

# CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

## Top portion of form to be completed by the Provider

It is preferred that the form is pre-printed with the attendees name and bar number.

Provider Name: Ventura County District Attorney's Office  
Provider Number: 1130  
Title of Activity: The Coley Case: Conviction Integrity and the Freeing of an Innocent Man  
Date(s) of Activity: February 12, 2018  
Time of Activity: 8:30 a.m. to 9:45 a.m.  
Location of Activity (City/State): Ventura, CA

This Activity qualifies for: Participatory  Self-Study

Total California MCLE Credit Hours for the above activity: 1.25, including the following sub-field credits:

- Legal Ethics: 1.25
- Recognition and Elimination of Bias: \_\_\_\_\_
- Competence Issues: \_\_\_\_\_

## Bottom portion of form to be completed by the Attorney after participation in the above-referenced activity

By signing below, I certify that I participated in all, or some\*, of the activity described above and am therefore entitled to claim the following California MCLE credit hours:

Total California MCLE Credit Hours: \_\_\_\_\_, including the following sub-field credits:

- Legal Ethics: \_\_\_\_\_
- Recognition and Elimination of Bias: \_\_\_\_\_
- Competence Issues: \_\_\_\_\_

*(You may not claim credit for the subfields above unless the provider is granting credit in those areas above.)*

Print Your Name (clearly): \_\_\_\_\_

Your California State Bar Number: \_\_\_\_\_

Signature: \_\_\_\_\_

\* partial participation hours must be pro-rated



**THE COLEY CASE:  
CONVICTION INTEGRITY  
AND THE FREEING OF AN  
INNOCENT MAN**

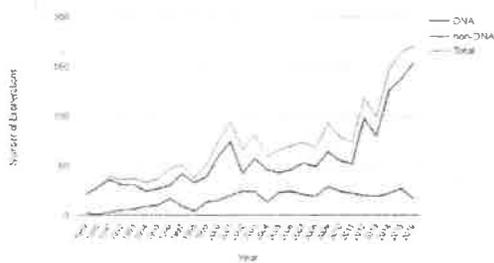
**Michael D. Schwartz**  
Special Assistant District Attorney  
February 12, 2018

Twofold aim of prosecutor:  
“that guilt shall not escape nor  
innocence suffer.”

*Berger v. United States*  
(1935) 295 U.S. 78, 88

2

**2167 exonerations in 28 years**  
National Registry of Exonerations



3

Even after conviction, the prosecutor  
is bound by ethics of his office to  
inform the appropriate authority of  
information that casts doubt upon  
correctness of the conviction.

*Imbler v. Pachtman*  
(1976) 424 U.S. 409, 427, fn. 25;  
*People v. Garcia* (1993) 17 Cal.App.4<sup>th</sup>  
1169, 1179

4

- Injustice to the defendant
- Real perpetrator may remain at large and reoffend

5

### People v. Craig Coley



6

**Craig Richard Coley**  
06-07-47



7



**KNOWN  
PROBLEMS**

9

**RED FLAGS**



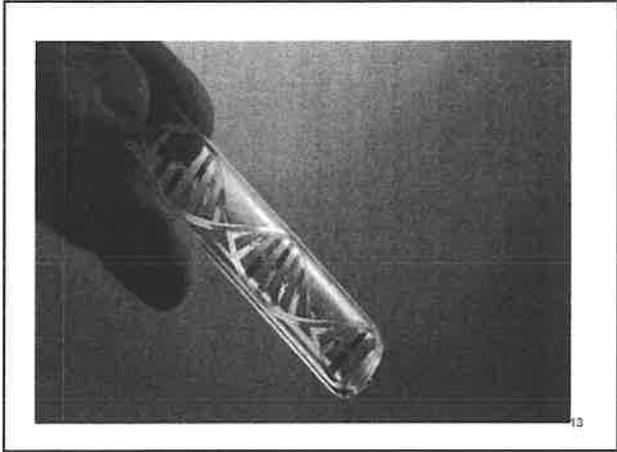
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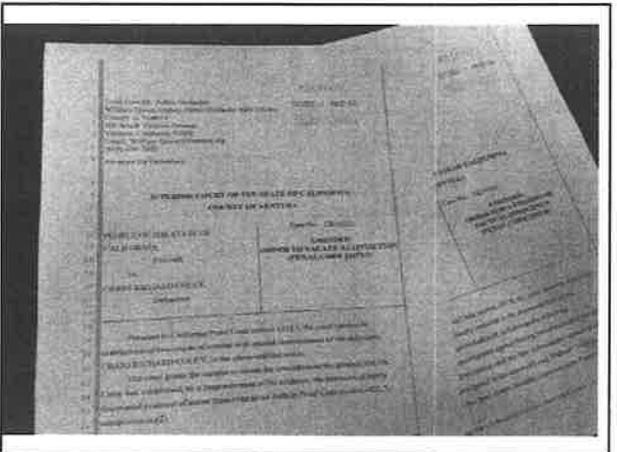
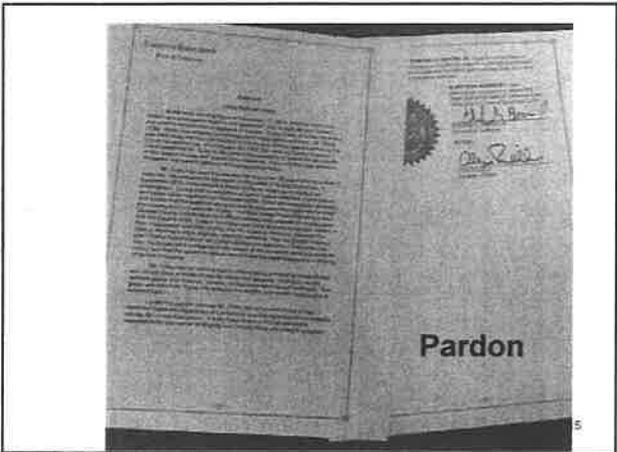
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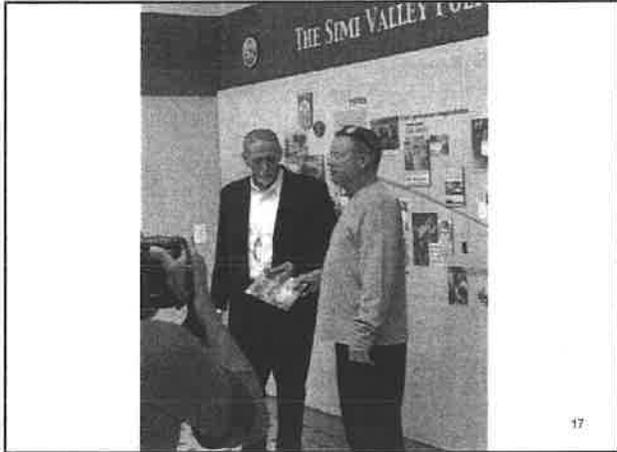
**Conviction  
Integrity/Clemency  
Investigation**

12



# RESOLUTION





**California Victim Compensation Board**

Person convicted of felony that is innocent because crime was not committed at all, or not committed by him or her

\$140 per day x 36 yrs. 3 mo. ≈ \$ 1,995,940

(Pen. Code § 4900 et seq.)

## **POTENTIAL CIVIL RIGHTS LAWSUIT**

21

## **Lessons learned**

- Be willing to have open mind and reopen mind
- Keep digging for “destroyed” evidence
- If significant doubts raised, reexamine whole case

22

## **Good reminders**

- Our system is fallible
- Follow the evidence wherever it leads
- Advances in technology give us a different lens to view the evidence
- Must act upon new evidence with diligence no matter how hard it is
- Our job is to ensure justice, even if it is 39 years too late

23

## **STATUTORY PROVISIONS**

24

**Penal Code 1473**  
**Grounds for Habeas Corpus**  
as amended effective 2015, 2017

- “New evidence” that would have likely changed the outcome of the trial
- “False evidence,” if material, including repudiated or undermined expert opinion evidence  
(abrogates *In re Richards* (2012)  
55 Cal.4<sup>th</sup> 948 – bite mark testimony)

25

**Penal Code 1473.7**  
as amended effective 2017

Motion to vacate conviction, no longer imprisoned or restrained:

- Error damaging ability to understand immigration consequences of guilty plea
- Newly discovered evidence of actual innocence

26

**Penal Code 1405**  
as amended effective 2015

Expanded ability of convicted defendants to obtain DNA testing

27

**Rules of Professional Conduct**  
**rule 5-110 (F)**  
as amended 11/2/2017

New, credible material evidence creating reasonable likelihood D did not commit crime:

- Disclose to court or appropriate authority
- Disclose to defendant
- Investigate if convicted of crime D did not commit

28

**Rules of Professional Conduct  
rule 5-110 (G)  
as amended 11/2/2017**

Clear and convincing evidence D convicted of crime he did not commit:

- Prosecutor shall seek to remedy the conviction

29

**Ventura DA  
Conviction Integrity  
Process  
Established Oct. 2012**

30

**Legal Policies Manual**

- Before and during trial, DDA to assess claims of factual innocence, supervisor to approval dismissal
- Finding of factual innocence after rejection, dismissal or acquittal (PC 851.8): supervisor approval
- After conviction: Conviction Integrity Deputy

31

**Legal Policies Manual**

- Defense has initial burden to produce evidence of innocence
- Not just reweighing of evidence, request for resentencing, or immigration relief
- Initial inquiry to determine if further review and/or investigation appropriate

32

## Conviction integrity is not based on procedural issues

- 1538.5, evidentiary rulings, etc., do not form basis for relief unless establish factual innocence
- But procedural bars to relief on appeal or habeas (untimely petitions, failure to object, multiple petitions, etc.) do not bar conviction integrity relief if factually innocent

33



**Michael Ray Hanline**  
36 years



**Craig Richard Coley**  
38 years

34

## Sources of Wrongful Convictions

35

## Tunnel Vision



Cognitive dissonance

36

### Informants

- LA County/Leslie Vernon White
- Report of 1989-90 LA Grand Jury regarding Jail House Informants
- Legal Policies Manual
- PC 4001.1: consideration limited to \$50
- PC 1127a
  - Notice to court
  - Jury instruction: view with caution

37

### Eyewitness Identification

- Suggestive line-ups (composition, instructions, feedback)
- Simultaneous vs. sequential line-ups, double blind
- LPM: Not file based on uncorroborated photo line-up

38

### False Confessions

- Juveniles
- Mental disability
- Exhaustion, want to go home

39

### Forensic Evidence

- Hair comparisons: overstated conclusions
  - FBI reviewing cases before 1999
- Arson testimony: "junk science"
- Flawed methodology (Alco-Sensor V)
- Credibility/competence of examiners (e.g., SF examiner certify drugs w/o doing tests)

40

## Prosecutorial misconduct

- *Brady* and other discovery violations

41

## IAC Ineffective Assistance of (Defense) Counsel

- Lack of legal knowledge
- Failure to investigate
- Low bid contracts
- Should have separate funds for investigators & experts

42

## Plea Bargaining



Brian Banks

- 17 years old
- Charged with kidnap and rape of classmate
- Potential sentence: 41 years to life
- Plea offer: 7 years
- Served 5 yrs 2 mo., parole, 290 register
- "Victim" received \$1.5 million, then recanted

43

Twofold aim of prosecutor:  
"that guilt shall not escape nor  
innocence suffer."

*Berger v. United States*  
(1935) 295 U.S. 78, 88

44

# Executive Department

State of California

## PARDON

### Craig Richard Coley

In the early morning hours of November 11, 1978, Rhonda Wicht was beaten and strangled to death in her apartment. Her 4-year-old son, Donald, was smothered and died of asphyxia in his bed. Craig Coley, a former boyfriend of Ms. Wicht, was arrested and charged with these heinous crimes. Mr. Coley was tried twice; the first trial resulted in a hung jury and he was convicted by the jury at his second trial. On February 26, 1980, the Ventura County Superior Court sentenced Mr. Coley to life without the possibility of parole for two counts of first degree murder with special circumstances. His conviction was affirmed on appeal and several petitions for habeas corpus failed.

Mr. Coley has been incarcerated for more than 38 years and he is now 70 years old. He petitioned for clemency on the basis of factual innocence. In September 2015, I requested the Board of Parole Hearings to conduct an investigation. During that investigation, a former police detective, police captain, and police officer reported that they believed Mr. Coley was wrongfully convicted and opined that the detective who originally investigated the matter mishandled the investigation or framed Mr. Coley. The Simi Valley Police Department and Ventura County District Attorney's Office subsequently initiated an investigation into the integrity of Mr. Coley's conviction and have recently concluded, based on their investigation and DNA testing, that Mr. Coley is innocent. Although the District Attorney's office originally opposed clemency, now the District Attorney and Chief of Police support Mr. Coley's petition for clemency. They write that they "no longer have confidence in the weight of the evidence used to convict Mr. Coley" and that the current evidence "would meet the legal standard for a finding of factual innocence."

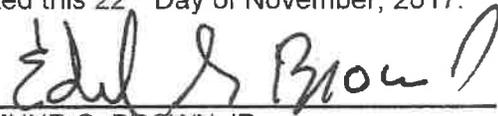
Mr. Coley had no criminal history before being arrested for these crimes and he has been a model inmate for nearly four decades. In prison, he has avoided gangs and violence. Instead, he has dedicated himself to religion. The grace with which Mr. Coley has endured this lengthy and unjust incarceration is extraordinary.

I grant this pardon because Mr. Coley did not commit these crimes. I direct the California Department of Corrections and Rehabilitation to immediately release Mr. Coley from prison. It is my hope that any and all individuals responsible for the murder of Rhonda and Donald Wicht are brought to justice.

**THEREFORE, I, EDMUND G. BROWN JR.**, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby grant to Craig Coley a full and unconditional pardon for the above offenses.



**IN WITNESS WHEREOF** I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 22<sup>nd</sup> Day of November, 2017.



EDMUND G. BROWN JR.  
Governor of California

**ATTEST:**



ALEX PADILLA  
Secretary of State

RECEIVED

2017 DEC -1 PM 12: 05

DISTRICT ATTORNEY  
COUNTY OF VENTURA

1 Todd Howeth, Public Defender  
2 William Quest, Deputy Public Defender SBN 191461  
3 County of Ventura  
4 800 South Victoria Avenue  
5 Ventura, California 93009  
6 Email: William.Quest@Ventura.org  
7 (805) 654-3032

8 Attorney for Defendant

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **COUNTY OF VENTURA**

11  
12 PEOPLE OF THE STATE OF  
13 CALIFORNIA,

14 Plaintiff,

15 vs.

16 CRAIG RICHARD COLEY,

17 Defendant.  
18

Case No.: CR14322

**AMENDED**  
**ORDER TO VACATE A CONVICTION**  
**(PENAL CODE §1473.7)**

19  
20 Pursuant to California Penal Code section 1473.7, the court vacates the  
21 convictions of two counts of murder with special circumstances of the defendant,  
22 CRAIG RICHARD COLEY, in the above-entitled action.

23 The court grants the motion to vacate the conviction on the grounds that Mr.  
24 Coley has established, by a preponderance of the evidence, the existence of newly  
25 discovered evidence of actual innocence as set forth in Penal Code section 1473.7,  
26 subdivision (a)(2).

27 ///

28  
AMENDED ORDER TO VACATE A CONVICTION (PENAL CODE §1473.7)

1 This order is based on the following:

2 1. The District Attorney does not contest the factual allegations  
3 underlying the grounds for granting Mr. Coley's motion to vacate.

4 2. The District Attorney's office provided notice to the Attorney  
5 General that they will not contest the factual allegations underlying Mr.  
6 Coley's motion to vacate in accordance with Penal Code section 1485.5,  
7 subdivision (b).

8 This order shall be binding on the Attorney General, the factfinder, and the  
9 California Victim Compensation Board in accordance with Penal Code section 1485.5,  
10 subdivisions (a) and (c).

11 The California Victim Compensation Board shall recommend to the Legislature  
12 that an appropriation be made and any claim filed shall be paid to Mr. Coley in  
13 accordance with Penal Code section 1485.55, subdivision (d).

14 This Amended Order rescinds and supersedes the order previously issued on  
15 November 29, 2017.

16  
17  
18  
19 Dated: 12/1/17

20   
21

22 HONORABLE RYAN J. WRIGHT  
23 JUDGE OF THE SUPERIOR COURT  
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DISTRICT ATTORNEY  
COUNTY OF VENTURA

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8  
9  
10 Attorney for Defendant

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **COUNTY OF VENTURA**

13 PEOPLE OF THE STATE OF  
14 CALIFORNIA,

15 Plaintiff,

16 vs.

17 CRAIG RICHARD COLEY,

18 Defendant.

Case No.: CR14322

**AMENDED  
ORDER FOR A FINDING OF  
FACTUAL INNOCENCE  
(PENAL CODE §851.8)**

19  
20  
21 Pursuant to California Penal Code section 851.8, the court finds the defendant,  
22 CRAIG RICHARD COLEY, factually innocent in the above-entitled action.

23 This order is effective forthwith and directs the following:

24 1. The law enforcement agency having jurisdiction over the offense,  
25 the Department of Justice, and any law enforcement agency which  
26 arrested or participated in the arrest of Craig Richard Coley for an offense  
27 for which he has been found factually innocent under Penal Code section  
28

1 851.8, shall seal and destroy their records of the arrest in accordance with  
2 Penal Code section 851.8 subdivision (b).

3 2. Pursuant to Penal Code section 851.865, this declaration of factual  
4 innocence shall be sufficient grounds for payment of compensation for a  
5 claim made pursuant to Penal Code section 4900.

6 This Amended Order rescinds and supersedes the order previously issued on  
7 November 29, 2017.

8  
9  
10 Dated: 12/1/17

11  
12 

13  
14 HONORABLE RYAN J. WRIGHT  
15 JUDGE OF THE SUPERIOR COURT  
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# The State Bar of California

## Rule 5-110 Special Responsibilities of a Prosecutor

### Current Rules

#### *Rules of Professional Conduct*

### Rule 5-110 Special Responsibilities of a Prosecutor

(Rule approved by the Supreme Court, effective Nov. 2, 2017)

The prosecutor in a criminal case shall:

- (A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
- (D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
- (F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - (1) Promptly disclose that evidence to an appropriate court or authority, and
  - (2) If the conviction was obtained in the prosecutor's jurisdiction,
    - (a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
    - (b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor

shall seek to remedy the conviction.

**Discussion:**

[1] 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, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (D) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (F) requires prompt disclosure to the court or other appropriate authority, such as the chief

prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110. (Amended by order of Supreme Court, operative Nov. 2, 2017.)



**OFFICE OF THE DISTRICT ATTORNEY  
COUNTY OF VENTURA**

**CLAIMS OF FACTUAL INNOCENCE**

The twofold aim of the prosecutor “is that guilt shall not escape nor innocence suffer.” (*Berger v. United States* (1935) 295 U.S. 78, 88.) Cases in which DNA evidence has exonerated convicted defendants, sometimes after they have served years in prison for crimes they did not commit, serve as important reminders that we must remain vigilant to avoid the conviction of an innocent person.

1. Before and during trial, claims of factual innocence shall be carefully evaluated by the assigned deputy district attorney in light of all of the evidence in the case. Where dismissal is appropriate, it shall be approved by the supervisor in accordance with office policy. A prosecutor shall obtain supervisor approval before agreeing to a finding of factual innocence pursuant to Penal Code section 851.8 after a rejection of prosecution, a dismissal, or acquittal.
2. After conviction, claims of factual innocence shall be referred to the Conviction Integrity Deputy.
3. Even “after a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of . . . information that casts doubt upon the correctness of the conviction.” (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.) After conviction, when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that the defendant did not commit an offense of which the defendant was convicted, the matter shall be referred to the Conviction Integrity Deputy, who shall do both of the following (Rules of Professional Conduct, rule 5-110 (F)):
  - (a) Promptly disclose that evidence to the court and, unless the court authorizes delay, to the defendant. Disclosure to a represented defendant must be made through the defendant’s counsel. If the defendant is not represented, disclosure ordinarily would be accompanied by a request to the court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.
  - (b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether a defendant was convicted of an offense the defendant did not commit.
4. Claims of factual innocence after conviction may be made in writing by the defendant, defense counsel, or a third person. The requesting party shall have the initial burden to produce evidence of innocence. The request must raise a meaningful claim of factual innocence and not be merely a request for resentencing, a reweighing of conflicting evidence, or for relief from immigration consequences.
5. An initial inquiry shall be made to determine whether further review and/or investigation are appropriate. Factors to be considered include, but are not limited to:

- The evidence of guilt.
  - The plausibility of the claims.
  - Whether the claims were known or reasonably should have been known to defendant prior to conviction.
  - Whether the issues were previously investigated or litigated.
  - Whether the defendant has consistently asserted his or her innocence.
  - Whether additional testing or investigation would be helpful in resolving the issues.
6. The fact that the claims have been previously rejected by a trial court or appellate court, or could have been raised by the defense earlier, shall be considered, but does not necessarily preclude further inquiry. (See Penal Code section 1405, providing that a convicted incarcerated defendant may make a motion for DNA testing.)
  7. The attorney who prosecuted the case should not conduct the conviction integrity review, but it generally will be appropriate to ask questions of and consider the opinion of the attorney who prosecuted the case.
  8. Victims have a right to notice of post-conviction court proceedings that may result in the defendant's release. (Cal. Const., article I, section 28(b)(7).) If and when to advise victims during the conviction integrity review process shall be determined based on factors including, but not limited to, the likelihood of release or exoneration, the potential trauma from notification, and whether victims are likely to learn an investigation is in progress. Assistance of a victim advocate should generally be obtained in notifying the victim.
  9. The standard for conviction integrity relief may be alternatively described as follows:
    - (a) Whether new information has undermined our confidence that the defendant is guilty beyond a reasonable doubt.
    - (b) Whether, based on what we know now as to defendant's guilt, we would not have filed the charges.
    - (c) "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction." (Rules of Professional Conduct, rule 5-110(G).) Comment 8 to the rule provides, "Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." Our policy would go beyond these steps, and would include affirmatively seeking to vacate the conviction.
    - (d) See Penal Code section 1473 (b)(3), providing that new evidence is a ground for habeas corpus relief if it "is credible, material...and of such decisive force and value that it would have more likely than not changed the outcome at trial."

10. Procedural issues, including those regarding constitutional rights, are appropriately addressed in the appellate court process, and do not form a basis for conviction integrity relief unless they undermine confidence in the guilt of the defendant.
11. Dismissal or vacating a misdemeanor case after conviction based upon factual innocence shall be approved by the division Chief Deputy District Attorney. Dismissal or vacating a felony case after conviction based upon factual innocence shall be approved by the Chief Assistant, or at a meeting of District Attorney Chief Deputies and Chief Investigator.
12. The above procedures shall also apply to requests to vacate a conviction by a person no longer in custody or restraint based on newly discovered evidence of actual innocence under Penal Code section 1473.7.
13. If a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that the defendant convicted in another jurisdiction did not commit an offense of which the defendant was convicted, the prosecutor shall promptly disclose the evidence to the appropriate court or other authority, such as the chief prosecutor in the jurisdiction in which the conviction occurred. (Rules of Professional Conduct, rule 5-110 (F).)

- *Ventura County District Attorney, Legal Policies Manual, 2/25/16, rev. 10/12/17, pp. 100-101*

# Fertile Ground for Wrongful Convictions

by Lucy Salcido Carter and Bryn Kirwin

## Definition and Prevalence of Wrongful Convictions

Perspectives on what qualifies as a wrongful conviction vary depending on who is defining the term. All would agree that wrongful convictions include circumstances in which innocent individuals are convicted of crimes they did not commit.

The parameters of what is considered a wrongful conviction change, depending on the stakeholder's perspective, when considering whether or not to include due process reasons for reversing a conviction. For example, many conviction review units in district attorney offices will consider claims of actual innocence but will not review claims of ineffective assistance of counsel, *Brady* violations, false testimony, or other procedural mistakes. Innocence projects, on the other hand, typically define wrongful conviction more broadly to include these other claims. Research on the prevalence of wrongful convictions is based on exonerations tracked by organizations such as the National Registry of Exonerations and includes the broader range of claims.

Research cannot tell us how many wrongful convictions occur or clearly pinpoint their causes, however. Prevalence is difficult to determine for obvious reasons (i.e., there are no scientific methods for determining whether a conviction, once it is decided, is accurate or not). All we have to go on is the convictions that have been found to be wrongful. As a result, all estimates of prevalence are based on studies of the numbers of exonerations versus total convictions in a crime or sentence category. For example, one recent study analyzing capital cases in the United States for convictions and exonerations estimated a wrongful conviction rate of at least 4.1 percent.<sup>2</sup> A study of capital cases between 1982 and 1989 involving murder and rape estimated that in 3 to 5 percent of the cases, the defendant was innocent of the crimes.<sup>3</sup>

## Causes and Contributing Factors

Prosecutors naturally tend to focus their post-conviction lens on trial reports and appellate review. If a case is lost or overturned, the analysis centers on whether a case should

The number of exonerations in the past several decades indicates that wrongful convictions happen, despite the best efforts of those in the criminal justice system. Remedying wrongful convictions is vital to ensure justice. However, by understanding key factors leading to wrongful convictions, prosecutors, police, defense counsel, judges, and other criminal justice system stakeholders can take a proactive approach to prevent them. As Nancy J. King noted in a recent *New Yorker* article on wrongful convictions, "The place to focus efforts for reforms for wrongful conviction is not on the back end—it's on the front end."<sup>1</sup>

Prosecutors reviewing convictions, either as part of an internal conviction review unit or through another review process, can look for factors contributing to wrongful convictions in their jurisdictions or can engage agency administrators, colleagues, and partners in developing strategies for reducing those factors. Conviction review units can add a prevention focus to their work over time, once procedures for remedying wrongful convictions are streamlined and operating successfully.

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or can be retried. Academics and innocence advocates, on the other hand, are the main source of root cause analysis of wrongful convictions, cataloging and publishing anecdotal information, or case model) research since the 1930s. Law review articles, research dissertations, and later, webpages and blogs, discussing the causes of wrongful convictions are plentiful and mushroomed in the late 1980s with the dawn of forensic DNA testing.

Information on causes of wrongful conviction also comes largely from the study of exonerations. These studies examine broadly defined wrongful conviction cases and the factors that led to those wrongful convictions. Seven key factors have been identified through these studies as contributing to wrongful convictions: eyewitness misidentification, false confessions, forensic errors, official error and misconduct, tunnel vision, false informant testimony, and inadequate defense representation.

One group of researchers has applied a methodical logistic regression model to the question of how the criminal justice system identifies innocent defendants in order to prevent wrongful convictions. With a grant from the National Institute of Justice, an arm of the U.S. Department of Justice, Professor Jon B. Gould and his co-researchers from American University looked at what might be the *predictors* of wrongful convictions in an attempt to analyze the issue in a more scientifically precise way, including identifying what actions can prevent wrongful convictions.<sup>4</sup> These researchers looked at 460 strictly defined exonerations and near miss cases (mistaken identity discovered prior to conviction) from 1980 to 2012, analyzing from a quantitative perspective, then a qualitative perspective employing a balanced expert panel of criminal justice stakeholders.

Gould and his associates concluded that wrongful convictions are “complex break-downs in the adversarial process [ ] that occur when errors are compounded rather than rectified” and involve as many as four to five errors.<sup>5</sup> There are 10 factors that can explain how an innocent person can be convicted after charges are filed:

1. a younger defendant;
2. prior criminal history;

3. a pro-death penalty state culture;
4. *Brady* error;
5. forensic testimony error [overstating certainty of results, neglecting key information, etc.];
6. a weak/ undeveloped defense case;
7. a weaker prosecution case [as measured by the Police Foundation Strength of Evidence Scale];
8. family defense witness testified [generally not helpful];
9. mistaken identification; and
10. lying by a non-eyewitness.<sup>6</sup>

According to Gould’s model, the interactions of these factors predicted a wrongful conviction versus a near miss 91 percent of the time. In a cross-validation study of cases outside the 460 sample, the model predicted a wrongful conviction over 87 percent of the time. More traditional factors like false confessions, official error, and race effects are not necessarily causes but rather circumstances that increase the chance that *an innocent person will be charged with a crime in the first place*.<sup>7</sup> All of the factors may be exacerbated by tunnel vision, a systemic problem that can be an obstacle to correction after an error is made.

In the near misses in this study, the investigators found that original errors were corrected by a variety of events, including but not limited to, better or more complete forensic testing, an active defense attorney who conducted a thorough investigation, or a witness withdrawing an identification. These findings led the researchers to recommend that near misses be studied more closely to better understand how mistakes happen, and therefore, how to prevent them from leading to wrongful convictions in the future.<sup>8</sup> The expert panelist suggested that safeguards such as evidence checklists, discovery conferences, objective line-up procedures, proper file maintenance, open communication between officers and supervisors, rigorous screening of cases by seasoned prosecutors, and adequate defense funding would help prevent errors or help rectify them before a miscarriage of justice.<sup>9</sup>

Other researchers acknowledge the predictors of wrongful conviction and the key factors leading to them, but also point to broader social and institutional challenges that contribute to the problem such as confirmation bias (in which investigations

confirm initial theories about a case without exploring alternative theories),<sup>10</sup> cultural notions about how to determine guilt, and the adversarial nature of trials.

Even if it is true that much larger system issues contribute to wrongful convictions, there is merit in looking at the key factors identified through the study of exonerations to date so that efforts can be made to reduce those factors and thereby help prevent wrongful convictions.

### **Eyewitness Misidentification**

Several analyses of exonerations pinpoint eyewitness misidentification as a leading cause of wrongful conviction. For example, a study of the first 250 exonerations based on DNA testing shows that roughly 75 percent involved the misidentification by an eyewitness of the wrongfully convicted individual as the perpetrator of the crime.<sup>11</sup> Of the 1,935 exonerations listed in the National Registry of Exonerations as of December 9, 2016, 30 percent include eyewitness misidentification as a contributing factor in the wrongful conviction.<sup>12</sup>

Research has increased knowledge about how the limits of human vision and memory can result in mistakes in eyewitness identification. In 2014, the National Academy of Sciences, in a report on eyewitness identification, captured the research on human vision and memory, highlighted the potential for error, and made recommendations for evidence-based practices that reduce the likelihood of eyewitness misidentification.<sup>13</sup> The report opens with the following statements:

Eyewitnesses play an important role in criminal cases when they can identify culprits. Yet it is well known that eyewitnesses make mistakes and that their memories can be affected by various factors including the very law enforcement procedures designed to test their memories.<sup>14</sup>

The accuracy of eyewitness identification can be affected by many variables. Variables in the circumstances surrounding the crime and in the condition of the eyewitness viewing the

crime are known as “estimator variables.” They include factors such as the lighting where the crime occurred, whether a lethal weapon was involved, the distance the witness was from the crime, the cognitive abilities of the eyewitness, the race of the eyewitness relative to the perpetrator, and the degree of stress the eyewitness was experiencing at the time.

The eyewitness’ perception of what happened during the crime, including who committed the crime and other vital details can be distorted by estimator variables. For example, when details are difficult to determine at the time the crime is happening, the witness may fill in missing or fuzzy details with information based on their prior experiences and biases.

Memory of perceptual experiences is also very malleable and can evolve over time. Memories can be forgotten and then reconstructed with similar or different details; they can also be distorted by experiences that happen after having witnessed the crime.

Criminal justice system responses to the crime and follow-up interactions with witnesses create what is known by researchers as “system variables” that can also affect the accuracy of an identification. These variables include procedures that law enforcement use during and after they have responded to a crime and when administering the identification process. There is little that stakeholders can do to affect estimator variables because they have little control over the circumstances of the crime or the state of the crime witness. However, system variables can be controlled by law enforcement and other stakeholders to increase the likelihood of accurate eyewitness identifications.

Studies have provided scientific validation for eyewitness identification practices that address these system variables and that reduce the likelihood that an eyewitness’ memories will be distorted by law enforcement interventions. For example, blind administration of the identification procedure, which means that the officer administering the identification procedure does not know who the suspect is in the lineup, can reduce the likelihood that the officer will unintentionally do something to influence the eyewitnesses and affect their ability to accurately select the person they saw commit the crime.

Other evidence-based practices include giving the witness clear and understandable instructions about the identification process and documenting verbatim the witness' statement of confidence in the identification right when the identification is made. Fillers in photo and in-person lineups should have physical characteristics like those of the suspect so that the suspect does not stand out as the obvious choice. Recording the identification procedure is also recommended to document how and with what level of confidence the witness makes the identification and to have a record that proper procedures were followed. Law enforcement training protocols on evidence-based practices can also increase accuracy of identifications. The National Academy of Sciences report does not make a recommendation regarding whether photos in a photo lineup should be presented to the witness all at one time or sequentially; research still conflicts on this point.

Evidence-based identification procedures not only increase the likelihood of an accurate identification, but also strengthen the use of that identification during the court process, which is advantageous for the prosecution. To support accurate interpretation by juries of eyewitness identifications, courts can ensure that jurors understand the identification process and the witness' confidence statement and can allow expert testimony on human perception and memory to clarify the strength of the identification.

The International Association of Chiefs of Police has developed a model policy on evidence-based eyewitness identification.<sup>15</sup> More than a dozen states around the country have implemented policies that require law enforcement to use evidence-based eyewitness identification procedures. Several jurisdictions in California voluntarily use these procedures, but there is no mandated statewide policy requiring all law enforcement to use them.

### **False Confessions**

False confessions are another contributing factor of wrongful convictions. The number of exonerations that include false confession as a contributing factor has increased over the

years. The National Registry of Exonerations' 2015 report on exonerations notes that of 149 exonerations in 2015, 27 included false confession as a leading factor. Of those 27 exonerations, 22 were murder cases.<sup>16</sup> Research to date does not explain why false confessions are more likely in homicide cases.

Innocent people confess for a variety of reasons to crimes they did not commit. Those reasons can include limitations of the suspect and problems with the interrogation process. The suspect may be under extreme duress when questioned, or be intoxicated or under the influence of drugs, or may be confused about what is happening and not understand the law and legal procedures well enough to take in the potential consequences of a false confession.

Anyone, including fully competent adults, can falsely confess, but suspects with limited mental capacity are more vulnerable to making a false confession. Juveniles are also at a higher risk of falsely confessing because they are less likely to understand the legal process and know their rights and may be unduly intimidated by authority figures like law enforcement officers. One study of 125 cases of proven false confessions found that 63 percent of the individuals who confessed were under the age of 25, with 32 percent being under the age of 18. Roughly 22 percent of the 125 studied cases involved individuals who were mentally challenged, and 10 percent of individuals involved in those cases had a diagnosed mental illness.<sup>17</sup>

Innocent individuals may be more likely to falsely confess because they think their innocence will help them later in the legal process. Some falsely confess to get out of the immediate circumstances of a difficult interrogation process. Psychology research supports the idea that people will try to make the best of the current circumstances to maximize their well-being as best they can, given what is happening to them in that moment. And they are likely to choose short-term improvements to their circumstances without fully absorbing the potential long-term negative consequences of their choices.<sup>18</sup>

In addition, circumstances surrounding the interrogation itself may increase the likelihood of a false confession. Inherent bias can be present in the interrogation because the officers conducting the questioning might already believe the person

being questioned committed the crime. This bias can lead the officers conducting the interrogation to assume the suspect is lying to them if the suspect proclaims innocence, and puts undue pressure on the suspect to admit to committing the crime. Other factors present during the interrogation can increase fear in the suspect—the presence of a weapon on the officer conducting the interrogation, for example. The length of the interrogation and the level of discomfort the suspect is experiencing can also influence whether the suspect falsely confesses.

One way to help prevent false confession and to document the circumstances surrounding a confession is to record all custodial interrogations from the time the suspect is read his or her *Miranda* rights to the conclusion of the interrogation. In most circumstances, the recording will document proper interrogation practices and a confession by the actual perpetrator of the crime. This recording can then be used as evidence in trial. Recording custodial interrogations can also protect law enforcement from false claims of torture or undue coercion.

In addition, a recording of the interrogation is crucial to document the conditions in which the confession occurred and the condition of the suspect making the confession. A recording will show whether the suspect was the first person to describe certain details of the crime or whether the officer doing the questioning mentioned crime details that the suspect then later repeated as part of the false confession. Electronic recording of interrogations also creates a record of inconsistent statements by the suspect that can point to a false confession.

More than 20 states have laws or case law requiring the electronic recording of custodial interrogations for different crime categories. Historically, California law enforcement officials were only required to electronically record custodial interrogations of juvenile homicide suspects. However, with the passage of Senate Bill 1389, as of January 1, 2017, law enforcement must now electronically record custodial interrogations of all homicide suspects, adult and juvenile.<sup>19</sup> Other jurisdictions in the state and throughout the country voluntarily record custodial interrogations for other crime categories as well. A National Institute of Justice study found that law enforcement agencies that use video recording of

custodial interrogations like the practice because it provides them with evidence they can use in trial and frees up the questioner to focus on the interrogation rather than notetaking.<sup>20</sup>

#### Forensic Errors

Forensic sciences are a vital part of the investigation and prosecution of a criminal case. However, forensic sciences, like other sciences, are not static; as new research is completed, new understandings are gained, old understandings are sometimes discarded, and new technology is put in place. Improvements to forensic sciences have resulted in tremendous gains in the use by law enforcement of forensic techniques for identifying criminals; improvements to DNA analysis are a good example of this.

In some forensic science disciplines, however, commonly used approaches and techniques are now in question that have resulted in wrongful convictions in the past. According to the National Registry of Exonerations, as of December 14, 2016, 24 percent of all exoneration cases since 1989 included “faulty forensic science” as a contributing factor in the wrongful conviction.<sup>21</sup> A close reading of the cases revealed that the most common forensic error was improper testimony at trial by a state’s witness who overstated the precision or inculpatory nature of the results she obtained.<sup>22</sup> Researchers also gleaned that poor communication between the forensic lab and the police and prosecutor’s offices, as well as inadequate training among criminal justice officials, also contributed to the erroneous convictions.<sup>23</sup>

There are many different forensic science disciplines with varying practices, levels of expertise, and scientific reliability. The forensic sciences include disciplines that rely on reviewing pattern evidence or analytical evidence. Analyses of fingerprints, tool marks, bite marks, hair and handwriting samples are examples of the former. Analyses of DNA, chemicals, and materials (including fiber and fire/explosions) are examples of the latter. On the whole, disciplines based on analytical evidence tend to be more objective than disciplines based on expert interpretation of pattern evidence. Visual interpretations of evidence are limited by the quality of the image being

interpreted. Sometimes interpretation of evidence is not supported by validated scientific studies.<sup>24</sup>

There is great variability from state to state and county to county in the quality of forensic facilities and the methodologies and standards used. And because there is considerable variability in the training and certification required in the different forensic science disciplines, the quality of expert testimony can also vary a great deal from discipline to discipline and expert to expert. There are no uniform practice standards within and across forensic disciplines. So although most forensic professionals operate ethically, their disciplines may not provide adequate “best practices.” Jurors are heavily influenced by expert testimony heard in court. Therefore, to ensure accurate convictions, it is vital that forensic science testimony represents the best and most recent scientific knowledge in the discipline, and that information about the scientific validity of the discipline is available to the jury.

Innocence advocates are calling for additional research in a number of forensic disciplines to address possible biases and better guide subjective interpretations of evidence. In addition, efforts are underway at both federal and state levels to increase practice and standards consistency across and within forensic science disciplines. In 2009, the National Academy of Sciences issued a report on forensic science based on studies funded through the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006.<sup>25</sup> The report noted that forensic sciences have contributed valuable evidence to criminal justice, but that faulty forensic science testimony has led to wrongful convictions. For example, sometimes interpretation of evidence is not supported by validated scientific studies.<sup>26</sup>

In addition, most criminal justice stakeholders agree that only DNA analysis has the scientific support behind it to show, with a high degree of certainty, a connection between evidence and a particular individual.<sup>27</sup> The report recommended ongoing advances in the field to increase law enforcement accuracy in identifying perpetrators and to reduce the likelihood of wrongful convictions. Several states, including Texas and New York, have forensic science commissions that set statewide practice standards for the disciplines and recommend policies to address

forensic science concerns. California does not currently have such a commission.

In April 2015, the FBI announced that at least 90 percent of trial transcripts analyzed through a multi-agency review of federal cases, contained wrongful testimony regarding hair analysis.<sup>28</sup> These findings have resulted in statewide review in several states, including Texas and Florida, of cases in which hair analysis testimony by FBI-trained experts helped secure a conviction. A collaborative effort among prosecutors, forensic scientists, criminologists, and innocence attorneys is underway in California to review prior convictions involving hair microscopy testimony by FBI-trained analysts to determine if that testimony resulted in wrongful outcomes.

Other efforts to prevent wrongful convictions caused by forensic error include support for federal standards in each forensic discipline and increased funding for research. Enforcement mechanisms can help ensure that newly developed standards are followed. Professional accreditation can help improve the quality of forensic analyses, including crime lab work. Ongoing funding for DNA testing is also critical to identify perpetrators of crime and to prevent and rectify wrongful convictions.

In September 2016, President Obama’s Council of Advisors on Science and Technology issued a report on forensic science in criminal courts, recommending approaches for strengthening the forensic sciences and for promoting more rigorous scientific support for accurate forensic findings and testimony.<sup>29</sup> The National District Attorneys Association issued a letter in response criticizing the report and the Council for its own biases and a lack of scientific validation for the report’s claims and recommendations.<sup>30</sup>

### Official Error and Misconduct

Official error and misconduct generally includes actions by prosecutors, investigators, or forensic personnel. The types of conduct can involve the investigative or prosecution phase, a chain of errors, or a systemic problem. Examples include ill-conceived or suggestive lineups, coercive interrogation practices, sloppy evidence collection or testing, omitting or suppressing

exculpatory evidence, making prejudicial arguments in closing or rebuttal, or coaching witnesses.

Most scholarly researchers agree that prosecutors and investigators by and large conduct themselves ethically and have no interest in arresting and prosecuting an innocent person. But even a well-intended prosecutor can accidentally, negligently, or incompetently fail their *Brady* obligation, over step the lines of witness preparation into the realm of witness coaching, or give a rebuttal statement lacking in preparation yet bursting with prejudicial remarks. And of course, there are bad apples with very bad judgment who may believe the end justifies the means, which is sometimes referred to as “noble corruption.”

However, in 2012, the National Registry of Exonerations reported that of all known exonerations across the United States from 1989 to 2012, 42 percent did involve misconduct or error by criminal justice officials.<sup>31</sup> According to Professor Gould of American University and his research team, the most commonly established transgression is the prosecution’s failure to turn over exculpatory evidence.<sup>32</sup> Of the 18 successful innocence cases the Northern California Innocence Project has tried, 10 involved some sort of official error or misconduct.<sup>33</sup>

Some advocates call for changes in the professional rules of conduct for prosecutors that go beyond *Brady* and its progeny line of cases, doing away with absolute immunity and more harshly punishing *Brady* error. This trend is highlighted by the California Legislature’s recent passage of Assembly Bill 1909, which created a new felony crime when prosecutors intentionally, or in bad faith, alter, modify, or withhold relevant exculpatory evidence.<sup>34</sup>

Ongoing, competent *Brady* and Penal Code section 1054 et seq. training within prosecutor’s offices for attorneys, investigators, paralegals, and outside law enforcement is imperative. Top-down emphasis on scholarship and writing within district attorney offices is also a way to promote deeper case analysis and careful case preparation. Prosecutors heading to trial also benefit from meeting with the detective to go through their file to ensure that nothing has fallen through the cracks. Some researchers suggest that discovery conferences would help prevent *Brady* error and also provide a great record on appeal.

Lastly, a consistent effort by prosecutors to more broadly view potential defenses can lead to a more thorough *Brady* analysis and disclosures that can better protect cases on appeal.

#### Tunnel Vision

Historically, academicians have characterized tunnel vision as a *cause of wrongful convictions*.<sup>35</sup> When first conceived in 1932 by Professor Edwin M. Borchard of Yale University, tunnel vision was described as the link between public pressure to solve crimes and quickly narrowing an investigation down to one suspect.<sup>36</sup> The premise being that tunnel vision can lead to prosecuting an innocent person and overlooking the real culprit. Modern psychologists have explained it as “the product of a variety of cognitive distortions that can impede accuracy in what we perceive and in how we interpret what we perceive.”<sup>37</sup> In plain English, tunnel vision is part of the human condition that is intensified by institutional or environmental factors, or more simply put, tunnel vision is a form of cognitive bias.<sup>38</sup>

Cognitive bias can be harbored by well-meaning people. Investigators and prosecutors, for example, are uniquely positioned to narrow in on a theory or suspect because that is what they are trained to do. Investigators and prosecutors tend to cling to facts that confirm the theory and may unconsciously discount facts that contradict the initial theory.

There are two ways to look at cognitive bias that apply in this context: (1) confirmation bias, the natural tendency to interpret new information about a case in a way that confirms a pre-existing belief, and (2) hindsight bias, the natural tendency to view a chain of events as cause and effect so that it becomes a “knew it all along” construct of memories, and therefore, makes one more resolute in one’s conclusions.

Scholars outside of the criminal justice system who adopt the cognitive bias theory conclude that the institutional pressure within police agencies reinforces cognitive bias because of public pressure to solve crimes. Once a case is submitted to a prosecutor’s office, the institutional pressure there reinforces further cognitive bias. Prosecutors are expected to believe in the guilt of the defendant, which engenders “belief perseverance.”<sup>39</sup>

Prosecutors tend to have an automatic focus on one suspect because the case against the suspect was submitted with little inconsistent evidence of third-party culpability. Prosecutors and police agencies are encouraged to maintain trusting and close relationships, which may deter prosecutors from second guessing the police agency's investigation.<sup>40</sup>

Cognitive bias is not limited to police and prosecutors. It is observed in a variety of professions including medicine, journalism, negotiating, and psychotherapy.<sup>41</sup> However, some claim that it is particularly troublesome in criminal justice because of the "biasing snowball effect," where knowing one piece of evidence can prejudice and contaminate another line of evidence. For instance, before STRmix™ and similar forensic DNA software existed, a forensic scientist's interpretation of DNA mixtures could be biased by knowledge of any fact about the larger criminal investigation.<sup>42</sup>

Some of the recommendations that come out of tunnel vision research and analysis include creating a stronger "fact verification" culture that emphasizes keeping an open mind and challenging facts or using a "contrarian process" wherein an investigator is tasked with asking the tough questions and providing "fresh eyes" on the investigation.<sup>43</sup>

Implementing an organizational accident model will enable police agencies and prosecutor offices to review errors as system-wide weakness instead of single-cause mistakes. Rather than blaming individuals, the review process should focus on the organizational factors that contributed to the error or chain of errors. Customized checklists or questionnaires can also be useful so that important steps in an investigation or in trial preparation are not overlooked.<sup>44</sup>

### Use of Cooperating Individuals

Cooperating individuals, also referred to as informants, generally are witnesses who provide information with the expectation of some benefit. Though the use of cooperating individuals has always been controversial, the case of Scott Dekraai, who is charged with the 2011 Seal Beach hair salon mass killing, has brought informant practices to the forefront.



*Witness for the Prosecution: The Jailhouse Informant* was approved by the Board of Directors of the CDAA Foundation. This model policy was created to provide guidance to prosecutors when using jailhouse informants. It was developed by Contra Costa County Senior Deputy District Attorney Mary Knox for DA offices and addresses issues regarding the use of in-custody informants, providing information to the defense, and educating law enforcement about *Brady* requirements. This document is online at <https://www.cdau.org/about-us/cdaa-foundation>.



In 2015, the Orange County District Attorney's Office was disqualified from further handling the *Dekraai* case. Judge Thomas Goethals found the office had a conflict of interest preventing all of its attorneys from being fair and impartial to Mr. Dekraai. Division Three of the Fourth District Court of Appeal recently affirmed the decision to recuse. The court held that the Orange County District Attorney's Office's loyalty to the Sheriff's Department, which had willfully withheld more than 1,000 pages of information about a jail informant program involved in the case, gave rise to the conflict. The court reasoned that the district attorney's office was complicit in failing to investigate and disclose information about a particular informant who had contact with Dekraai in custody.<sup>45</sup> Prior to the appellate decision, a panel established by the Orange County District Attorney released a highly critical report saying a "failure of leadership" in the office led to the scandal. After the panel presented its findings to District Attorney Tony Rackauckas, he wrote to U.S. Attorney General Loretta Lynch requesting a federal inquiry. According to the *Los Angeles Times*, U.S. Justice Department officials have launched an investigation into whether the office has routinely denied accused criminals fair trials by using jailhouse informants.<sup>46</sup>

Using cooperating individuals, though fraught with peril, as the *DeKraai* case highlights, has been an essential tool in law enforcement's toolbox. If used carefully and ethically, cooperating individuals can help the government infiltrate dark spaces otherwise veiled from detection and gain information necessary to stop crime. If not used properly, as in *DeKraai*, they can lead to wrongful convictions.

In a 2004 study, the Center of Wrongful Convictions at Northwestern University School of Law reported that there were 111 death row exonerations since capital punishment was resumed in the 1970s. The use of confidential informants accounted for 45.9 percent of those cases.<sup>47</sup> According to another study of the nation's first 200 exonerations proven through DNA testing, 18 percent of the convictions were due, at least in part, on the basis of informant, jailhouse informant, or cooperating, alleged crime-partner testimony.<sup>48</sup> As other scholars note, informants are sometimes rewarded without regard to the accuracy and reliability of their information.<sup>49</sup>

Though false statements by cooperating individuals (CIs) have been noted as a "cause" of wrongful convictions, this factor was relatively infrequent in the Gould study, occurring in just 11 percent of wrongful convictions and seven percent of near misses. However, CIs were included in a variable that *was* significant in regression analysis—lying by any non-eyewitness—so Gould and his fellow researchers could not discount that CIs might play some role in distinguishing wrongful convictions and near misses.

Regardless of the exact influence of CI practices on wrongful convictions, there is no denying that the use of CIs requires very careful consideration. Good practices include following comprehensive and clear office policies and procedures, a standing relationship of candor and trust between prosecutors and outside law enforcement, a rigorous evaluation process, detailed documentation, and ongoing training. Lives are at stake on both sides. Disqualification is not the worst sanction; cases can get dismissed, people can get killed, and others wrongly convicted if the complexity of issues is taken lightly.

Any CI protocol should include layers of analysis, supervision, control, and consistency so that law enforcement

can ensure the decision to use a CI is worth the cost to the public, the defendant, the CI, and the case. Use of CIs requires a working knowledge of the Fifth and Sixth Amendments, Rules of Professional Conduct, rule 2-100, Penal Code section 1054 et seq., Evidence Code sections 915, 930 et seq., 1040, 1041, 1042, and of course, *Brady* doctrine (*Giglio* and *Kyles* in particular).<sup>50</sup> Checklists of factors to consider, including availability of independent corroborating evidence and timelines of disclosure, make issue-spotting and good decisionmaking a part of the process. More specifically, proper management of informants occurs through a suitability assessment that includes understanding the informant's motives, tracking in a central database the use of informants (including detailed records of all interactions with them), and electronically recording conversations with informants.<sup>51</sup>

### **Inadequate Defense Representation**

According to the Center on Wrongful Convictions at Northwestern Pritzker School of Law, an inadequate legal defense occurs when an exonerate's lawyer at trial or on appeal provides obviously and grossly inadequate representation.<sup>52</sup> From a technical legal standpoint, ineffective assistance of counsel (IAC) occurs when a defendant first shows that counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms.<sup>53</sup> A court will only make an IAC finding if it is reasonably probable a more favorable result would have been obtained in the absence of counsel's failings.<sup>54</sup>

A more simplistic way of describing "competency" is that it is counsel's ability to protect a client from the mistakes of others, including the government, witnesses, and the jury.<sup>55</sup> Indeed, IAC can include failure to investigate, call a witness, cross-examine a state witness, question eyewitness identifications, seek DNA testing, present an expert witness, object to prosecutor arguments, prepare for trial, or report a conflict of interest. In short, an effective advocate should mean the difference between an innocent defendant and a wrongful conviction.<sup>56</sup> Yet an incompetent defense can and does contribute to wrongful convictions. Of the 18 exonerations achieved by the Northern

California Innocence Project, nine of them involved IAC.

Though not a “root cause,” when counsel fails to ferret out a client’s innocence, IAC is considered a significant contributing factor in wrongful convictions. Specifically, competent investigation is a basic tool of an adequate defense and is sometimes viewed just as fundamental as the right to competent counsel itself.<sup>57</sup> But not surprisingly, the failure to adequately investigate has been identified as the most prominent oversight by counsel when it comes to wrongful convictions.<sup>58</sup>

An early study of the first 74 DNA exonerations in the United States found that defense lawyer incompetence was a factor in 32 percent of the cases.<sup>59</sup> In a more recent study of 2,500 reported California appellate decisions from 1997 through 2006, in which IAC claims were raised, reviewing courts found prejudicial IAC in 121 cases. Deficient investigation accounted for 54 percent of the 121 cases, which was attributed to excessive investigator workloads and lack of investigative resources.<sup>60</sup> Professor Larry Benner of California Western School of Law put these numbers into perspective:

The most important finding from our study is the discovery that criminal defense counsel in many counties lack the resources necessary to conduct the defense investigation required by the Constitution, and by both national and California State Bar standards. This finding is especially troubling because it concerns more than the technical right to a fair trial; it goes directly to the heart of guilt or innocence.<sup>61</sup>

The Gould study looked at the problem another way. The researchers were struck by “exceptionally *good* lawyering” in the cases that resulted in a dismissal or an acquittal, referred to as “near misses.” Among the near misses, the defense attorneys often did “months of leg-work, hired experts, and most importantly, persisted in proving the defendant’s innocence rather than immediately working on obtaining a plea.”<sup>62</sup> Whether the attorney was public or private did not make a difference, or whether a defense expert testified for the defendant.<sup>63</sup> Exceptionally good lawyering made the difference between wrongful convictions and near misses.

Cases are better served by all parties with the involvement of a highly effective defense counsel. No one benefits from bad lawyering. Scholars, innocence advocates, and criminal defense organizations across the country have called for increased funding for public defender offices and court appointed attorneys, more formalized standards for workload limits, increased professional independence, and more rigorous training requirements.

In California, institutional public defenders handle approximately 80 percent of felony complaints. In 2008, the California Commission on the Fair Administration of Justice concluded that the state’s public defender offices by and large meet at least the minimum standards of acceptable workloads but that more resources should be dedicated to defense services for the indigent, in particular, resources that would support investigative efforts.<sup>64</sup>

### Concluding Thoughts

Wrongful convictions and exonerations have been, and may continue to be, real life by-products of our criminal justice system, with dire consequences for wrongfully convicted individuals. As with any multifaceted system involving fallible humans, there will always be a margin of error. But for system stakeholders, there should never be an “acceptable margin of error.”

Prosecutors are adapting, overcoming, and improving as the rules and circumstances continue to be redesigned in this era of reform. Conviction review units (CRUs) are a promising prevention strategy because they are able to right wrongs through collaboration, and this collaboration enhances opportunities to work with colleagues and partners to prevent wrongful convictions. There are always going to be positive changes that prosecutors can make happen in the areas of eye witness identification practices and evidence, interrogation practices and presenting defendant statements to a jury, communication with criminalists along with the interpretation and presentation of forensic evidence, discovery practices and other problematic prosecutorial error pitfalls, the use of

cooperative individuals, natural cognitive bias, and even the way prosecutors interact with the defense by having a deeper understanding of defense counsels' need to investigate their cases and competently represent their clients. CRUs have the ability to efficiently identify system errors and rectify a wrongful conviction. Another product of this post-conviction work is the ability to make system improvements where needed in order to prevent wrongful convictions. The criminal justice system is a high-stakes, human endeavor, requiring constant vigilance against error.

California's county criminal justice systems are fairly sophisticated. But despite their varying sizes, all counties have something to learn from one another. While larger counties may have more resources to dedicate to conviction review and prevention work, medium and small counties may have better agility to affect changes that can reduce the chances of a wrongful conviction. CRUs, and even those offices doing more informal conviction review work, are well-served by communicating and discussing the issues they confront in their conviction review work, issues that may signal areas ripe for improvement within and across counties. ■

#### ENDNOTES

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## Klante, Cynthia

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**From:** Schwartz, Michael  
**Sent:** Friday, January 26, 2018 9:19 AM  
**To:** DA Attorneys; Baray, Mike  
**Cc:** Klante, Cynthia; Ronald Janes; Richard Holmes (reholmes45@gmail.com); Pode, Chuck; Donna Thonis; Lisa West; Hurley, Ruth; Ibarra-Cortez, Danali; Mitchell, Christine; Pampalone, Yvonne; Rodriguez, Maria; Rosenthal, Carissa; Simpson, Karen; Wright, Connie; Cheryl Temple; kim.gibbons01@gmail.com  
**Subject:** Mandatory MCLE: Conviction Integrity

Topic: **THE COLEY CASE: CONVICTION INTEGRITY AND THE FREEING OF AN INNOCENT MAN**

Date: Monday, February 12, 2018 (court holiday)

Time: 8:30 – 9:45 a.m.

Place: Lower Plaza Assembly Room (Hall of Administration)

Speaker: Special Assistant DA Michael Schwartz

MCLE: 1.25 hours Legal Ethics credit

MANDATORY FOR D.A. ATTORNEYS

Craig Coley was convicted in Ventura County of a double murder and sentenced to LWOP. After serving 38 years in prison, new evidence established his innocence. The class will discuss how the system failed him, the Conviction Integrity process, and lessons learned.

The Ventura County District Attorney's Office is a State Bar of California approved MCLE provider. The above-listed class will qualify for 1.25 hours Legal Ethics credit by the State Bar.

Note: The Officer Involved Shootings class will begin immediately after, from 10 am to 12 pm.

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