

**Justice in Foresight:
The Past Problems with Eyewitness Identification
and Exoneration by DNA Technology**

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Abstract

According to Scheck, Newfeld, and Dwyer (2000), there have been innumerable individuals wrongly convicted of a crime and sentenced to life imprisonment or to death based upon faulty evidence. The historical development of DNA evidence as a tool in the investigative process during the past 25 years is explained and analyzed as well as the role eyewitness identification has played in the wrongful conviction of innocent individuals, including people convicted based on cross-racial identification where the suspect is Black and the victim is White. This paper culminates in case studies where eyewitness testimony, cross-racial identification, and erroneous convictions wrongfully imprisoned the innocent before the advent of DNA technology that ultimately freed those people years later. The methodology used is the examination of journal articles, books, and newspaper articles on the phenomenon of wrongful convictions.

Introduction

Before the advent of DNA testing, suspects were convicted with many types of physical evidence: blood type, fingerprints, eyewitness identification, admissions, and occasionally, circumstantial evidence. These types of evidence were occasionally unreliable but were the best evidence that the criminal justice system had to obtain convictions. Rarely were convictions overturned based on witness recantations, new physical evidence, admission by the true offender, or other types of evidence. Since 1986, improvements in

DNA technology have provided a practically flawless and reliable method for convicting offenders and releasing those wrongly convicted. This paper highlights the historical use of DNA evidence, procedures and problems associated with DNA science, the examination of eyewitness testimony, cross-racial identification, and how Blacks are disproportionately affected by erroneous convictions. This paper concludes with a review of recent applications of DNA evidence used to exonerate innocent people who spent decades in prison for crimes that they did not commit.

Reasons for Wrongful Convictions

A wrongfully convicted person can be defined as either an innocent person who is convicted at trial, or an innocent person who pleads guilty to a charge.¹ Many reasons exist in the literature for erroneous convictions: police or prosecutorial misconduct, inadequate defense counsel, racial discrimination, use of jail-house informants, multiple types of evidence, prior record of the defendant, faulty eyewitness identification, and false confessions.² C. L. Fitzgerald, author of *The Accuracy of Cross-Racial Eyewitness Identification*, proposes that both minority and non-minority witnesses have difficulty identifying minority suspects in a crime scenario suggesting a crossover between race and eyewitness misidentification as a major concern in erroneous convictions.³ Paul Cassell, author of *Protecting the Innocent from False Confessions and Lost Confessions- and from Miranda*, suggests that wrongful convictions create a major public policy concern because false confessions by innocent people can

¹ C. Ronald Huff, *Wrongful Conviction and Public Policy: The American Society of Criminology 2001 Presidential Address*, 40 CRIMINOLOGY 1 (2002); C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996); see also Jean C. Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179 (2003).

² Blackerby, *supra* note 1, at 1186; see also Talia Roitberg Harmon, *Predictors of Miscarriages of Justice in Capital Cases*, 18 JUST. Q. 949, 950 (2001) (discussing the factors contributing to erroneous convictions); Talia Roitberg Harmon & William S. Lofquist, *Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent*, 51 CRIME & DELINQ. 498 (2005).

³ C.L. FITZGERALD, THE ACCURACY OF CROSS-RACIAL EYEWITNESS IDENTIFICATION (University of Massachusetts, Lowell 1997) (UMI No. 1384176).

undermine the criminal justice system and allow the guilty to go free.⁴ An illustration of this point is the wrongful conviction of Anthony Capozzi and other case studies as later discussed in this paper.

Criminal justice procedures, policies, and techniques are not the only perspectives on wrongful convictions. C.L. Huff, at the American Society of Criminology 2001 Presidential Address, outlined theoretical perspectives on these procedures that contribute to wrongful convictions, such as plea-bargaining.⁵ Theoretical explanations of prosecutorial misconduct in regard to plea-bargaining are based on the crime or criminals, uncertainty of conviction, and the socially constructed definitions of crime.⁶ Prosecutors engage in misconduct when they rely on the stereotypes of criminals and use questionable tactics to gain convictions. Such conduct violates the trust of citizens.⁷ Furthermore, a comparative analysis conducted by Renee Learner of the two adversarial systems in the United States and France found that error results from structural and procedural problems that rely on convictions, rather than justice filtering, or the removing of innocent individuals, from the trial process.⁸ This contention is supported by hundreds of thousands of arrests in the United States every year and hundreds of people exonerated since 1989, which makes it possible for thousands of wrongful convictions in the United States annually.⁹ As a counterweight to these factors, DNA technology is perhaps the most important issue of wrongful convictions to mete justice for the wrongly convicted.

DNA Technology

Francis Crick and James Watson discovered deoxyribonucleic acid (DNA) in 1953 at Cambridge University.¹⁰ DNA exists in each

⁴ Paul G. Cassell, *Protecting the Innocent From False Confessions and Lost Confessions—and From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 499 (1998).

⁵ *Id.*

⁶ Heather Schoenfeld, *Violated Trust: Conceptualizing Prosecutorial Misconduct*, 21 J. CONTEMP. CRIM. JUST. 250 (2005).

⁷ *Id.*

⁸ Renee L. Lerner, *The Intersection of Two Systems: An American On Trial for An American Murder in the French Cour D'assises*, 2001 U. ILL. L. REV. 791 (2001).

⁹ See generally Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523.

¹⁰ JAMES D. WATSON & ANDREW BERRY, *DNA: THE SECRET OF LIFE* (2003).

cell of every person and cannot be modified. The material found in each cell throughout the body is also constant; for example: DNA is the same in an individual's semen, blood, hair, and saliva.¹¹ Further development occurred throughout the 1960s and 1970s with the discovery of the genetic code rooted in proteins of the DNA sequence and use of DNA in criminal forensics. Several authors surmised that newly developed techniques of identifying human genes, or "DNA fingerprinting," could be used to aid law enforcement in establishing biological characteristics of offenders, as demonstrated in a 1986 England serial rape/murder case.¹² Alec Jeffreys, known as the father of DNA fingerprinting, discovered that DNA is unique to each person and is an invaluable investigative tool for the criminal justice system.¹³

Several methods of testing DNA identification exist in criminal investigations. This article focuses on the following constructions: the single-locus probe, multi-locus probe, the Short Tandem Repeat, and mitochondrial DNA testing. The first method is the single-locus probe (SLP), which is the quickest and preferred procedure. The SLP "isolates only a select number of DNA regions that are marked via radio active particles."¹⁴ A second method is the multi-locus probe (MLP). The MLP dissolves DNA into fragments and restricts enzymes with the use of chemical scissors, but this method is more time consuming.¹⁵ Jeff Wise, author of *Under the Microscope: Legal Challenges to Fingerprints and DNA as Methods of Forensic Identification*, developed the Short Tandem Repeat (STR)

¹¹ JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY AND TECHNOLOGY BEHIND STR MARKERS (2001); *see, e.g.*, NEIL A. CAMPBELL & JODI REISS, BIOLOGY (6th ed. 2002); BRUCE ARRIGO, CRIMINAL BEHAVIOR: A SYSTEMS APPROACH (2006); NORA RUDIN & KEITH INMAN, AN INTRODUCTION TO FORENSIC DNA ANALYSIS (2d ed. 2001); Terhi Telsavaara & Bruce Arrigo, *DNA Evidence in Rape Cases and the Debbie Smith Act: Forensic Practice and Criminal Justice Applications*, 50 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 487 (2006).

¹² *Id.*; *see also*, RONALD HOLMES & STEPHEN HOLMES, PROFILING VIOLENT CRIMES: AN INVESTIGATIVE TOOL (3d 2002); BRENT E. TURVEY, CRIMINAL PROFILING: AN INTRODUCTION TO BEHAVIORAL EVIDENCE ANALYSIS (2d 2002); Jeff Wise, *Under the Microscope: Legal Challenges to Fingerprints and DNA as Methods of Forensic Identification*, 18 INT'L. REV. LAW COMPUTERS & TECH. 425 (2004).

¹³ *Id.*

¹⁴ *See* Telesavaara & Arrigo, *supra* note 11, at 493.

¹⁵ *Id.*

test, which uses minute samples of degraded DNA. The STR utilizes the Polymerase Chain Reaction (PCR) that reproduces multiple strains of DNA. Mitochondrial DNA, which is passed from mother to offspring during fertilization, can be determined from a “matrilineal mode of inheritance.”¹⁶ This procedure is often used in investigations for missing persons because the mitochondrial DNA can be extracted from bones and teeth while nuclear DNA degrades over time.¹⁷ First used in 1996, mitochondrial DNA profiling has been used in high profile cases, such as the Boston Strangler and the Laci Peterson homicides, and has also been used to differentiate between trace evidence left by the offender and DNA of the victim.

A DNA fingerprint profile of suspects can be created by collecting and testing biological trace evidence from minute samples of blood, semen, hair, or drops of sweat. This evidence can be used to exonerate the innocent and convict the guilty at trial, which is also true for convictions entered before the introduction of DNA science.¹⁸ The Justice for All Act provides federal funding to initiate or improve training programs for law enforcement, prosecutors, and laboratory staff in the handling and presentation of evidence. This legislation also improves laboratories and enters the backlog of DNA evidence into a national database. Offenders convicted of felonies compose DNA profiles in the Combined DNA Index System (CODIS) at the state and local level. Innocents were exonerated because of questionable handling of DNA evidence and laboratory procedure inaccuracies that compromise the validity and reliability of evidence.¹⁹ The Justice Department cites the use of DNA testing as a significant factor in overturning wrongful convictions based on faulty eyewitness testimony as the most prominent reform agenda of recent public policy.²⁰ DNA evidence is used with greater certainty of

¹⁶ LAWRENCE F. KOBILINSKY ET AL., DNA: FORENSIC AND LEGAL APPLICATIONS 119 (2005).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Myriam S. Denov & Kathryn M. Campbell, *Criminal Injustice: Understanding the Causes, Effects, and Responses to Wrongful Conviction in Canada*, 21 J. CONTEMP. CRIM. JUST. 224 (2005); John C. House et al., *Improving The Effectiveness of the National DNA Data Bank: A Consideration of the Criminal Antecedents of Predator Sexual Offenders*, 48 CAN. J. CRIMINOLOGY & CRIM. JUST. 61 (2006); see also Telsavaara and Arrigo, *supra* note 11.

²⁰ *Id.*

conviction or exclusion of suspects beyond a reasonable doubt as it provides an undeniable genetic blueprint of an individual.²¹

Researchers Talia Harmon and William Lofquist hypothesized that the disparity between executed and exonerated individuals resulted from several factors such as a poor defense at trial, the presence of an attorney at post conviction appeal, and the issues preserved on the record for appeal.²² Using a logistic regression, case-significant predictors of exonerations include the race of the defendant, defendant's prior felony record, quantity of evidence, the skill of the trial attorney, and perjury. Harmon and Lofquist replicated a previous logistic regression study by Harmon and concluded that significant predictors of wrongful convictions were new evidence, skill of attorney at post-convictions, perjury allegations, and use of multiple evidences.²³ Harmon and Lofquist corroborated Harmon's initial study that discussed policy implications and additional insights into the phenomenon of capital reversals. Bivariate analyses were conducted on the independent variables of race, perjury, police misconduct, private appellate attorney, and multiple evidences with the dependent variable of execution or release.²⁴ Both studies should be viewed with caution due to the small sample size and use of multiple regressions.

Many convicted offenders are increasingly requesting DNA testing for post-conviction relief with the hope of exoneration.²⁵ The first DNA exoneration occurred in a plea bargaining case that wrongly sentenced David Vasquez to thirty years for rape and murder; the actual murderer was arrested and convicted via DNA testing. The second exoneration was an accusation of rape that led to a false confession and victim recantation. Gary Dotson was cleared by DNA testing after the court refused to accept that his confession

²¹ EDWARD CONNORS, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION (2005).

²² Harmon & Lofquist, *supra* note 2.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

was false.²⁶ These two exonerations created a public policy issue of wrongful convictions, creating a powerful option to eliminate or focus on suspects utilizing the high probability of biological evidence. As a result, the professional/social indifference on wrongful convictions has evolved to a focusing on miscarriages of justice.²⁷

In 2000, former Illinois Governor George Ryan placed a temporary moratorium on the death penalty because of trial errors that resulted in appellate courts' ordering re-sentencing or retrying cases.²⁸ Perhaps the most salient reason for reversals was based on prosecutors' use of jailhouse informants, witnesses' being coerced to lie, and reliance on accomplices' or co-defendants' testimony as the sole means of conviction. Other reasons for exoneration included forensic fraud, prosecutorial and police misconduct, and faulty eyewitness testimony. In 2003, the Illinois death row emptied as the Governor granted blanket clemency to all inmates and placed a moratorium on the death penalty until the capital process laws were revamped. The most recent Illinois legislation allows pretrial hearings on jailhouse informants, a procedural method to scrutinize eyewitness testimony for its probative value, and investigation of cases that rest on a single eyewitness or informant. This allows judges to bar a death sentence that results from convictions not based on multiple types of evidence. Furthermore, jury instructions were simplified in capital cases, and police were required to record interrogations. Lastly, police who were found to have engaged in misconduct were fired, and the Illinois Supreme Court could set aside capital cases "even if there are no grounds for relief."²⁹

Additional reform efforts included a commission to study the effects, appropriateness, and fairness of the capital process. These procedures are being established to prevent wrongful convictions and to create safeguards that avoid erroneous death convictions. It is important to note that many states have passed laws that provide post-

²⁶ HENRY LEE & FRANK TIRNADY, BLOOD EVIDENCE: HOW DNA IS REVOLUTIONIZING THE WAY WE SOLVE CRIMES (2003); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); see Telsavaara and Arrigo, *supra* note 11.

²⁷ Rob Warden, *Illinois Death Penalty Reform: How it Happened, What it Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381 (2005).

²⁸ *Id.*

²⁹ *Id.* at 384.

conviction relief where DNA evidence is later discovered.³⁰ Many advocates claim that post-conviction DNA testing is a constitutional right although there is no uniformity by the courts. As a peripheral issue, many inmates may seek redress through the courts in the form of habeas corpus where newly discovered or existing DNA evidence is accessible. An important issue in many wrongful convictions is the use of eyewitness testimony, particularly where DNA evidence exonerated the innocent and vacated conviction.³¹

Eyewitness Testimony

The outcome of a trial sometimes relies on human memory and its accuracy, or eyewitness testimony.³² Small details become increasingly important. However, because witnesses are certain that what they recall is vivid detail, eyewitness testimony becomes unreliable; forgetfulness is a part of human life because human memory can be changed or transformed unconsciously from inferred suggestions.³³ Unknown etiology of differences between individuals may be accounted for by sex, race, and age.³⁴ Realistic stress-producing situations are poorly related to accuracy and confidence, and while no one factor is responsible for the phenomenon of accurate memory perceptions, Wells and Murray cited multiple causes of witness perceptions: optimality, experience with others, selective cognition, and self-attributions.

Perceptive jurors scrutinize the accuracy, confidence, credibility, reliability, and certainty of eyewitness memory that is generally accepted as truth, and has an impact on verdicts.³⁵ Truth is based on the subjectivity and interpretation of the witness, and the mind filters these “truths” from objective reality, even situations that

³⁰ See KOBILINSKY, *supra* note 16; *see also*, Warden, *supra* note 28.

³¹ FREDERICK R. BEIBER, SCIENCE AND TECHNOLOGY OF FORENSIC DNA PROFILING: CURRENT USE AND FUTURE DIRECTIONS 23-62 (2004).

³² ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL (1991).

³³ *Id.*

³⁴ HADYN D. ELLIS, RECOGNIZING FACES 12-37 (1975).

³⁵ GARY WELLS & D. MURRAY, WHAT CAN PSYCHOLOGY SAY ABOUT THE NEIL VS. BIGGERS CRITERIA FOR JUDGING EYEWITNESS IDENTIFICATION? 155-70 (1983).

never occurred.³⁶ The filtered representations are not bad memory; they are a normal function inherent in the human mind. Fractions and bits of memory unconsciously fill in gaps where missing information is constructed by the subliminal. This is especially true in “event factors,” which is a distortion or altering of memory within a specific event.³⁷ In this environment, police tactics, such as a photo line-up before a physical line-up, can bring about mistaken identifications that result in wrongful identifications. Despite these mistaken identifications, prosecutors use eyewitness testimony, confessions, and expert testimony as evidence to gain convictions.

Witnesses also sometimes mistake individuals because the individual has similar features to the actual offender.³⁸ For example, face recognition requires encoding that involves sequential patterns for peripheral analysis of certain reference points (i.e., recall of the nose leads to recall of the eyes, etc.), so atypical faces are more easily recognizable. Other factors have been blamed for an eyewitnesses’ propensity to include societal, cultural, psychological, and systematic events where later DNA exoneration and mistaken identification resulted.³⁹ Eyewitness testimony, once thought absolute, now faces reassessment because of the doubt created through the introduction of DNA evidence.⁴⁰

A parallel argument to eyewitness identification in wrongful convictions is the use of jailhouse informants. As indicated by Bloom (2005), informants have been used throughout the centuries by the government to obtain information and make a case when prosecuting individuals. While the early use of informants was commonly for political purposes, contemporary use of informants, particularly jailhouse informants and snitches, has revealed that offenders facing serious charges are willing to fabricate information about other

³⁶ *Id.*

³⁷ LOFTUS & KETCHAM, *supra* note 32.

³⁸ *Id.*

³⁹ C. Ronald Huff, *Wrongful Convictions: The American Experience*, 46 CAN. J. CRIME & CRIM. JUST. 107 (2004); ELIZABETH LOFTUS, EYEWITNESS TESTIMONY (1979); GARY WELLS ET AL., EYEWITNESS IDENTIFICATION PROCEDURES: RECOMMENDATIONS OF LINEUPS AND PHOTOSPREADS 603-47 (1998).

⁴⁰ See Doyle, *supra* note 21; Richard A. Leo, *Rethinking The Study Of Miscarriages of Justice: Developing Criminology Of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201 (2005); WELLS ET AL, *supra* note 39.

suspects to gain favor with correctional administrators, the police, and prosecutors.⁴¹ It was further cited by Huff that many death row and “snitch crisis” convictions in the 1980’s at the L.A. County Jail were linked to exonerations by DNA and the improper use of jailhouse snitches and informants.⁴² Other examples of the misuse of high-level and jailhouse informants used in multiple cases, demonstrating the criminal justice system’s sanctioning criminal actions to gain convictions, include the cases of James Bulger, Leslie White, and Stephen Flemmi.⁴³ These types of informants are highly unreliable but often used to secure convictions.

A real-world case stemming from a 1987 wrongful conviction illustrates the main elements of this paper: mistaken eyewitness testimony, DNA technology, exoneration, and the apprehension of the guilty.

A Wrongful Conviction

On September 29, 2006, a woman from Clarence, a suburb of Buffalo in Western New York, was found unclothed, beaten, and strangled to death on a bike path in the Town of Newstead, a popular attraction for bikers and joggers.⁴⁴ Her husband, Steven Diver, stated that he had seen her vehicle parked near the bike path that morning, and provided a DNA sample to eliminate himself as a suspect. While there was no sexual assault, the killer left a DNA sample behind that conclusively linked him to the murder. The modus operandi of the killer was familiar to detectives because it was the same as that in nine serial rapes and two murders committed between 1986 and 1994. The killer preferred White females, stalked secluded areas, attacked the victim from behind, and left a signature of double ligature marks from a chain on the necks of victims.⁴⁵ The DNA and modus operandi matched cases from as far back as 1983, where a thirteen-year-old girl was attacked and raped on her way to school. These

⁴¹ ROBERT M. BLOOM, *RATTING: USE AND ABUSE OF INFORMANTS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2002); *see also* Huff, *supra* note 39.

⁴² *See* Bloom, *supra* note 41.

⁴³ *Id.*

⁴⁴ Maki Becker, *Felon’s DNA Being Sifted in Search for Killer-Rapist: Parolees Hunted Down for Not Giving Sample*, THE BUFFALO NEWS, Nov. 19, 2006, at C1.

⁴⁵ *Id.*; *see also* Gene Warner, *Jailed Man May be Innocent*, THE BUFFALO NEWS, Jan. 28, 2007, at A1.

incidents occurred before DNA technology was available and where the rapist-killer left DNA at eight of the scenes.⁴⁶ The two women killed were Christine Mazur and Linda Yalem; the latter was killed on September 29, 1990, the anniversary of the most recent murder.

A profile of the killer created by criminal investigators revealed an organized, arrogant, nonpsychotic, methodical, meticulous, plotting individual, who left few clues. He was also believed to be White, and now in his forties or fifties.⁴⁷ More important was that he was becoming increasingly violent. The DNA sample left by the killer was drops of sweat in the victim's vehicle, which signified that the "bike path killer-rapist" had returned to Buffalo.⁴⁸ Because of a lapse in attacks since 1994, officials thought that the killer may have been incarcerated, and the most recent murder was committed due to a parole release. A recently enacted New York State law requires all felons to submit samples to a DNA databank. Those samples are then used to attempt to solve cold cases. No DNA samples from the recent murder yielded a match, and all parolees who had not provided a court-mandated sample were pursued.⁴⁹

In January 2007, the eating utensils of Altemio Sanchez were collected from a local restaurant and processed for DNA. The samples matched that from the crime scenes of the bike path killer-rapist.⁵⁰ Sanchez was charged with the death of Christine Mazur, Linda Yalem, and Joan Diver, assertions that he vehemently denied.⁵¹ Because DNA was recovered only from the vehicle of Diver and not

⁴⁶ Gene Warner, & Maki Becker, *Bike Path Rapist's First Attack May Have Been in '84*, THE BUFFALO NEWS, Nov. 18, 2006, at A1.

⁴⁷ *Id.*; see also Maki Becker, *Two Live In Juxtaposition: How Did Altemio C. Sanchez, The Ordinary Guy, Turn Out to be Charged as the Bike Path Killer*, THE BUFFALO NEWS, Jan. 21, 2007, at A1.

⁴⁸ Gene Warner, *Sanchez is Facing Indictment in 2 Killings*, THE BUFFALO NEWS, Jan. 19, 2007, at A1.

⁴⁹ Maki Becker, *Newfound Evidence That Exonerated Capozzi Stored at ECMC All Along*, THE BUFFALO NEWS, Mar. 29, 2007, at A1.

⁵⁰ Matt Gryta, *Sanchez Indictment Expected in Diver Case: Alleged Bike Path Killer Tied by DNA to 3rd Victim*, THE BUFFALO NEWS, Mar. 2, 2007, at A1; C. Thompson, *Man Accused of Being "Bike Path Rapist" Pleads Not Guilty*, THE BUFFALO NEWS, Jan. 23, 2007, at A1.

⁵¹ Matt Gryta, *Sanchez Pleads Not Guilty To 3 Slayings*, THE BUFFALO NEWS, Mar. 13, 2007, at B1; Gene Warner, *Alleged Bike Path Killer Insists He's Innocent*, THE BUFFALO NEWS, Jan. 17, 2007, at B1.

her body, the case was circumstantial.⁵² Sanchez's attorney commented that the admissibility of evidence collected, including when the evidence was collected, would be the main issue brought before the court at trial. Because of a five-year statute of limitations in rape cases, the rapes were not prosecuted, although five of the rapes and all of the murders were linked to Sanchez.⁵³ Friends and family portrayed Sanchez as a friendly guy who would be least expected to commit a crime of this magnitude. A former profiler for the FBI stated that the psychopathology of serial killers matched that of Sanchez: normalcy, sanity, and legitimately nice. For example, in the mid-1980s, Sanchez was a Little League baseball coach and a volunteer for local charities, and was known for his kindness and generosity. Sanchez was, at one point in time, a suspect in the rape cases but was dropped for lack of evidence.

In 1987, Anthony Capozzi was convicted of two rapes in Delaware Park, in the City of Buffalo. The conviction was based on eyewitness testimony, the suspicious activity of a man matching his description, identification in police line-ups, a match in blood type, and strikingly similar features to the offender.⁵⁴ Sentenced to serve up to thirty-five years for the rapes, he served twenty-one and a half years before investigators had their doubts about the conviction. Capozzi spent that long in prison despite the fact that he maintained his innocence and refused to accept responsibility for the crimes. The Erie County DA, Frank Clark, cited that physical evidence to overturn the conviction was lacking and that the conviction was based mainly on eyewitness identification.⁵⁵ DNA testing was not available, or was in its infancy, at the time of the crimes and conviction.⁵⁶

Investigators searching case files discovered that DNA evidence did indeed exist from the Delaware Park rapes, and were stored, preserved, and catalogued at the Erie County Medical Center because they had occurred before computers were used to accumulate

⁵² Gryta, *supra* note 50, at B1.

⁵³ *Id.*

⁵⁴ *Id.*; See also Maki Becker, *How Capozzi's Case Went Terribly Wrong*, THE BUFFALO NEWS, Mar. 30, 2007, at A1.

⁵⁵ *Id.*

⁵⁶ Gene Warner, *Purchase at Hardware Store May Link Sanchez to Latest Bike Path Murder*, THE BUFFALO NEWS, Mar. 4, 2007, at A1.

evidence.⁵⁷ The discovered evidence soundly exonerated Anthony Capozzi of the crimes and matched DNA evidence from Altemio Sanchez. In early April, an Erie County Judge vacated the charges and dismissed the case in the interest of justice, thus setting Capozzi free after incarceration for more than two decades.⁵⁸ To avoid a trial based on the overwhelming physical evidence, Altemio Sanchez pled guilty to the three murders on May 16, 2007.⁵⁹

The Criminal Justice System and Black People

A prevalent issue in wrongful convictions, particularly those based on faulty eyewitness identification, is cross-racial identification where the defendant is Black and the victim is White. Most White citizens view the criminal justice system as racially neutral, while many Black people view the same system as racially biased. As a result, the perception of a White-Black gap exists as to the extent of racial bias.⁶⁰ For example, minorities have more negative perceptions of the police than non-minorities, regardless of their role as an offender, complainant, or victim of crime. As evidenced by literature, White citizens trust the police more than Black citizens do.⁶¹

⁵⁷ Michael Beebe & Maki Becker, *Handling of Capozzi Evidence Spurs Feud*, THE BUFFALO NEWS, Mar. 31, 2007, at A1.

⁵⁸ *Judge Vacates Capozzi's Rape Convictions*, THE BUFFALO NEWS, Apr. 2, 2007, at A8.

⁵⁹ Michael Beebe & Maki Becker, *Sanchez Admits He's a Killer*, THE BUFFALO NEWS, May 17, 2007, at A1.

⁶⁰ Martha L. Henderson et al., *The Impact of Race on Perceptions of Criminal Injustice*, 25 J. CRIM. JUST. 447 (1997); Derral Cheatwood & Rebecca D. Petersen, *The Film Criminal Justice: Race, Gender, and University Experience In Students' Perceptions of Racism and Guilt*, 32 CRIM. JUST. REV. 26 (2007).

⁶¹ Georgia Ackerman et al., *Crime Rates and Confidence in the Police: America's Changing Attitude Toward Crime and Police: 1972-1999*, 28 J. SOC. & PUB. WELFARE 43 (2001); Ben Brown & William R. Benedict, *Perceptions of the Police: Past Findings, Methodological Issues, Conceptual Issues and Policy Implications*, 25 POLICE INT. J. POL. STRAT. MGMT. 543 (2002); Mark E. Correia et al., *Public Perceptions of State Police: An Analysis of Individual-Level and Contextual Variables*, 24 J. CRIM. JUST. 17 (1996); James Frank et al., *Exploring The Basis of Citizens' Attitudes Toward the Police*, 8 POLICE. Q. 206 (2005); John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88. AM. J. SOC. 329 (1982); Shaheen Halim & Beverly Stiles, *Differential Support for Police Use of Force, the Death Penalty, and Perceived Harshness of the Courts*, 28 CRIM. JUST. & BEHAV. 3 (2001); James Hawdon, *Legitimacy, Trust, Social Capital, and Policing Styles: A Theoretical Statement*, 11 POLICE. Q. 182 (2008);

Furthermore, Black citizens report less favorable attitudes toward the police and, compared to the demographic factors of sex, age and socioeconomic status, race is the strongest predictor of inadequate relations with the police in poor urban areas.⁶²

James Hawdon et al., *Policing Tactics and Perceptions of Police Legitimacy*, 6 POLICE. Q. 469 (2003); Yolander Hurst & James Frank, *How Kids View Cops: The Nature of Juvenile Attitudes Toward the Police*, 28 J. CRIM. JUST. 189 (2000); Clement Norris et al., *Black and Blue: An Analysis of the Influence on Being Stopped by the Police*, 43 BRIT. J. SOC. 207 (1992); BRIAN PAYNE & RANDY GAINNEY, *DRUGS AND POLICING: A SCIENTIFIC PERSPECTIVE* (2005); Brian Payne & Randy Gainney, *Attitudes About the Police and Neighborhood Safety in Disadvantaged Neighborhoods: The Influence of Criminal Victimization and Perception of a Drug Problem*, 32 CRIM. JUST. REV. 142 (2007); Thomas B. Priest & Deborah B. Carter, *Evaluations of Police Performance in an African American Sample*, 27 J. CRIM. JUST. 457 (1999); Carroll Seron et al., *Judging Police Misconduct: "Street-Level" Versus Professional Policing*, 38 LAW AND SOC. REV. 665 (2004); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW AND SOC. REV. 513 (2003); Terrance J. Taylor et al., *Coppin' an Attitude: Attitudinal Differences Among Juveniles Toward Police*, 29 J. CRIM. JUST. 295 (2001); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC. REV. 129 (2000); Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC. PROB. 305 (2004); Richard Tewksbury & Angela West, *Crime Victims' Satisfaction with Police Services: An Assessment in One Urban Community*, 14 JUST. PROF. 271 (2001); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); L. Murdo, *Police Practice: Teaching Youths About the Law*, 66 THE FBI LAW ENF. BULL. 19 (1997).⁶² Richard L. Block, *Fear of Crime and Fear of the Police*, 19 SOC. PROB. (1971); M. Borrero, *The Widening Mistrust Between Youth and Police*, 82 FAM. IN SOC.: J. OF CONTEMP. HUM. SERV., 399 (2001); William Gamson, & James Mcevoy, *Police Violence and Its Public Support*, 391 ANN. AM. ACAD. POL. & SOC. SCI. 97 (1970); Ilana Hadar & John Snortum, *The Eye of the Beholder: Differential Perceptions of Police by the Police and the Public*, 2 CRIM. JUST. & BEHAV. 37 (1975); Michael Hindelang, *Public Opinion Regarding Crime, Criminal Justice and Related Topics*, 11 J. RES. IN CRIME & DELINQ. 106 (1974); Herbert Jacob, *Contact with Government Agencies: A Preliminary Analysis of the Distribution Of Government Services*, M.W. J. POL. SCI., 16, 123 (1972); Stacey Nofziger & L. Susan Williams, *Perceptions of Police and Safety in a Small Town*, 8 POLICE. Q. 248 (2005); Keith D. Parker et al., *African Americans' Attitudes Toward the Local Police: A Multivariate Analysis*, 25 J. BLACK STUD. 396 (1995); Charles W. Peek et al., *Race and Attitudes Toward Local Police: Another Look*, 11 J. BLACK STUD. 361 (1981); Robert J. Sampson & Dawn J. Bartusch, *Legal Cynicism and Subcultural Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC. REV. 777 (1999); Sara E. Stoutland, *The Multiple Dimensions of Trust in Resident/Police Relations in Boston*, 38 J. RES. IN CRIME & DELINQ. 226 (2001).

Several authors suggest that police legitimacy and trust can be increased in communities with a history of poor relations, but that the task will be difficult and dependant on the environment in which the interaction occurs.⁶³ It has been suggested that Whites might receive lenient treatment in the justice system, conversely, Blacks receive tougher sentences and fall victim to selective prosecution.⁶⁴ Indeed, Blacks perceive injustice and bias in dealings with the police and criminal justice system, and often cite disparate treatment compared to Whites.⁶⁵ Many injustices and inequities exist for “lower or working-class individuals, people of color, mental health sufferers, or others disadvantaged by existing social conditions” as minorities perceive the United States system of justice today.⁶⁶

Cross-Racial Identification

The concepts of mistrust with the police and criminal justice system are apparent in cross-racial identifications that result in erroneous convictions, particularly where the suspects are Black and the victims are White. In cross-racial identification, features associated with “out-groups,” i.e. features associated with other races, ethnicities, age, or gender, are processed automatically. This is much different than the “in-group,” or the homogeneity effect, where people of a particular group are expected to have similar features.⁶⁷

⁶³ *Id.*; see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

⁶⁴ Daniel Coker, *Supreme Court Review: Forward: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. LAW & CRIME 827 (2003).

⁶⁵ S.H. Decker, Citizen Attitudes Toward the Police, 9 J. POLICE SCI. & ADMIN. 80 (1981); Frank Furstenberg & Charles Wellford, Calling the Police, 7 LAW & SOC. REV. 393 (1973); see also Hagen & Albonetti, Halim & Stiles, and Hurst & Frank, *supra* note 61; Henderson et al., *supra* note 60; Payne & Gainey; Weitzer, *supra* note 61.

⁶⁶ David Courtney & Stephen Lyng, *Tyryn Simon and the Innocents Project*, 3 CRIME MEDIA CULTURE, 176, 189 (2007).

⁶⁷ Gordon H. Bower & Martin B. Karlin, *Depth of Processing Pictures of Faces and Recognition Memory*, 103 J. EXP. PSYCHOL. 751 (1974); Daniel T. Levin, *Classifying Faces by Race: The Structure of Face Categories*, 22 J. EXP. PSYCHOL. LEARN. MEMORY. & COG. (1996); Wei-Jen Ng, & R.C.L. Lindsay, *Cross-Race Facial Recognition: Failure of the Contact Hypothesis*, 25 J. CROSS-CULT. PSYCHOL. 217 (1994); George A. Quattrone & Edward E. Jones, *The Perception of Variability Within Ingroups and Outgroups: Implications for the Law of Small*

Although people who have significant contact with other races do not demonstrate their “own face recognition bias,” the homogeneity effect denotes that most witnesses do not accurately remember faces of other races.⁶⁸ To place the literature in context, Fitzgerald conducted a study on race and witness misidentification in a fictional situation where the race of the witness and the race of the suspect were significant under similar circumstances. Whites and Asians had more difficulty accurately identifying Black suspects.⁶⁹ Many false eyewitness testimonies and mistaken identifications were due to personal race bias, or perhaps “other-race recognition.” This is generally consistent and reliable across all racial groups, as people are likely to accurately recognize faces of their own race; this has led to many erroneous convictions.⁷⁰

Numbers, 38 J. PERS. SOC. PSYCHOL. 141 (1980); Siegfried L. Sporer, *Deep—Deeper—Deepest? Encoding Strategies and the Recognition of Human Faces*, 17 J. EXP. PSYCHOL. LEARN. MEMORY. & COG. 323 (1991); Siegfried L. Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOL. PUB. POL. & LAW 36 (2001); Siegfried L. Sporer et al., *Matching Faces: Differences in Processing Speed of Out-Group Faces by Different Ethnic Groups*, 38 J. CROSS-CULT. PSYCHOL. 398 (2007); Daniel B. Wright & Joanne N. Stroud, *Age Differences in Lineup Identification Accuracy: People Are Better With Their Own Age*, 26 LAW & HUM. BEHAV. 641 (2002).

⁶⁸ Robert. K. Bothwell et al., *Cross-Racial Identification*, 15 PERS. & SOC. PSYCHOL. BULL. 19 (1989); June E. Chance et al., *Differential Experience and Recognition Memory for Faces*, 97 J. SOC. PSYCHOL. 243 (1975); Patrick Chiroro & Tim Valentine, *An Investigation of the Contact Hypothesis of the Own-Race Bias in Face Recognition*, 48a Q. J. EXP. PSYCHOL. 879 (1995); Tara Anthony et al., *Cross-Racial Facial Identification: A Social Cognitive Integration*, 18 PERS. & SOC. PSYCHOL. BULL. 296 (1992); Daniel T. Levin, *Race as a Visual Feature: Using Visual Search and Perceptual Discrimination Tasks to Understand Face Categories and the Cross-Race Recognition Deficit*, 129 J. EXP. PSYCHOL.: GEN. 559 (2000); Sid E. O’Bryant & Robert J. McCaffrey, *Preliminary Findings on the Cross Cultural Test of Face Recognition*, 13 APPLIED NEUROPSYCHOL. 223 (2006); see also Sporer, *supra* note 67.

⁶⁹ See also O’Bryant & McCaffrey, *supra* note 68.

⁷⁰ See JUNE E. CHANCE & ALVIN G. GOLDSTEIN, *THE OTHER-RACE EFFECT AND EYEWITNESS IDENTIFICATION* 176 (1996); Peter Hills & Michael Lewis, *Reducing the Own-Race Bias in Face Recognition by Shifting Attention*, 59 Q. J. EXP. PSYCHOL. 996 (2006); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POLICY, & LAW 909 (1995). Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces—A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL. & LAW 3 (2001).

According to several authors, the case for witness inaccuracies in cross-racial identifications may be based on racial stereotypes and stereotypical expectations.⁷¹ Indeed, witnesses were prone to report what they expected to see when the suspect was a member of another race rather than situations actually witnessed. Therefore, their testimony was not reliable.⁷² Although the statement “they all look alike” has limited support in the literature and research, it is suggested that facial discrimination is based on “effects of prior exposure to, experience with, and attitudes towards other races” or the phenomenon known as “functional race membership.”⁷³ In a study on the face recognition of other races, it was found that cross-racial bias did have some validity as a reason for wrongful recognition, particularly when Whites viewed the faces of Black people in multiple numbers.⁷⁴ Case studies elucidate how wrongful convictions

⁷¹ Robert Buckhout, *Eyewitness Testimony*, 23 SCI. AM. (1974); Sherri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Henry R. Luce, *The Neglected Dimension in Eyewitness Identification*, 4 CRIM. DEF. (1977); JAMES MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* (1980); Transcript of Testimony, *People v. Marsh*, 679 P.2d 1033 (Cal. 1984); Molly Treadway & Michael McCloskey, *Effect of Racial Stereotypes on Eyewitness Performance: Implications of the Real and the Rumoured Allport and Postman Studies*, 3 APPLIED COG. PSYCHOL. 53 (1989).

⁷² Robinson Ayuk, *Cross-Racial Identification of Transformed, Untransformed, and Mixed-Race Faces*, 25 INT. J. OF PSYCHOL. 509 (1990).

⁷³ Paul Barkowitz & John Brigham, *Do “They All Look Alike?”: The Effect of Race, Sex, Experience, and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED. SOC. PSYCHOL. 306 (1978); Paul Barkowitz & John Brigham, *Recognition Of Faces: Own-Race Bias*, 12 J. APPLIED. SOC. PSYCHOL. 255 (1982); Amo J. Bruce et al., *African Americans’ Recognition and Likability Responses to African American and Caucasian Faces*, 124 J. GEN. PSYCHOL. 143 (1997); John F. Cross et al., *Sex, Race, Age, and Beauty as Factors in Recognition of Faces*, 10 PERCEP. & PSYCHOL. 393 (1971); Hayden Ellis & James Deregowski, *Within-Race and Between-Race Recognition of Transformed and Untransformed Faces*, 94 AM. J. PSYCHOL. 27 (1981); R. Galper, *Functional Race Membership and Recognition of Faces*, 37 PERCEP. AND MOTOR SKILLS 455 (1973); Roy Malpass & Jerome Kravitz, *Recognition Of Faces Of Own And Other Races*, 13 J. PERS. SOC. PSYCHOL. 330 (1969); V. Seeleman, *The Influence of Attitudes Upon the Remembering of Pictorial Material*, 36 ARCH. PSYCHOL. 258 (1940); John W. Shepherd et al., *A Cross-Cultural Study of Recognition for Faces*, 9 INT. J. PSYCHOL. 205 (1974); June E. Chance & Alvin G. Goldstein, *Depth of Processing in Response to Own- and Other-Race Faces*, 7 PERS. & SOC. PSYCHOL. BULL. 745 (1981); Patricia G. Devine & Roy S. Malpass, *Orienting Strategies in Differential Face Recognition*, 11 PERS. & SOC. PSYCHOL. BULL. 33 (1985); see also Bothwell et al., *supra* note 68.

⁷⁴ See Bruce et al, *supra* note 73.

based on cross-racial identification affect real people, especially when the convicted is innocent.

Case Studies of Cross-Racial Identification

The following newspaper articles were reprinted by permission of the managing editor of the Associated Press and the Journal Inquirer of Connecticut as written by Alex Wood⁷⁵: *Are some wrongful convictions inevitable? Experts don't see police errors in Tillman case*, by James Carlton⁷⁶: *Man cleared by DNA tests released after 26 years in prison* on the cases of James Tillman and Charles Chatman, and by permission of the author in the Marcus Lyons case, written by Gerry Smith⁷⁷ of the Chicago Tribune: *"Rape conviction gone, stigma isn't: 20 years later, DNA clears man of crime,"* which are based on cross-racial identification and exoneration by DNA technology. The stories have been condensed for space. These stories go to the heart of discussion of erroneous convictions where the victim is White and the suspect is Black.

Analysis of the James Tillman Conviction *

The most striking aspect of Journal Inquirer interviews with four eyewitness-identification experts about the case of James Calvin Tillman, the East Hartford resident who served more than eighteen years of a forty-five year prison sentence because of a mistaken eyewitness identification:

- None of the experts identified a clear error in the procedures Hartford police used in investigating the case.

⁷⁵ Alex Wood, *Are Some Wrongful Convictions Inevitable? Experts Don't See Police Errors in Tillman Case*, J. INQUIRER, July 21, 2007, available at <http://truthinjustice.rrg/Id-Error.Htm> .

⁷⁶ Jeff Carlton, *Man Cleared By DNA Tests Released After 26 Years in Prison*, ASSOCIATED PRESS, Jan. 3, 2008, available at <http://truthinjustice.org/chatman.htm>.

⁷⁷ Gerry F. Smith, *Rape Conviction Gone, Stigma Isn't: 20 Years Later, DNA Clears Man of Crime*, CHICAGO TRIB., Oct. 22, 2007, available at <http://truthinjustice.org/marcus-lyons.htm>.

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- Although several experts suggested that the jury in Tillman's 1989 trial would have benefited by hearing from an expert in eyewitness identification, none identified a compelling point an expert could have made to change the jurors' minds.

The victim in the Tillman case was a twenty-six-year-old woman who told police that a man she did not know forced his way into her car as she prepared to leave a downtown Hartford parking lot in the early morning hours of Friday, January 22, 1988. She said the man punched her in the face at least twice during the crime and drove her to a more remote parking lot several blocks away, where he robbed her of money and jewelry and then raped her. Finally, she said, he drove her several more blocks before parking the car and running away with her pocketbook. The woman reported the crimes immediately and was taken to Hartford Hospital for treatment.

Identified from "Mug Book"

She went to the Hartford police station the following Monday, where she was interviewed in detail about the incident. Detective Stephen Kumnick showed her eight color Polaroid photos of black men, none of whom she identified as her attacker, according to summaries of the trial evidence by the prosecutor and defense lawyer who argued Tillman's appeal before the state Supreme Court. The court upheld Tillman's conviction in 1991. Kumnick then asked the woman to look through a book of Hartford police color photographs of black men who had been arrested in the area of the city where she had been accosted. The initial attack occurred in a parking lot near the Arch Street Tavern, where she had been socializing with co-workers after completing a noon-to-10 p.m. shift at the Travelers Insurance Co.

Kumnick left the woman to look through the book with Janette Getz, a social worker with the Hartford Police Crisis Unit, according to the prosecutor's summary of the evidence. The victim looked at 11 photos in the book, then picked the tenth, a nearly five-year-old photo of Tillman, according to Kumnick's affidavit seeking a warrant for Tillman's arrest. The detective said the victim was positive of the identification but commented that the man looked younger in the

picture. Kumnick said in the affidavit that he then obtained a “black-and-white contact photo print” of Tillman that was less than eight months old, and the victim reported that it showed the current appearance of her attacker.

One of the major concerns expressed by eyewitness-identification experts about traditional police lineups or photo arrays is that investigators may unconsciously steer the witness toward selecting the suspect. Gary L. Wells, a psychology professor at Iowa State University, has written that if the witness says the number of the photo of someone who is not a suspect, the investigator might reply, “Take your time. Make sure that you look at all the photos.” Wells added that if the witness wavers between photos of the suspect and a non-suspect, the investigator might focus the witness’ attention on the suspect by asking, “What about No. 4 makes you remember him?” But the known facts suggest that no such steering occurred in the Tillman case. Police evidently had no suspect, and Kumnick, the lead investigator, was out of the room when the victim made her initial selection.

Safeguards Lacking

It is true that the “mug book” approach to identification used in the Tillman case lacks some of the safeguards built into a traditional photo lineup:

- Everybody in the mug book is a potential suspect, so there is no “wrong” answer for the witness to give, unless the person selected can be excluded by biological evidence or has an unassailable alibi, such as being in jail.
- The photos in a photo lineup are selected because they look similar to the suspect. But many of the photos in a mug book may look nothing like the perpetrator, leaving the witness with fewer genuine choices. Evidently, the only things the people shown in the mug book in the Tillman case had in common were that they were black men who had been arrested in a given part of Hartford. But to criticize mug-book identifications raises the difficult question of how

police could solve crimes committed against strangers if they were deprived of this technique.

Steven D. Penrod, a psychology professor at the City University of New York's John Jay College of Criminal Justice, says Tillman's case provides "a lesson about the unreliability of eyewitness identification." But he adds, "There is not a lesson about police practices in this case." "I would not fault the police for doing what they did," agrees Robert W. Shomer, a psychologist in Encino, Calif., who has testified hundreds of times as an expert on eyewitness identification for over thirty years. The moral of the story thus, may be a particularly sobering one: Some erroneous criminal convictions may be unavoidable.

The Element of Luck

Tillman was freed in large part due to the work of two public defenders, Karen A. Goodrow of Vernon Superior Court and Brian S. Carlow of Middletown Superior Court, who together head the Innocence Project of the state public defender's office. They tracked down the rape victim's clothing, stained with bodily fluids, in a box being held in storage at the Hartford Legal Aid Society, whose lawyers had obtained a DNA test on Tillman's behalf during a "habeas corpus" lawsuit in 1991. But Tillman's exoneration is also attributable in large part to sheer luck: He was convicted of a rape in which the perpetrator apparently left bodily fluid at the scene, and the advanced DNA testing now available revealed that the fluid was not Tillman's. The 1991 DNA test had failed to produce these results because the amount of DNA for testing was insufficient with the technology then available.

There are no means to correct all erroneous convictions. People frequently are convicted of crimes on the basis of eyewitness identification by strangers when no DNA evidence is available to check the accuracy of the identification, says Otto H. MacLin, a psychology professor at the University of Northern Iowa. Of the first 130 DNA exonerations in the United States, 101 involved mistaken identifications, most of which were eyewitness identifications, according to the Innocence Project at Yeshiva University's Benjamin N. Cardozo School of Law in New York. Moreover, studies show

that twenty to twenty-five percent of witnesses pick a non-suspect out of photo arrays, according to Penrod. If these witnesses could be characterized as guessing, Penrod adds, other witnesses who are guessing must be picking the suspect. Based on data from the studies, he estimates that unreliable suspect selections may run as high as five percent. But two more recent field studies have shown lower selection rates for non-suspects.

Race Difference Problem

Tillman's conviction is consistent with one phenomenon that has support in research: The rape victim is White, Tillman is Black, and studies have shown that people are less accurate in identifying strangers of other races than they are in making such identifications among members of their own race. In a 2001 article analyzing the results of thirty-nine studies, Florida State University psychologists Christian A. Meissner and John C. Brigham concluded that people are 1.56 times as likely to misidentify a person of another race as they are to make such a mistake with someone of their own race. Similarly, the psychologists concluded, people are 1.4 times as likely to make an accurate identification of a member of their own race as they are to identify correctly a member of another race. Bigots are not the only ones who make such mistakes.

Meissner and Brigham found no evidence that racial attitudes were a factor in the accuracy of identification. Interracial contact is a factor but only a small one, accounting for some two percent of the variation in accuracy, they added. "It's not a stereotyping thing. It's a brain thing," MacLin says of the problems with cross-racial identification. "Everybody's brain has problems when looking at people of another race." One theme mentioned repeatedly by the experts interviewed by the Journal Inquirer was that expert witnesses should be permitted to tell juries about the results of these and other studies showing problems with eyewitness identification.

Experts Rarely Allowed

In Connecticut, as in a number of other states, judges traditionally have been reluctant to allow such testimony. Expert testimony on eyewitness identification is "just beginning to be

allowed,” says public defender Christopher Cosgrove, who represented Tillman in his 1989 trial in Hartford Superior Court, and now heads the public defender’s office in Litchfield. “It was routinely. . . . not allowed back then.” One common misconception among jurors is that the stress of being victimized in a violent crime “stamps in” the memory of the perpetrator’s face, Shomer says. In fact, he says, stress interferes with the psychological processes that produce reliable identification. But even when an expert provides such information to a jury, the defense inevitably faces an uphill battle in an eyewitness-identification case. “They see an honest, well-meaning victim pointing at a guy and saying, ‘I’ll never forget that face,’” Shomer says.

Experts also can expose juries to a more sophisticated understanding of the processes involved in memory than they might have when they arrive in the courtroom. “Our memory isn’t a photo album,” MacLin says. “Memory is a mosaic, a blur.” One of the major issues that eyewitness-identification experts focus on is how the memory of a face can be affected by subsequent events. For example, studies have shown that witnesses become more confident in their identifications when told that they have identified the police suspect and less confident if told that they have not identified the suspect. Juries, in turn, give considerable weight to witness confidence in deciding whether to rely on the identification. But Solomon M. Fulero, a psychology professor at Sinclair College in Dayton, Ohio, says studies have shown that the confidence of the witness is “poorly related to accuracy.”

Emotion is Not Proof

When the victim first saw Tillman’s photo in the mug book, she began to shake and cry, according to the prosecutor’s summary of trial testimony. “That’s gonna be used as evidence - that she shook,” MacLin says. “That will be used as a validation of her memory.” But he questions such reasoning, in part on the basis of a personal experience. He says a man once attacked his girlfriend, who took off her stiletto heel and smashed him in the face with it. There was a similar-looking man living in the area, MacLin recalls, and when he would see that man, the hair on the back of his neck would stand up. But he could tell the man was not the attacker, who had a scar from

where he had been hit in the face. “The hair on the back of my neck stood up for the wrong guy,” MacLin says. That, he says, is an example of a phenomenon psychologists call “stimulus generalization.” Another example of the phenomenon, he says, is that people will stop for red lights that look slightly different from the ones they are familiar with.

MacLin stresses the importance of richly detailed information in analyzing an eyewitness identification. For example, available public records do not indicate the total number of photographs in the mug book from which the rape victim picked Tillman’s photo. If there were only twelve, MacLin suggests, she may have felt pressured to make a selection when she reached the eleventh. “Everything makes a difference,” MacLin says.

Search an Option?

When Hartford Superior Court Judge Thomas P. Miano dismissed the charges against Tillman, he suggested that one lesson of the case is that prosecutors should not rely solely on eyewitness identifications by strangers. Prosecutor Edward Narus, who tried the case, says he had more than that. Tillman gave police an alibi that did not check out when police spoke to the alibi witnesses, Narus says, though one of those witnesses later supported Tillman’s alibi in trial testimony.

In addition, Kumnick testified that Tillman had cuts and bruises on his knuckles when he was arrested, according to the prosecution appeal brief. When asked how he had gotten the cuts, Tillman first said he was not sure, then said he had gotten them working at a car wash, the brief adds. The hand injuries would have been considered consistent with his having punched the victim. There also was physical evidence that failed to rule Tillman out as the attacker. One of the bodily fluid stains found on the victim’s clothing was from a “non-secretor,” someone who doesn’t secrete the antigens used for blood typing into other bodily fluids in detectable quantities. Tillman is a non-secretor. But that evidence was not strong. It made Tillman one of twenty percent of the population who could have committed the crime.

There may have been at least one additional avenue police could have pursued to corroborate the victim's identification of Tillman: They could have sought to search for the more than \$2,500 worth of distinctive jewelry stolen from the victim. But failure to find the jewelry would have been unlikely to bring about Tillman's acquittal at his trial in 1989. The perpetrator could have sold the jewelry or discarded it in the three days between the crime and the victim's identification of Tillman as her assailant. So failure to find the stolen jewelry during a search would not have been evidence of Tillman's innocence, Fulero says. But discovery of the jewelry in Tillman's living quarters "sure would be incriminating," the professor adds.

Charles Chatman*

Three times during his nearly twenty-seven years in prison, Charles Chatman went before a parole board and refused to tell them what they wanted to hear: that he had raped a woman in his neighborhood. Chatman, forty-seven, won his freedom after new DNA testing excluded him as the rapist, adding to Dallas County's nationally unmatched number of wrongfully convicted inmates. "Every time I'd go to parole, they'd want a description of the crime or my version of the crime," Chatman said. "I don't have a version of the crime. I never committed the crime. I never will admit to doing this crime that I know I didn't do."

District Judge John Creuzot, whom defense lawyers credited with shepherding Chatman's case through the legal system, recommended that Texas' Court of Criminal Appeals find Chatman innocent. With several relatives dabbing at their eyes with tissues and cheering, Chatman was released. Before the crime is officially cleared from Chatman's record, the appeals court must accept the recommendation or the governor must grant a pardon. Either step is considered a formality after Creuzot's ruling.

Chatman became the fifteenth inmate from Dallas County since 2001 to be freed by DNA testing. He served more time than any of the other inmates, four of whom were in court to show their

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support. Dallas has freed more inmates after DNA testing than any other county nationwide, said Natalie Roetzel of the Innocence Project of Texas. Texas leads the country in prisoners freed by DNA testing, with at least thirty wrongfully convicted inmates since 2001, according to the Innocence Project. One of the biggest reasons for the large number of exonerations is the crime lab used by Dallas County, which accounts for about half the state's DNA cases. Unlike many jurisdictions, the Dallas County lab used by police and prosecutors retains biological evidence, meaning DNA testing is a viable option for decades-old crimes.

District Attorney Craig Watkins also attributes the exonerations to a past culture of overly aggressive prosecutors seeking convictions at any cost. Watkins has started a program in which law students, supervised by the Innocence Project of Texas, are reviewing about 450 cases in which convicts have requested DNA testing to prove their innocence. "It is time we stop kidding ourselves in believing that what happened in Dallas is somehow unique," said Jeff Blackburn, the founder of the Innocence Project of Texas. "What happened in Dallas is common. This is Texas."

The start of Chatman's hearing was delayed about thirty minutes, partly because his lawyers were trying to find him suitable clothing. When Chatman finally walked in — wearing a coat, a tie and an uncertain expression — members of his family gasped. "He doesn't look the same," one whispered. The hearing attracted a standing-room-only crowd that included Watkins, who was greeted warmly by two wrongly convicted Dallas men who have since won their freedom. Also there was State Rep. Terri Hodge, a member of the criminal jurisprudence committee, who promised unspecified reforms when the Legislature convenes in 2009.

Chatman was twenty when the victim, a young woman in her twenties, picked him from a lineup. Chatman said he lived five houses down from the victim for thirteen years but never knew her. She identified him in court as the attacker, and serology tests showed that the type of blood found at the crime scene matched that of Chatman, along with forty percent of Black males. Chatman also said he was working at the time of the assault, an alibi supported by his sister, who was also his employer. Nevertheless, Chatman was

convicted of aggravated sexual assault in 1981 and sentenced to ninety-nine years in prison. When convicted, he said Thursday, he felt “that it was all a joke.” His religious faith and support from family and friends “is the answer to why I never gave up fighting for this for twenty-seven years.” “I really can’t tell you how I feel,” said his aunt, Ethel Barley. “But I can tell you it is a different feeling than I have had in a long time, just to be holding his own hand.”

Chatman, who is Black, said he believes his race led to his arrest and conviction. The jury, he said, had one Black member. “I was convicted because a Black man committed a crime against a White woman. . . . and I was available,” Chatman said. Chatman’s lawyer, Dallas County public defender Michelle Moore, said he applied for DNA testing in 2004 but was told the process could be risky. The only evidence containing DNA was from a vaginal swab of the victim, Moore said, and a single test would consume the entire sample. An inconclusive test would exhaust all evidence. Chatman was again warned of the gamble when he reapplied for testing last year. “This is a guy who’s had to face horrible decisions,” Moore said.

Chatman said he wants to work with the Innocence Project of Texas to support other exonorees and wrongly convicted inmates. “I believe that there are hundreds, and I know of two or three personally that very well could be sitting in this seat if they had the support and they had the backing that I have,” Chatman said.

The wrongful conviction of Marcus Lyons^{*}

Two weeks after his release from prison in March 1991, Marcus Lyons arrived at the DuPage County Courthouse carrying a wooden cross. As police tried to intervene, Lyons stepped onto a small platform attached to the bottom of the eight- by six-foot crucifix, lifted a hammer and drove a nail into his foot. It was a cry for help. Lyons had just served three years in prison for a rape he said he did not commit. “I needed someone to listen,” he said in a recent interview.

^{*} Reprinted by permission of Gerry Smith of the Chicago Tribune.

A few years ago, someone finally did. A new attorney took his case, and after DNA evidence from the 1987 crime proved his innocence, Lyons' conviction was dismissed by DuPage County State's Attorney Joseph Birkett -- the same prosecutor who tried the case. Lyons' exoneration is another illustration of the impact DNA technology has had on the criminal justice system, shedding new light on cold cases that often hinged on witness identifications. But beyond the legal ramifications lies a deeper, more personal story of frustration and redemption, of the extreme measure one man took to vindicate his tarnished reputation and his bitter twenty-year wait.

“A Perfect Storm”

In 1987, Lyons was a slim twenty-year-old Navy reserve officer engaged to be married. He lived in west suburban Woodridge, took courses at the College of DuPage and worked as a computer operator at AT&T. On weekends, he spent time with his four brothers, roller skated with friends and rode his motorcycle along the lakefront. He looked forward to returning to active duty, perhaps being stationed at Pearl Harbor. “Everything was going great,” Lyons recalls.

But on November 30, a twenty-year-old White woman who lived at the Maple Lake Apartments told police she had been raped. She described a Black man who knocked on her door, identified himself as “Mr. Williams from downstairs” and asked if he could use her bathroom, according to police records. A composite sketch of the attacker was shown to two other women who lived in the apartment complex. They said it looked like one of their neighbors -- Marcus Lyons. Lyons was not surprised that he resembled the attacker. “I was the only Black male in the apartment complex,” he says.

In addition, the victim pointed out Lyons in a police lineup and in a photo array. Although Lyons maintained he was home at the time of the incident, he gave police conflicting accounts of his whereabouts earlier in the day. And the victim's description of the attacker's clothes, which included a pair of brown polyester pants, matched garments that Lyons owned, Birkett said. Lyons was arrested and charged with criminal sexual assault. “It was the perfect

storm for the type of case that may result in a conviction,” Birkett said in a recent interview.

Lyons says his brown polyester pants were a size thirty-two and could never have fit the victim’s description of the attacker, who she said weighed 200 pounds and had a “large belly and hips.” In addition, the victim requested to view the police lineup a second time, although police records do not indicate why. The all-White jury deliberated for less than three hours after a four-day trial, according to one of the jurors, who asked that her name not be used. In the end, the jury was swayed by Lyons’ resemblance to the composite sketch and the demeanor of the victim, who was “shaking like a leaf” on the stand and “really gave the appearance that she was scared of this guy,” the juror said. Lyons was sentenced to six years in the Illinois Department of Corrections and was appointed a new lawyer, George C. Howard, to appeal his conviction. But Howard never did. “While I was in jail, I was asking him what was happening,” Lyons said. “He said he was working on it.”

Lyons did his time without incident. But just two weeks after he was released early on parole, facing a future as a registered sex offender, he was frustrated and desperate. Hoping to get the U.S. Navy to hear his plight, Lyons dressed in his reserves uniform, carried a cross on his back and tried to crucify himself outside the courthouse where he was tried and convicted. The stunt, which cost Lyons a \$100 fine for disturbing the peace and a week in an Elgin mental health facility, showed the depths to which the wrongfully convicted will go to clear their names, said Vanessa Potkin, a staff attorney at the Innocence Project, which investigates such potential cases. After losing their freedom, Potkin said, they enter society devoid of things they once took for granted, such as relationships and possessions. “All they have left is their word,” she said.

In Search of a New Life

Pushing fifty now, his hair speckled with gray, Lyons looks different than the man who went to prison two decades ago. He lives in Gary, Indiana and rarely sees his brothers, who are scattered across the country. He combats bouts of depression with prayer. Though he became a certified biomedical engineer through courses he took in

prison, Lyons says finding work has been nearly impossible. And so he has found jobs with employers who were less selective, such as working at a sewage treatment plant.

His personal life also suffered. After his conviction, his fiancé left him. Other relationships fizzled as fast as he could tell his story. “You tell a woman you’re a convicted sex offender and she’s gone,” Lyons said. “Can you blame her?” Lyons is one of more than 200 convicts to be exonerated by DNA evidence over the last decade. About seventy-five percent of those cases involved misidentification by witnesses. At the time of Lyons’ conviction in 1987, DNA technology was still in its infancy.

But in 2002, Lyons read an article about a case in Lake County involving a man who was convicted of sex assault and later exonerated by DNA evidence. Lyons contacted the man’s attorney, John Curnyn, who agreed to take his case. Curnyn found that two key pieces of evidence -- rape kits and cutouts of the victim’s garments -- were missing from a laboratory fifteen years after the crime. Birkett said missing evidence is not unusual in cases in which an appeal was not filed. However, one garment that had never been tested for DNA was still there, what Curnyn calls “a fluke of chance.” Later, Birkett vacated Lyons’ conviction after DNA evidence found that a semen stain on the victim’s bra did not match his sample. “If we make a mistake, we want to make sure we correct it,” Birkett said. “As far as I’m concerned, Marcus Lyons deserves to have his record cleared.” Birkett said Lyons has no other criminal record in DuPage County, and a check of Cook County records showed no record for him there either. Upon learning of Lyons’ exoneration, the juror, who now counsels victims of rape and sexual assault, said, “I just feel bad.” “I wish they had DNA back then,” she said.

After the proper motions are filed, Birkett said, Lyons’ name will be struck from the sex offender database. This spring, Lyons will seek clemency, a necessary step toward possible compensation for the three years he was incarcerated, Curnyn said. Meanwhile, the DNA sample taken from the victim’s garments remains on file, and if a match ever registers, that person will be investigated, Birkett said. But for Lyons, the scars remain. “Imagine, for twenty years, trying to

tell the world you didn't do it," Curnyn said. "He's going to carry this baggage for the rest of his life."

Lyons said he is ready to move on now, find a better job, perhaps a wife. But he says he may never forgive his accuser or the prosecutors who argued to put him in prison -- a place that still haunts him two decades after his conviction. "You never forget the sound of a cell door closing on you," Lyons said. "It wakes you up at night, and you wonder if this is all still just a bad dream."

Conclusion

The case of the Bike Path Rapist/killer spanned over two decades without a conviction, and the conviction of an innocent man in similar cases based on multiple types of evidence, such as eyewitness testimony and blood typing. This is a case where lack of DNA technology made it possible for a man to be wrongly convicted and later exonerated. This is also a case where DNA led to a plea bargain of a man who terrorized the women of Western New York for two decades. The advent and improvements in DNA technology have proved to exonerate those wrongly convicted, process evidence from suspects or eliminate potential ones, focus on suspects in the DNA computer bank when a match is made in criminal cases, and store evidence in cases where offenders have not been identified. DNA evidence has been the vanguard to exonerations of wrongful convictions and miscarriages of justice, especially where witness misidentification and/or the misuse of informants was the foremost reason for conviction. Given the historical context between the Black community and the perceived or real injustices of the criminal justice system, race relations in the United States may be marred by wrongful convictions and hinder the healing process. DNA exonerations will have serious implications in the future for police, courts, corrections, in terms of race relations and minority communities.

A further concern for minority communities and the criminal justice system is how the system affects the health of poor and minority communities. Future study recommendations should focus on the health of the Black community, particularly if the mental health of the Black community is affected by erroneous convictions based on cross-racial identification.