



## Jeff Deskovic

# Exposing The Death Penalty, Part 3

In my effort to raise awareness about the problem of wrongful convictions, as well as seeking legislative changes to make the criminal justice system more accurate, I have always included abolishing the death penalty amongst the reforms I advocate. My reasoning is simple; any system of justice that results in wrongful convictions will, if it has a death penalty as a sentencing option, inevitably execute innocent people.

This past March 17 New Mexico legislatively abolished the death penalty citing, amongst other issues, that very real possibility. In this three-part series I have been reviewing likely wrongful executions, near-misses, ongoing cases of potential wrongful execution, systemic deficiencies, along with one case example wherein innocent people were wrongly convicted and sentenced to death before being cleared. I will look at modern-day recognition that the death penalty risks the execution of innocent people.

On December 17, 2007, New Jersey became the first state since

1976, when the U.S. Supreme Court reauthorized the death penalty, to legislatively abolish it. In his speech following the signing of the bill, New Jersey Gov. Corzine made several references to the risk that the death penalty poses to executing innocent people, taken from Death Penalty Information Center's website: "We evolve, if you believe as I do, that government cannot provide a foolproof death penalty that precludes the possibility of executing the innocent. Society must ask - Is it not morally superior to imprison 100 people for life than it is to execute all 100 when it is probable we execute an innocent?"

On March 17, 2009 New Mexico Governor Richardson signed a bill which repealed the death penalty, saying, as reported by the website FBIHOP, "the system is not perfect." "Innocent people have been put on death row all across the country." The governor also said, "We cannot be 100% sure that innocent people aren't convicted. Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the State is going to undertake this awesome responsibility, the

system to impose this ultimate penalty must be perfect and can never be wrong. But the reality is the system is not perfect - far from it. The system is inherently defective. DNA testing has proven that. Innocent people have been put on death row all across the country. Even with advances in DNA and other forensic evidence technologies, we can't be 100-percent sure that only the truly guilty are convicted of capital crimes.

Evidence, including DNA evidence, can be manipulated. Prosecutors can still abuse their powers. We cannot ensure competent defense counsel for all defendants.

The sad truth is the wrong person can still be convicted in this day and age, and in cases where that conviction carries with it the ultimate sanction, we must have ultimate confidence - I would say certitude - that the system is without flaw or prejudice. Unfortunately, this is demonstrably not the case.

### Systemic Deficiencies

The Innocence Project has reported that to date there have been 235 people proven to have been wrongfully convicted and proven innocent by DNA evidence. Out of those two hundred and thirty five people, seventeen of them had been sentenced to death. Thus the same systemic deficiencies that exist in non-capital cases exist in capital cases. Below are listed some of the

systemic deficiencies.

A) **Misidentification:** Misidentification has been the cause of wrongful convictions in 75% of the now 235 DNA proven wrongful convictions. Kirk Bloodworth served eight years in prison, including two on death row for murder and rape in Maryland before being proven innocent by DNA. At trial, five witnesses testified that they had seen Bloodworth with the victim.

B) **False Confessions:** False confessions have accounted for 25% of the nation's 235 DNA proven wrongful convictions. According to *The Innocence Project*, Robert Miller was sentenced to death in Oklahoma for murder, rape, and robbery. His wrongful conviction was based in part on a false confession. Police conducted a 12-hour interview that followed. In this interview, police detectives took advantage of Miller's fragile mental state, playing along with Miller's admission that he had special powers and was deeply religious, even joining him in group prayer.

Police eventually led him to what the State called an admission of guilt. Later, an examination of the taped interviews revealed many inconsistencies between Miller's statements and the actual circumstances of each crime.

There were several key differences; for example, Miller

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claimed that one of the victim's was only a little older than himself. She was eighty-three at the time of her death and Miller was twenty-eight. He was later proven innocent by DNA.

C) **Incentivized Witnessing:** Incentivized witnessing is when a witness receives a benefit in exchange for testifying, such as getting a lesser sentence or having charges dropped against them altogether. The problem with this practice is that when desperate prisoners are caught red handed and they have no truthful information to trade on, they resort to falsely implicating other people.

Incentivized witnessing has resulted in wrongful convictions in 15% of the 235 DNA proven wrongful convictions. Charles Fain was sentenced to death in Idaho for murder, rape, and kidnapping. His conviction was caused in part by incentivized witnessing. The two jailhouse informants testified that Fain had told them of his involvement in the crime and provided graphic details while they shared a cell with him. He was later proven innocent by DNA.

D) **Bad Lawyering:** Without competent representation to adequately investigate a case and to put on the best possible defense for the client, a defendant stands a good chance to be wrongfully convicted. Some of the systemic deficiencies include: no real oversight to maintain quality control and the enforcement of standards, a big disparity between the financial resources and manpower between a district attorney's office and a public defenders, and too large a caseload.

The quality of representation

that the poor receive as compared to the wealthy, is like the difference between night and day. Although quality representation can be hard for the poor to obtain, establishing ineffective assistance of counsel on appeal is quite difficult.

Examples of outrageous and *ipso facto* ineffective representation that was nonetheless not found to be so by appellate courts include sleeping in the courtroom during trial, failure to investigate alibis, failure to call or consult experts on forensic issues, failure to show up for hearings, and being disbarred shortly after finishing a death penalty case.

Although in death penalty cases it is commonly believed that because the death penalty involves a lot of interest and passion that therefore defendants charged with a capital crime receive better representation. That is not always the case. Dennis Williams was convicted of rape and murder in Illinois, in part based upon bad lawyering. *The Innocence Project* reported, "A state expert testified improperly that a hair found in Williams' car microscopically 'matched' Williams' hair, saying: 'Just like if you drop two dollar bills and you see dollar bills on the floor. You see two one dollar bills. It's obvious.' Microscopic hair comparison can never prove a conclusive match, but his attorney failed to challenge this evidence. Hair evidence cannot be individualized based on microscopic analysis. Because there is not adequate empirical data on the frequency of various class characteristics in human hair, it is impossible to say definitively that strands of hair 'matched' a particular person. He was later

proven innocent by DNA."

In explaining his decision to commute the death sentences of all death row inmates in Illinois, Gov. Ryan referenced inadequate representation as being a cause of wrongful convictions. According to the website *salon.com*, Ryan said "Thirty-three percent of the death row inmates were represented at trial by an attorney who had later been disbarred or at some point suspended from the practice of law"

E) **Junk Science:** Junk science is when "expert" testimony is presented regarding a science which has no sound scientific principles on which it is based, no statistical foundation, and no reliability, although the impact at a trial is to make a case seem legitimate. Ray Krone was sentenced to death in Arizona for murder and kidnapping. *The Innocence Project* reported, "Bite marks were found upon the victims neck and breast. Police had Krone make a Styrofoam impression with his teeth for comparison. Experts for the prosecution testified that the bite-marks found on the victim's body matched the impression that Krone had made on the Styrofoam. Krone was wrongfully convicted and sentenced to death, won an appeal and was retried. He was later proven innocent by DNA."

F) **Governmental Misconduct:** Governmental misconduct can occur at the level of the police or the prosecutor's office, and/or involve experts. Some examples include withholding information from the defense, deliberate mishandling or destruc-

tion of evidence, the fabrication of test results, perjury, and not correcting perjury.

It also can include areas which overlap the other causes, such as deliberate suggestiveness in identification procedures, the coercion of false confession, and the use of unreliable government informants or snitches.

Curtis McCarty was wrongfully convicted of a murder **twice** and sentenced to death **three times** in Oklahoma before he was proven innocent by DNA. A forensic analyst compared hairs from the crime scene with McCarty's and found that they were not similar. However, once he was arrested she changed her notes and reversed her findings, saying that the crime scene hairs could be attributed to him and that he was at the crime scene.

### Conclusion

Clearly, the death penalty risks the execution of innocent people. To be wrongfully convicted is bad enough. but to be sentenced to death, which thereby limits the time that indigent defendants with meager resources have to clear themselves, makes the situation even worse.

To my way of thinking, to impose a penalty as irreversible as death, knowing that the criminal justice system is broken, is to be willing to execute innocent people. Is that moral? ■

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