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Wrongful Convictions Just Keep Coming Out - *Part 3*

In an effort to continue to sound the alarm that legislative changes are needed in order to prevent future wrongful convictions and as well as correct current injustices, I again point out still more wrongful conviction cases that have come out since my last installment in this series.

As I have mentioned in prior issues, although the cases have come from around the country, the exact same deficiencies that have led to them in other states exist in New York. To date, despite 23 DNA proven exonerations in New York, and several non-DNA exonerations, New York has failed to enact one single reform to prevent future injustices.

Timothy Cole

Nine years after dying in prison due to asthma, a DNA test has posthumously shown that Timothy Cole was innocent of the rapes for which he spent the last years of his life wrongfully imprisoned. The facts of this case are taken from a series by Elliot Blackburn of the ***Lubbock Avalanche Journal***, and from T Chris on the internet site ***TalkLeft***:

On Dec. 27, 1984 the first victim tied to the Texas Tech rapes, a nurse, was abducted from the parking lot of Lubbock General Hospital. A second victim was abducted from a parking lot near a law school and raped on Jan. 13, 1985. On Feb. 1, 1985 a third victim was taken from St. John's United Methodist Church parking lot. On Feb. 3, 1985 a fourth victim, a Denny's waitress, was taken from a parking lot outside her restaurant. A fifth victim, a Texas Tech sophomore was taken from church parking lot and raped east of town on March 24, 1985.

The police investigation focused on Timothy Brian Cole after he flirted with an undercover police detective. A victim identified Cole's picture in a photo array, then identified him in a lineup. Another victim identified a different suspect who had been arrested earlier. A search of Cole's property found nothing that incriminated him, and the forensic evidence was inconclusive.

Cole's lawyer wanted to present evidence at his trial of a similar rape, but it was ruled inadmissible. He argued the jury should have been allowed to hear the striking similarities between the March rape and another attack in the same parking lot in February. The woman was taken by an attacker fitting the same description and following the same methods. The victim never identified Cole, and fingerprints recovered from the earlier victim's car didn't match. The circumstances should have raised doubt that Cole was involved in almost the same crime more than a month later, Brown argued.

Cole lost his appeal. Ten years after he committed the rape, Jerry Johnson decided to confess, declaring, "I knew that I probably couldn't be charged with the crime," he said. "And it had a lot to do with my case. And my trials had a lot to do with me not coming forward before that. And that's understandable, but, pretty much I just knew that that was the time, you know, to try and free him." He asked in a February 1995 court filing to be put in touch with Mike Brown and for a judge to consider a confession he wanted to make. Nine years after Timothy Cole went to prison, Johnson wrote the Lubbock district clerk that he had committed the rape keeping Cole behind bars.

Five years passed, and Johnson wrote again to a supervising judge. He worried there was an effort to conceal a wrongful conviction. He couldn't understand why the case wasn't being pursued. "Judge, its hard to imagine attorney Mike Brown has made [no] attempt to contact me to start the process of getting information to finally prove his client was in fact innocent but wrongfully convicted," Johnson wrote. "It is more hard to imagine when you look at the documented facts that Mike Brown sought to show at the man's trial that I committed the crime."

The case was transferred in a reshuffling of the courts not long after his letter. In a one-sentence filing issued six months after he asked why nothing had been done, another judge dismissed the case, writing "The case having been transferred to this Court, it is ordered, without necessity of a hearing, that the relief requested in the petition herein is denied."

Six years later, on May 11, 2007, Jerry Johnson, thinking that by then Cole would be home on parole, attempted to let Cole know of the confession by writing Cole's mother's address. He was unaware that Cole had died in prison of asthma on Dec. 2, 1999. Prison conditions took their toll on Cole. He never managed more than three years without a trip to infirmary units or the Galveston hospital throughout his 13-year prison stay.

"I have been trying to locate you since 1995 to tell you I wish to confess. I did, in fact, commit the rape Lubbock wrongly convicted you of," Johnson wrote. "If this letter reaches you, please contact me by writing so that we can arrange to take the steps to get the process started. Whatever it takes, I will do it." Though they had the letter, it was not enough for authorities, and so both the District Attorney's Office and The Innocence Project Of Texas began investigating. Finally, in May of 2008, after much frustration by Johnson due to the time everything was taking, DNA test results proved that he had committed the rape.

Cole's attorney Jefff Blackburn, of the Texas Innocence Project, recently requested that a court of record declare to Cole's family that he was innocent, and expressed his resolve to not stop until that happens.

If ever there was anything worse than being wrongfully incarcerated, it would be dying while there. That was a horrible fate, and my heart goes out to both Timothy Cole and to his family. In the Cole case, tunnel vision on the part of police was at fault, as were misidentifications. Misidentification continues to be the leading cause of wrongful convictions at seventy five percent. Unfair rulings by trial judges, in this case not allowing Cole's attorney to argue an alternative perpetrator based on a similar *modus operandi*, also factors in. Kangaroo Court appeal proceedings also factor in when Johnson wrote the judge, confessing, and that didn't set off alarms and a rush to investigate and then free Cole. The *carte blanche* brush off that post conviction judges frequently give to post conviction proceedings reared it's ugly head as well.

One of the things that really strikes me is the hypocrisy involved: Had Johnson not been writing, informing the Court that an already-convicted prisoner was innocent, but instead been offering to provide testimony implicating someone in exchange for a plea bargain, I am sure that there would have been a rush to act on what he wrote. Courts frequently won't accept the uncorroborated reports of a prisoner exonerating another one, but they will accept it as evidence with which to prosecute, convict, and keep in prison. Why is that? In reality, testimony from those who seek to get a benefit from such information is unreliable and has led to wrongful convictions in 15 percent of the now 218 DNA proven exonerations.

Patrick Waller

On July 3rd, 2008, Patrick Waller was released from prison in Dallas, Texas, after serving 16 years for kidnapping, robbery, and rape. I take the facts of the case from ***The Dallas Morning News***, in an article by Jennifer Emily:

"Mr. Waller was cleared of crimes in which two men in March 1992 abducted a couple at gunpoint in the West End, forced them to withdraw money from an ATM and took them to an abandoned house in Oak Cliff. The woman was raped. Another couple who pulled up in front of the house was also abducted. The men attempted to rape a second woman but were scared off by a Dallas schools security guard who drove by. Mr. Waller was later incorrectly identified in police lineups as one of the attackers. A jury convicted Mr. Waller of aggravated robbery

in December 1992 and sentenced him to life in prison. Mr. Waller then pleaded guilty to two aggravated kidnapping charges in exchange for dual, 30-year prison terms. He thought jury trials would lead to even longer sentences.

In April 2001, Mr. Waller was one of the first inmates from the county to request testing. But he was twice denied post-conviction DNA tests – in 2001 and 2005 – under previous District Attorney Bill Hill.

Only after Craig Watkins succeeded Mr. Hill and began the conviction integrity unit did Mr. Waller get his test. The test showed that the DNA did not match Mr. Waller but because there were two men tied to the crimes, he was not automatically cleared. Then, the DNA matched a convicted criminal in a state database. That man confessed to the crime and pointed out his accomplice, who also confessed. Both men told a grand jury – under penalty of perjury – that they and not Mr. Waller were responsible. The statute of limitations has expired, so neither man can be prosecuted. Had the DNA test been granted under Mr. Hill, who has not returned calls seeking comment, the DNA test may have been used to keep one of the true perpetrators from gaining parole on a home invasion case. He had served 15 of 45 years on that case."

When Judge Don Adams announced that Mr. Waller was "free to go," Mr. Waller, again according to the article by Jennifer Emily, "jumped from his chair and raised both fists in the air in victory. Mr. Waller, now 38, then turned and held his mother in a bear hug. They had embraced many times during her visits to prison. But this was the first time since 1992 that he hugged her as a free man. He wept, and his mother clung to him. "Honey, it's all right. It's over," his mother, Patricia Cunningham told him. "It's going to be all right now." She wiped away his tears with a crumpled tissue. "We're going home," she said. "It's OK, baby." Before leaving the courtroom, he used a cellphone for the first time to call his aunt and niece in North Carolina to share the news. "I'm free," he told them

As I have done in previous installments of this series, I will point out commonalities in this case with other wrongful conviction cases. In the Waller case, we see that misidentification, which has been the cause of seventy five percent of the now 218 DNA based exonerations, again rears its ugly head. As Barry Scheck and Peter Neufeld have wondered about out loud many times, I wonder how many other innocent people are wrongly convicted based on misidentification but whose cases do not have DNA in them to test? Considering that there have been no legislative changes in New York to institute better identification practices that research has shown would improve the accuracy of identifications, I similarly wonder about how many such cases will occur in the future.

Waller being denied DNA Testing twice illustrates the need for legislation allowing prisoners, as a matter of right, access to DNA testing in all circumstances where there is material to test, including instances where the defendant has previously pleaded guilty. Waller pleaded guilty to the two kidnapping charges in order to avoid additional prison time after he had been wrongfully convicted of the rape. There have been exonerations by DNA in instances when the prisoner had previously pleaded guilty. Those cases, along with Waller's, illustrate the reality that innocent defendants, understandably skeptical of the accuracy of the court system as it is currently constructed, sometimes plead guilty falsely. The testing allows justice to be done for the factually innocent defendant, while also allowing society the possibility to identify the real perpetrators and punish them. Had Bill Hill allowed the testing, the real perpetrators would not have escaped prosecution.

Under Craig Watkins, a pro active district attorney concerned about justice, Dallas County has had more inmates cleared by DNA than any other county in the nation since 2001 when the state Legislature approved post-conviction DNA testing. There are a variety of reasons for this. Unlike other jurisdictions, Dallas County has preserved most of its evidence. For another, there is District Attorney Craig Watkins, who is a shining beacon of what every prosecutor should be.

Watkins has given many presentations in Texas about wrongful convictions and the need to enact reforms. He also participated in a Summit On Wrongful Convictions in Texas, during which he said "It can be argued that Texas ... may have one of the worst criminal justice systems in this country. We have to start where we have the most problems."

In a story reported by the ***Dallas Morning News***, Watkins advocated for incarcerative penalties for prosecutors who intentionally withhold evidence of innocence. "Something should be done," said Watkins. "If the harm is a great harm, yes, it should be criminalized."

Watkins said that he was still pondering what kind of punishment unethical prosecutors deserve but that the worst offenders might deserve prison time. He said he also was considering the launch of a campaign to mandate disbarment for any prosecutor found to have intentionally withheld evidence from the defense. In the interim, he has adopted, as an internal policy, the practice of firing prosecutors who do so. To illustrate the seriousness with which he views the subject, prospective employees are asked if they are familiar with the case Brady v. Maryland. The term refers to the 1963 U.S. Supreme Court ruling in Brady v. Maryland, which held that prosecutors violate defendants' constitutional rights if they intentionally or accidentally withhold evidence favorable to the defense.

State Sen. Rodney Ellis, chief author of the Texas law that created the compensation system for wrongfully convicted inmates, said he, too, would support criminalizing the intentional withholding of evidence by prosecutors. No criminal charge exists in Texas for a prosecutor who intentionally commits a "Brady violation." Speaking to the necessity of such a law, Senator Ellis said "Why wouldn't we have a criminal statute to keep prosecutors from lying when they know the truth?" Given that prosecutors have been known to intentionally withhold Brady material and evidence of innocence, it is obvious that such a law is needed.

But the most important thing that Watkins has done has been the setting up of a Conviction Integrity Unit. The Unit is an in-house oversight unit within the District Attorney's Office, which is designed to look at previous cases, scanning for possible wrongful convictions. As I reported in the Jan 17, 2008 issue of ***The Guardian***, there are a variety of objectives that the unit tries to achieve: Ensuring that past injustices are undone, ensuring that only the guilty are convicted and that those convictions are not achieved through police or prosecutorial misconduct; and studying the causes of wrongful convictions with an eye toward preventing them in the future. Included in their review is a determination of whether there was any inappropriate patterns and practices involving the police and prosecutors.

Watkins obtained funding from county Commisioners. He hired two attorneys, one investigator, and one secretary. In order to make up for the lack of funding, he has collaborated with the Texas Innocence Project, which has law students, working with paid staff review cases. The total number of people that have been exonerated as a result of the Conviction Integrity Unit now exceeds 25.

Dallas County prosecutor Mike Ware, who oversees the Conviction Integrity Unit and approved the DNA test in the Waller case, said agreeing to the test was an easy decision. "Why wouldn't I?" said Mr. Ware. "I believed that we can learn important facts about what happened with this case with a DNA test. I had no idea how it would turn out." If not for the DNA test, said Mr. Waller's attorney, Gary Udashen, "he probably would have spent the rest of his life in prison."

Why is that Texas, which in general has an awful track record in defendant's rights and a fair court system, has a Conviction Integrity Unity, but the rest of the country, in particular New York, does not? The shining example of prosecutorial work at it's best: buried knee deep in the quest for justice both in terms of convicting the guilty, freeing the innocent and trying to prevent wrongful convictions that Craig Watkins is doing, should not be ignored. Instead, it needs to be emulated. All of us concerned citizens should want, and in fact insist, that all district attorneys have such a program. For if they do not, that means that they are okay with wrongful convictions continuing to occur.

In the next issue of ***The Guardian*** I will report the results of my contacts with various District Attorney Offices throughout New York, in an effort to ascertain whether such a program is in place in their jurisdictions and, if so, which personnel work in it. Conversely, if an office does not have one, I will ask why not. All of the responses, and an analysis of those responses, will appear in next week's issue of ***The Guardian***. The presence of such programs goes a long way toward creating public confidence in the accuracy of court proceedings, and therefore neither they, nor the particulars of the program, ought to be a secret. After all, New York is currently third in the nation with the most demonstrated wrongful convictions by DNA, with 23, and it is clear that our state government, as a whole, is not doing anything about it.

Therefore, as a natural part of my mission and life long battle against wrongful convictions, I intend to shine the spotlight on those who are trying to help bring about changes, and on those that are resistant, whoever they may be. My loyalty is strictly to those that are against wrongful convictions and injustice and take all reasonable actions towards those goals, and is dependant on their continued adherence to that goal. Armed with the info I bring to light, I hope that voters will, as I do, value this most important issue, and decide if they are happy with the people in office's actions or lack of actions.

I lost 16 years of my life due to a wrongful conviction. I did not have a record, nor was I a high school dropout. It happened to me, and it can happen to anybody at anytime. ■