a widely used and virtually unchecked tool for law enforcement and prosecutors. Without question, our lack of attention to the problems inherent with snitch testimony contributed to depriving Bruce Godschalk of fifteen years of freedom and put Nicholas Yarris on death row.

#### CONCLUSION

Reforms in such areas as eyewitness identifications, false confessions, the use of snitch testimony, and the creation of an innocence commission to identify and respond to these and other factors that cause wrongful convictions, are politically viable and legitimate innocence reform measures that are ready to be taken, if not overdue. The progress of science has brought us to this point. It did not lead us to an abstract notion of academic truth that interests us; it has taken us to the concrete conditions of human truth that left unattended, threaten the core values of our Republic. But science is not the whole of life—it reveals chaos but does not create a new-ordered reality. That timely task falls upon us.

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available at <http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/Snitch.htm>. (The factor that was most prevalent in concert with incentivised testimony was police and/or prosecutorial misconduct, which was documented in fourteen cases, or 36.8% of the cases in which incentivised testimony was used.)

405. *Id.* The use of jailhouse informants, especially in exchange for some form of favorable treatment, special treatment, or the dropping of charges, has proven to be a specious form of evidence, as has testimony that has only appeared after rewards were offered. Often, the testimony of these snitches and informants has been the key in sending an innocent man or woman to prison for a crime he or she did not commit. The Center on Wrongful Convictions published a definitive study on the issue in 2004.