# THE BANALITY OF WRONGFUL EXECUTIONS

*Brandon L. Garrett*[*]

LOS TOCAYOS CARLOS. By *James Liebman, Shawn Crowley, Andrew Mark-quart, Lauren Rosenberg, Lauren Gallo White* and *Daniel Zharkovsky.* Print version, 43 COLUMBIA HUMAN RIGHTS LAW REVIEW 711, 711–1152 (2012); online version with footnotes, *available at* http://www3.law.columbia.edu/hrlr/ltc/chapter/editors-note/1.html.

ANATOMY OF INJUSTICE: A MURDER CASE GONE WRONG. By *Raymond Bonner.* New York: Alfred A. Knopf. 2012. Pp. xv, 283. Cloth, $26.95; paper, $16.

IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS. By *Dan Simon.* Cambridge and London: Harvard University Press. 2012. Pp. 222. $45.

## INTRODUCTION

"I didn't do it," said Carlos DeLuna before his 1989 execution in Texas for a 1983 murder in Corpus Christie (Liebman et al., p. 1102). Three decades after the murder, we now know that he likely did not do it. And we know who likely really did do it. At the time, DeLuna's execution went unnoticed: there were no candlelight vigils, no petition drives, no international media, and no last-minute clemency requests. DeLuna was, coincidentally, executed in the same year that DNA testing first exonerated a convict in the United States. Since 1989, a drumbeat of wrongful convictions has generated headlines and captured the public imagination.[1] In eighteen cases to date, DNA tests have played a role in preventing wrongful executions of innocent men on death row, and since the 1970s, over a hundred more death-row inmates have been exonerated by non-DNA evidence.[2] Some of those cases have attracted real attention, but most have not.

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\*   Roy L. and Rosamond Woodruff Morgan Professor of Law, University of Virginia School of Law. ©

1. *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT (2011). The first DNA exonerations in the United States occurred in 1989. *Id.* at 181.

2. My book examined the first 250 postconviction DNA exonerations in the United States. *Id.* at 5. There have now been over 310 such exonerations. Douglas A. Blackmon, *DNA Evidence Exonerates Louisiana Death-Row Inmate,* WASH. POST, Sept. 29, 2012, at A03, *available at* http://www.washingtonpost.com/national/louisiana-death-row-inmate-damon-thibodeaux-is-exonerated-with-dna-evidence/2012/09/28/26e30012-0997-11e2-afff-d6c7f20a83bf_story.html. Damon Thibodeaux was the 300th DNA exoneree and the 18th death-row DNA exoneree in the United States. *Id.* These DNA death-row exonerations alone suggest a non-trivial exoneration rate. Far more death-row inmates have been exonerated by evidence that was not chiefly in the form of postconviction DNA testing. The Death Penalty Information

What is so haunting about the known wrongful convictions is that those cases are the tip of the iceberg. Untold numbers of unnoticed errors may send the innocent to prison—and to the death chamber. That is why I recommend to readers a trilogy of fascinating new books that peer deeper into this larger but murkier problem. Outside the rarified group of highly publicized exonerations, which have themselves done much to attract attention to the causes of wrongful convictions, errors may be so mundane that no one notices them unless an outsider plucks a case from darkness and holds it to the light.

That is what happened in the Carlos DeLuna case, which drew no attention at the time and remained in near-total obscurity until Professor James Liebman[3] and a team of five law students painstakingly dissected the case in their book *Los Tocayos Carlos* (the Carlos look-alikes). Their book was the product of an in-depth investigation of the case, from the first 911 call to the police through the execution and the evidence gathered since. They have also published the results online, including multimedia and images of key documents that they uncovered.[4] The result is an exhaustive postmortem. Whether political theorist Hannah Arendt was right to call Adolf Eichmann a banal person caught up in a twisted Nazi culture that made evil seem normal—that is another question.[5] But cases like DeLuna's show how entrenched failures of our criminal justice system can make the individuals involved seem all too banal, even if some were by turns plodding, incompetent, misguided, or even malicious.

In *Anatomy of Injustice: A Murder Case Gone Wrong*, journalist Raymond Bonner[6] presents a vivid account of tunnel vision gone wrong, but a case in which the system did eventually—if only partially—right itself. Bonner unravels the case against Edward Lee Elmore, a mentally retarded black man who was sentenced to death in South Carolina in 1982 (the year before DeLuna's trial in Texas). Once again, the outcome was not due to one "bad guy" but rather to a criminal justice system with practices and procedures that, predictably, create errors that are very difficult to correct.

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Center has a current count of 142 death-row inmates who have been exonerated. *The Innocence List*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Oct. 29, 2013). This is not an inconsequential exoneration rate, as Professors Sam Gross and Barbara O'Brien have found by carefully modeling the false-conviction rate among death sentences in both published works and works in progress. *See* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008).

3. Simon H. Rifkind Professor of Law, Columbia Law School.

4. *See* LOS TOCAYOS CARLOS, http://www3.law.columbia.edu/hrlr/ltc/ (last visited Oct. 29, 2013).

5. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

6. Investigative journalist, former foreign correspondent for the *New York Times*, and former staff writer at the *New Yorker*. Prior to becoming a journalist, Bonner taught at the University of California, Davis School of Law.

While the Liebman team drills deeply into one case, Professor Dan Simon's book, *In Doubt: The Psychology of the Criminal Justice Process*,[7] takes a panoramic, empirical view of the larger problem (Simon, p. 1). Simon digested decades of social science research into a readable and concise book. And an important lesson emerges once the banality of wrongful convictions is cast in the mold of cognitive research: Individual actors may not act as "evil" villains trying to frame an innocent person. They may tend to assume that a suspect is guilty (Simon, p. 24). Well-intentioned criminal justice actors, however, can be precisely the ones to fall prey to a guilt-bias and make errors, particularly when working in groups in law enforcement agencies (Simon, pp. 28–29). Ordinary tendencies to confirm prior theories, susceptibility to tunnel vision, and other everyday cognitive biases may blind criminal justice actors to alternative theories and entrench their views, even when they are wrong. The fault for any one wrongful conviction does not simply lie with a few bad actors—even malicious actors depend on the cooperation and support of many others—but with an entire system that we must all take responsibility for improving.

Slowly but surely, many jurisdictions have adopted important reforms that can help prevent such miscarriages of justice. These reforms include the following: improved eyewitness identification procedures, particularly blind lineups; reformed interrogation practices and videotaping of interrogations; scientific oversight of forensics; increased discovery in criminal cases; new institutions for reviewing potential errors and claims of innocence; and broader standards for considering newly discovered evidence of innocence postconviction.[8] After reading any one, but hopefully all three of these important books, many more will hopefully take up the call for reform.

## I.  INNOCENT AND EXECUTED

Carlos DeLuna was executed on December 7, 1989 (Liebman et al., p. 719). *Los Tocayos Carlos* is so detailed and exhaustive in its search for what went wrong that readers can misapprehend that there was something inevitable about his ultimate execution. Yet what makes the story so powerful and troubling is that readers are reminded each step of the way how little evidence there ever was of his guilt and how contingent the rush to judgment was that led to his execution.

The DeLuna case is particularly unsettling for two reasons. First, the case's near-complete "obscurity" is "a far better representation of what usually goes on" in typical criminal cases than "the facts and proceedings in more notorious and idiosyncratic cases" (Liebman et al., p. 1116). Second, it exposes how easy it can be to sentence someone to death: A single, shaky eyewitness. No DNA or other forensics. No confession. Not even a murder

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7.  Dan Simon is the Richard L. and Maria B. Crutcher Professor of Law and Psychology, University of Southern California Gould School of Law.

8.  *See* Simon, pp. 45–49, 82–84, 140–42, 177–79, 203–05, 220–22; GARRETT, *supra* note 1, ch. 9.

weapon. The jurors must be convinced beyond a reasonable doubt that the defendant did it, but if they never hear an alternative story, they may accept what they are told—however flimsy—even in a death penalty case. The authors conclude, "How much more evidence do we need that our system allows the innocent to be executed?" (Liebman et al., p. 1118).

DeLuna was convicted and sentenced to death for the vicious murder of a young woman working as a clerk at a gas station convenience store in one of Corpus Christi, Texas's tough neighborhoods. The victim had called the police before she was murdered. In a chilling 911 call, she described a frightening person in the store before letting out a scream. The police who eventually responded sent out a radio call with an eyewitness's description of a "Hispanic man, about 5 foot 9, wearing a flannel shirt and a gray sweatshirt," seen running away from the gas station (Liebman et al., p. 737). Forty minutes into a haphazard and confused police search of the surrounding streets, DeLuna was found a few blocks from the crime without a shirt and hiding under a truck (Liebman et al., p. 748). It was, as the Texas Death House chaplain later said, a "childlike" response to hide under a truck, and not the response of "[t]he average convict" (Liebman et al., p. 719). DeLuna's supposed motive was unclear. Nor was the murder clearly a robbery; as the Liebman team concluded, there was at best 20 dollars missing from the store (Liebman et al., p. 784).

The police brought DeLuna back to the crime scene to obtain an eyewitness identification. There were four eyewitnesses (Liebman et al., p. 761). All of them refused to try to identify DeLuna. With the police pleading for them to cooperate, two eyewitnesses decided to try to identify a suspect. One tried, but at a later preliminary hearing in the case, he was unable to identify DeLuna (Liebman et al., p. 764). The other, who had seen the killer run out of the store, was walked over to a patrol car surrounded by police, where they had DeLuna shirtless and handcuffed in the backseat with flashlights shining on him. The eyewitness was told beforehand, "We found him. Is this the gentleman? He was hiding underneath a car" (Liebman et al., p. 761). The police then elaborated, "[W]e found this guy hiding underneath a car without a shirt on, two blocks north of us or three blocks north of us" (Liebman et al., p. 765). Only after that contrived charade did the police ask the eyewitness, "Is this the guy you seen?" (Liebman et al., p. 757). This last eyewitness was able to identify DeLuna, and he became the central pillar supporting the prosecution's case.

The Liebman team excavated substantial additional evidence about this identification procedure that had gone ignored. The eyewitness recalled, speaking to an investigator many years later, that "[i]t was really tough, you know," to say "yes or no." With the police insistent and a crowd of onlookers, and since "it seemed like the right guy," he identified DeLuna (Liebman et al., p. 757). If it had not been for the additional information the police gave him about having found DeLuna under a car, the eyewitness said that his identification would have been about "fifty-fifty," but with those remarks by the police, his certainty climbed somewhat higher, to 70 percent (Liebman et al., p. 765).

This was a terribly suggestive eyewitness identification procedure. It was a showup—a one-on-one eyewitness identification procedure. Showups are far more error-prone than other identification procedures since there are no "fillers" included in addition to the suspect to better test the memory of the eyewitness.[9] Showups are typically only conducted shortly after an incident. This one was conducted about an hour after the murder, which would have the advantage that the eyewitness's memory, such as it was, would still be fresh (Liebman et al., pp. 757–59). This was, however, a showup conducted in a gratuitously suggestive manner, with the suspect handcuffed and all the rest.[10] The eyewitness later recalled that the police "maybe tried to direct me" by making leading comments (Liebman et al., p. 765). Social science studies have shown that such remarks, even telling the eyewitness that the suspect had been arrested prior to the identification procedure, increase the rate of error.[11]

And it was also a cross racial identification. The eyewitness later recalled that he had trouble with Hispanic faces, noting "[i]t's tough . . . to identify cross cultures" (Liebman et al., p. 765). In fact, social scientists have long found that eyewitnesses have greater difficulty identifying individuals of another race.[12] A large number—almost half—of the eyewitness misidentifications in cases of DNA exonerees involved cross racial identifications.[13] Each of these troubling features of the eyewitness identification unfortunately makes the case all too typical: showups are extremely common and poorly regulated.[14]

Nor was there other evidence in the case. As is unfortunately typical, the police did not carefully try to collect forensic evidence from the crime scene. There was no effort to interrogate DeLuna; given DeLuna's mental limitations and how little evidence of guilt they had, it is perhaps surprising that the police did not try to extract a confession from him.

While the jurors may have relied on the single eyewitness identification, without hearing about how such flawed eyewitness identifications can go wrong, they also did not hear any competing story. Prosecutors had closed

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9. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 630–31 (1998) ("[T]here is clear evidence that show-ups are more likely to yield false identifications than are properly constructed lineups.").

10. Liebman et al., pp. 757, 761–62. For examples of unnecessarily suggestive showups in cases of DNA exonerees, see GARRETT, *supra* note 1, at 55–56.

11. ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-8b (4th ed. 2007).

12. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 5–13 (2001); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 230 (2001).

13. GARRETT, *supra* note 1, at 72–73.

14. For studies finding that showups are extremely common, and even more common than prepared lineups, see Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 479 (2001), and Richard Gonzalez et al., *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525 (1993).

their eyes to evidence pointing to the other Carlos—a violent man named Carlos Hernandez who openly bragged that he had committed the murder. Yet, the lead prosecutor called him nothing more than a "phantom" (Liebman et al., pp. 956, 1002). From the moment police found him hiding, scared, under a truck a few blocks away, DeLuna had told them, "'I didn't do it, but I know who did.' [DeLuna] said the same thing to his family, friends, lawyers, prosecutors (whom he begged to give him a lie detector test), and any member of the media who would listen" (Liebman et al., p. 1102). Liebman's team highlights the many additional "small" pieces of evidence pointing to Hernandez, including descriptions of the killer's age, moustache, use of a knife, and other evidence. All of that was ignored in favor of the seemingly "big" piece of evidence: the shaky eyewitness identification (Liebman et al., pp. 734, 981).

DeLuna's own lawyers never claimed that he was innocent either, much less tried to prove it. This is typical; many people later exonerated by DNA did testify and proclaim their own innocence at trial, but their lawyers were less than enthusiastic about repeating such claims on appeal or postconviction. Perhaps their lawyers were reluctant to claim innocence for a good reason, since exonerees only raised successful claims of innocence after they had obtained DNA tests.[15] DeLuna's lawyers actually told the governor of Texas when he was considering a clemency request that "guilt was clear and obvious" (Liebman et al., p. 1078). Moreover, the appellate and postconviction courts seemed completely unaware that the lone eyewitness identification was deeply flawed. In affirming the conviction, the Fifth Circuit noted, in a gross exaggeration of the evidence supporting the conviction, that DeLuna was "seen and identified by witnesses before, during, and after the offense."[16]

The enigmatic villain of the story is Hernandez, who laughingly thumbed his nose at the criminal justice system, which repeatedly allowed him to escape punishment for a series of murders and other violent crimes. But who was the *legal* villain in this story who should be haunted by the ghost of an executed but innocent man? That villain is a phantom. There was no one person to blame. The trial judge was not out to get DeLuna. The defense lawyer at trial was far from aggressive but certainly did not act out of spite. The prosecutors were not likely trying to frame DeLuna. The police may not have realized how shoddy the showup identification procedures were. Judges on appeal were likely accustomed to being highly deferential. Nor were there multiple ill-bent masterminds all in cahoots, rubbing their hands with delight at having executed the wrong man. It might be reassuring, in a way, to think that a corrupt cop or prosecutor did this—that would make it a bad-apple case and not just a symptom of a far larger and systemic problem. DeLuna's last words were, "I want to say I hold no grudges. I hate

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15.  *See* GARRETT, *supra* note 1, at 160–61, 202–03.

16.  DeLuna v. Lynaugh, 890 F.2d 720, 724 (5th Cir. 1989), *quoted in* Liebman et al., p. 1052.

no one. I love my family. Tell everyone on death row to keep the faith and don't give up" (Liebman et al., p. 1118).

## II. THE NOT-EXONERATED

A second book, *Anatomy of Injustice*, is as aptly titled as the other two (and perhaps playing off the title *Anatomy of a Murder*[17]). Like DeLuna's prosecution, Elmore's saga underscores the systemic failings that can cause the capital conviction of an innocent person. Elmore was convicted on flimsy evidence in a hurried trial. And even in light of later evidence indicating Elmore's innocence, he remains a convicted criminal, although he is no longer in custody, thanks to the assistance of an indefatigable team of lawyers.

Elmore's case, unlike DeLuna's, was a big deal, at least in the small town of Greenwood, South Carolina, where the murder happened. A white, well-to-do, elderly woman was murdered in a gruesome fashion. A frantic rush to judgment ensued. Giving new meaning to "speedy trial," Elmore's trial was fast-tracked and it was brief, with no semblance of a defense case presented (Bonner, p. 43).

The State's case was as skimpy as in DeLuna's case. There was a jail-house informant who said that Elmore confessed (Bonner, p. 70). There were scant forensics because police botched the crime scene investigation and did not interview a possible suspect who found the body and gave them a tour of the crime scene (Bonner, pp. 12–14, 56). The prosecution relied heavily on a state crime lab agent's testimony that "forty-something of his pubic hairs" were collected from the victim's bed. A juror later recalled that this was "the most convincing element in the whole trial." Another said, "That's what convicted him" (Bonner, p. 193).

In fact, the crime lab agent's testimony was unsupported by sound science. Crime scene hairs were not DNA tested back in the 1980s. Instead, they were compared under a microscope, and it was not possible to say that hairs came from one person to the exclusion of all others. The most an analyst could say was that hairs appeared "similar," whatever that meant. I have described a series of DNA exonerations in cases in which the prosecution presented invalid and unreliable testimony about hairs, including in cases like Elmore's in which multiple hairs were supposedly compared and found to be a "match."[18] The Department of Justice is now auditing thousands of cases from that time period in which unscientific claims were made about hair evidence in criminal cases, including in death penalty cases.[19] Elmore was in part a victim of terribly misleading and unscientific forensic testimony.

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17. ROBERT TRAVER, ANATOMY OF A MURDER (1958).

18. *See* GARRETT, *supra* note 1, ch. 4.

19. *See* Spencer S. Hsu, *FBI Lab's Woes Cast Growing Shadow*, WASH. POST, Dec. 23, 2012, at A01, *available at* http://articles.washingtonpost.com/2012-12-22/local/36016999_1_crime-lab-arnold-melnikoff-fbi.

Elmore was first convicted and sentenced to death in 1982. But like in so many death penalty cases, it was only after the trial that top lawyers inter-vened.[20] Elmore had two more criminal trials, and the South Carolina Su-preme Court reversed the judgment of each. During these years,

> Elmore's home was an eight- by ten-foot cell. It had a stainless steel toilet and basin and a metal bed bolted to the wall; each inmate was given a plastic mat for the bed. There was a window, about six feet high and three inches wide. The door was solid metal, with a covered slot that would slide open for meal trays . . . . (Bonner, p. 130)

Relentless postconviction lawyers uncovered how crucial exculpatory forensics had been hidden. Bonner does a wonderful job of vividly explain-ing how hard it is to raise a claim of innocence in our postconviction system (Bonner, pp. 152–53). Instead, Elmore's lawyers had to argue that the trial lawyer was ineffective. They uncovered more than just missteps at trial, how-ever. They uncovered that the jailhouse informant, who had testified three times against Elmore, had finally "had an attack of conscience" and had spoken to his pastor; he then admitted under oath that he had been lying all along, in exchange for leniency from the prosecutors—and that a police of-ficer had even placed him in Elmore's cell so that he could "help out with Mr. Elmore" (Bonner, pp. 162–66). They discovered that an expert, a lead-ing pathologist, had concluded that the victim could not have been killed on a Saturday night, as he was according to the State's theory, and moreover that the evidence had suggested a violent murder of the victim but no rape (Bonner, pp. 174–75). It also emerged for the first time at a postconviction hearing that fingerprints found at the scene did not match those of either the victim or the defendant (Bonner, p. 191).

Finally, Elmore seemed likely to be saved by a hair. Only after Elmore's postconviction hearings in 1995, while still more appeals were pending, did Elmore's lawyers learn that the crime lab analyst had several pieces of evi-dence—sitting in his desk for sixteen years—that he had never given to the defense (Bonner, p. 213). The lab analyst had even testified that the items contained no hairs; in fact, they included Caucasian hairs that did not match Elmore's (Bonner, pp. 215–16, 238). Not only, therefore, was the hair testi-mony at trial scientifically invalid but, as Bonner describes, that was the least of the problems. It emerged that no hairs were ever reported to have been found on the victim's bed; somehow, only after the police had yanked hairs from Elmore's head the morning he was arrested, were his hairs said to have been found at the scene (Bonner, pp. 200–02). The State initially had no evidence tying Elmore to the crime, and Bonner suggests that the police may have sought the jailhouse informant testimony and rustled up some hairs out of desperation.

After learning of the additional hairs in 1996, Elmore's lawyers had DNA tests conducted. Several of the hairs were found to be consistent with

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20. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2074–78 (2000).

the victim's DNA, but one could not have come from her (Bonner, p. 236). This Caucasian hair was obviously not Elmore's; it belonged to some other, unidentified man. John Blume, a law professor who argued for Elmore, told the judge that the concealed hair "in and of itself, we believe entitles Mr. Elmore to a new trial" (Bonner, p. 238). More bluntly, he added, "The whole thing really stinks" (Bonner, p. 240). The judge responded that, although the hair "should have been disclosed to counsel," "[o]ne hair is not enough" to justify overturning the conviction (Bonner, pp. 241–42).

With relief denied to Elmore yet again, the roller-coaster ride continued. Bonner vividly describes each new discovery, followed by a new setback, through the eyes of Elmore and his indefatigable team of lawyers. One cannot read this book and view our complex system of appeals, postconviction review, and habeas corpus review the same way. It becomes clear that although serious criminal cases may receive multiple rounds of judicial review, judges do not perform the kind of serious review that we might expect. Certainly, innocence is not of significant legal concern to appellate and postconviction judges, who are often more focused on complex procedural technicalities that can prevent review on the merits—or, in the rare cases where they reach the merits, the details of narrowly defined constitutional claims. Predictably, then, the South Carolina Supreme Court denied relief.

With an execution date set for October 2004, the prosecutors agreed to a request to conduct more DNA tests (Bonner, p. 262). The tests uncovered that two of the hairs were from a male individual, not Elmore, and the material under the victim's fingernails did not match Elmore's DNA profile. The tests also uncovered, however, that spots of blood on Elmore's shoes and blue jeans matched the victim's blood (Bonner, pp. 272–73). Meanwhile, in 2007, a psychological evaluation concluded that Elmore "meets the diagnostic criteria for mental retardation" and was therefore ineligible for execution (Bonner, p. 275). His death sentence was vacated, after twenty-seven years, but he was still facing a life sentence in prison (Bonner, pp. 277–78).

Elmore remains a convicted felon to this day. But Bonner's book has an epilogue. A federal appeals court granted Elmore a new trial, citing "persuasive evidence that the agents were outright dishonest" concerning the forensics.[21] The court described how hairs, and not just blue fibers, should have been readily apparent to the naked eye and how the fingerprint evidence was misreported as unidentifiable.[22] The court called Elmore the "victim" of "inept and corrupt law enforcement officers unchecked by incompetent defense counsel."[23] The dissenter on the Fourth Circuit accused his colleagues of

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21.   Elmore v. Ozmint, 661 F.3d 783, 870 (4th Cir. 2011), *quoted in* Bonner, p. 279.

22.   *Id.* at 870–71. For a description of similar failures to disclose exculpatory forensics in cases of people later exonerated by DNA testing, as well as similar assertions that potentially highly probative and exculpatory forensics were inconclusive, see Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009).

23.   *Elmore*, 661 F.3d at 872.

entertaining a "fanciful conspiracy,"[24] which was perhaps unsurprising—
that dissenting judge had written a prominent opinion rejecting relief for a
Virginia death-row inmate, Earl Washington, Jr., who was later cleared by
postconviction DNA tests.[25] Heartened by this dissent, the State seemed
poised to continue to appeal the order of a new trial.

The content of the epilogue was itself not the end of the story. In yet
another turn of events, shortly after Bonner's gripping book was published,
Elmore was permitted to plead guilty to a lesser crime (without admitting
guilt).[26] After 11,000 days in prison, he is free but not exonerated.[27] This
does not at all take away from the power of Bonner's book, particularly
given the lack of a complete exoneration or vacatur of the conviction, in
spite of the new evidence of Elmore's innocence. Perhaps the attention di-
rected to Elmore's case due to the publication of Bonner's book played some
role in securing his freedom. In contrast, it is too late for Carlos DeLuna,
whose case remained swept under the rug until researchers unearthed it de-
cades later.

## III.  Accuracy in Doubt

The third in this trilogy of recent inquiries into criminal injustice ac-
complishes a truly Herculean feat of synthesis, rather than focusing on a
single case. Dan Simon digests decades of psychological research exploring
why wrongful convictions may go unnoticed. In some areas, there are liter-
ally thousands of social science studies as well as meta-analyses—often in
psychological journals that lawyers may never come across—but, prior to
Simon's book, a single, comprehensive roadmap to that social science re-
search simply did not exist. A book like this, which highlights the most au-
thoritative and relevant work, is an invaluable resource for lawyers and
scholars.

Simon does far more than digest decades of social science work, how-
ever. He uses that work to highlight the reasons why everyone involved in
the criminal justice system, from police, prosecutors, and defense lawyers to
judges and jurors may make mistakes—even when they have the best inten-
tions. Although wrongful convictions can happen because there were "delib-
erate efforts to distort the truth," Simon correctly focuses on the everyday
work of criminal justice actors who "seek to fulfill their roles honestly and
dutifully" (Simon, p. 10). Errors may be the product of everyday cognitive
bias. Police may want to be supportive of witnesses trying to help solve cases

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24.  *Id.* at 876 (Wilkinson, J., dissenting), *quoted in* Bonner, p. 279.

25.  Washington v. Murray, 4 F.3d 1285 (4th Cir. 1993); Maria Glod, *Former Death-Row
Inmate Would Get $1.9 Million*, Wash. Post (Mar. 28, 2007), http://www.washingtonpost.com/
wp-dyn/content/article/2007/03/27/AR2007032702240.html.

26.  Associated Press, *Mentally Disabled Inmate Goes Free After 30 Years as a Single Strand
of Hair Grants Him the Right to a Retrial on 1982 Murder Charge*, MailOnline, http://www.
dailymail.co.uk/news/article-2109357/Mentally-disabled-inmate-goes-free-30-years-single-
strand-hair-gives-retrial-murder-charge.html (last updated Mar. 2, 2012).

27.  *Id.*

or may wish to "jog" the witnesses' memories, so they ask leading questions, display the suspect standing alone, or tell eyewitnesses that the suspect will appear in the lineup, and they congratulate eyewitnesses on a job well done when they pick the suspect (Simon, pp. 111–13). Seemingly innocuous suggestions, however, can transform a shaky eyewitness into a confident one— even if he in fact picked an innocent man (Simon, pp. 75, 114–15). Police and prosecutors may succumb to "tunnel vision" and ignore evidence contradicting the narrative they have built up around a suspect (Simon, p. 24). Errors may escalate and take on a life of their own.

Moreover, as Simon carefully notes, plea bargaining dominates the criminal justice system, but it "does not readily lend itself to psychological experimentation" (Simon, p. 10). Although this is not the theme of his book, Simon highlights that the same flaws in criminal investigations and evidence development can and do affect plea negotiations.

What can prevent cases like DeLuna's from going wrong? Simon painstakingly reviews reforms at each stage of the criminal investigation process. It is not enough to conduct a lineup using best practices. As soon as possible after a crime, police officers and prosecutors must carefully interview individual witnesses separately and in a nonleading way (Simon, p. 118). All such evidence should be recorded and documented (Simon, p. 118). Trial judges should serve as careful gatekeepers for the evidence, particularly eyewitness identifications, confessions, and other types of evidence that might be highly unreliable and misleading if obtained through flawed procedures (Simon, p. 178). Wrongful convictions of the high-profile variety have encouraged more legislators, policymakers, law enforcement officials, prosecutors, and courts to adopt these much-needed improvements (Simon, pp. 220–22). Simon carefully shows how each recommended reform flows from social science research.

Why have these changes been so slow in coming? As Simon describes, cognitive bias is an everyday phenomenon, even among people working "honestly and dutifully," and it does not provide an evil villain to blame and punish (Simon, p. 10). While decades of social science research suggest clear improvements to the practices used in eyewitness identifications and interrogations, as well as to other common investigative tools, these improvements have slowly been adopted in our fragmented and slow-moving criminal justice system.[28] Cases like DeLuna's and Elmore's suggest how it may be very hard to correct the ingrained habits of our criminal justice system without larger changes to the incentives and structure of the system.

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28.   For a description of the pace of adoption of such reforms, see GARRETT, *supra* note 1, ch. 9. For a case study in the pace of adoption of eyewitness identification procedure reforms in Virginia, see Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 3 VA. J. CRIM. L. (forthcoming 2014), *manuscript available at* http://ssrn.com/abstract=2313908.

CONCLUSION

These three books share a deep connection to each other and to other works on what causes wrongful convictions. Social science researchers are increasingly interested in studying criminal investigations and procedures, particularly at the state and local levels, where reforms have been adopted in response to high-profile exoneration cases. After studying the path-breaking social science research that Simon marshals, cases like Elmore's are not surprising. Nor is DeLuna's case surprising, especially after familiarizing oneself with the decades of research on cases of eyewitness error and the tunnel vision that can set in during murder investigations.

Other death-row exonerations share such forms of flawed evidence. The evidence that contributed to the convictions and sentences of the eighteen people sentenced to death but later exonerated by DNA testing is telling.[29] Eight of those cases involved false confessions, and in each of those cases, the person was said to have confessed in detail. Those false confessions were each presented to the jury as statements including details that only the true culprit supposedly could have known. The jurors thought that they were hearing the words of the actual killer.[30] Ten of the eighteen death penalty cases involved testimony by informants.[31] The informants may have been unsavory characters trying to earn leniency, but they claimed to have overheard confessions with details that only the culprit could have known. Nine of the cases involved eyewitness identifications, as in DeLuna's case.[32] Fourteen of the death penalty cases involved forensic evidence, including cases with unreliable forensics. Ten of the cases involved hair comparisons, and

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29. *See supra* notes 1–2.

30. These figures update the discussion in GARRETT, *supra* note 1, at 257, to include the Thibodeaux case noted *supra* note 2, which involved a false confession and an eyewitness misidentification. The eight death-row exonerees who had falsely confessed were Rolando Cruz, Alejandro Hernandez, Ronald Jones, Robert Miller, Damon Thibodeaux, Earl Washington, Jr., Ronald Williamson, and Nicholas Yarris. An appendix that describes the details reported to have been present in the confessions is available at Brandon L. Garrett, *Characteristics of Exoneree False Confessions*, UNIV. OF VA. SCH. OF LAW, http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_false_confessions_appendix.pdf (last visited Nov. 17, 2013). For information concerning Damon Thibodeaux's confession, see *Know the Cases: Damon Thibodeaux*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Damon_Thibodeaux.php (last visited Nov. 17, 2013).

31. The death-row exonerees who had informants of various types testify at their trials were Kirk Bloodsworth, Rolando Cruz, Charles Fain, Alejandro Hernandez, Verneal Jimerson, Ryan Mathews, Curtis McCarty, Dennis Williams, Ronald Williamson, and Nicholas Yarris. An appendix that describes the details reported to have been present in the confessions is available at Brandon L. Garrett, *Characteristics of Informant Testimony in DNA Cases*, UNIV. OF VA. LAW SCH., http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_informants_appendix.pdf (last visited Nov. 17, 2013).

32. The death-row DNA exonerees who had eyewitness testimony at their trials were Kirk Bloodsworth, Alejandro Hernandez, Ronald Jones, Ryan Mathews, Frank Lee Smith, Dennis Williams, Ronald Williamson, and Nicholas Yarris. An appendix that describes the eyewitness testimony in those and other DNA exoneree cases is available at Brandon L. Garrett, *Characteristics of Eyewitness Misidentifications in DNA Exonerees' Trials*, UNIV. OF VA. LAW

two involved fiber comparisons. Nine involved serology, or blood typing. Two involved bite mark comparisons.[33] That forensic evidence was often presented in an unscientific and exaggerated way, as in the Elmore case, made it seem very powerful to jurors. Only one of the death-row DNA exonerees received any relief from a federal court prior to obtaining DNA testing—Ronald Williamson, who received DNA testing and was exonerated after a federal judge granted his habeas corpus petition.[34]

There are straightforward ways to prevent irreversible errors, including better lineups, improved police investigations, videotaped interrogations, robust discovery, and gatekeeping by judges. Courts in New Jersey and Oregon, for example, have recently issued high-profile decisions revamping standards for regulating eyewitness identifications in the courtroom.[35] More and more jurisdictions have adopted interrogation reforms. Some prosecutors have created "conviction integrity units" designed to review possible errors.[36] Although there are more such efforts across the country each year, it may take high-profile wrongful convictions to push us further toward getting it right.

I note one more development, ongoing in the months that these books were published: the National Registry of Exonerations, a collaboration between Professor Samuel Gross of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University Law School, was established.[37] DNA exonerations are only a small part of the Registry's collection of cases, which now includes well over 1,000 exonerations, the vast bulk of which have never attracted significant notice before. Some of those people may well be guilty, but they were all exonerated, and it is not every day that courts reverse convictions on the basis of new evidence

SCH., http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_eyewitness_appendix.pdf (last visited Nov. 17, 2013). In addition, Damon Thibodeaux was misidentified by two eyewitnesses. *See* INNOCENCE PROJECT, *supra* note 30.

33.   The death-row DNA exonerees who had forensic testimony at their trials were Michael Blair, Kirk Bloodsworth, Kennedy Brewer, Rolando Cruz, Charles Fain, Alejandro Hernandez, Verneal Jimerson, Ronald Jones, Ray Krone, Curtis McCarty, Robert Miller, Dennis Williams, Ronald Williamson, and Nicholas Yarris. In addition, Earl Washington, Jr., had serology evidence concealed from the defense, and Ryan Mathews was excluded by DNA tests presented at his trial. An appendix that describes the forensic testimony in these cases and that in the others of the first 250 DNA exoneree trials is available at Brandon L. Garrett, *Forensic Testimony*, UNIV. OF VA. LAW SCH., http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_forensics_appendix.pdf (last visited Dec. 30, 2013).

34.   Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. Okla. 1995), *aff'd sub nom.* Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997).

35.   State v. Henderson, 27 A.3d 872 (N.J. 2011); State v. Lawson, 291 P.3d 673 (Or. 2012).

36.   CTR. ON THE ADMIN. OF CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES (2012), *available at* http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf.

37.   *National Registry of Exonerations*, JOINT PROJECT OF MICH. LAW & NW. LAW, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Oct. 29, 2013). I note that I am now a member of the advisory board of the Registry.

of innocence. We simply do not know how many innocent people languish behind bars or how many were improperly or unfairly sentenced to terms that they do not deserve. We have only begun to try to keep count.

Our judicial system does not normally conduct inquiries when miscarriages of justice occur. It is left to the outsiders and the obsessives, journalists and academics, social scientists and postconviction lawyers—a diverse group of which I am privileged to count myself a member—to try to meticulously pick up the pieces. Liebman's, Bonner's, and Simon's books each bring some daylight and understanding to the reasons why our criminal justice system so often makes terrible mistakes. They provide powerful resources for lawyers and reformers trying to improve our criminal justice system. They also provide something quite rare: a clearer understanding of what went wrong. The only way to truly do justice to this remarkable trilogy of new books is to ask you to read each of them.