Judges and Wrongful Convictions

Brandon L. Garrett

"[T]he evidence will show, not that she's a liar, but that she's mistaken, that her identification is wrong and it's a misidentification," McKinley Cromedy's defense lawyer told the jury in the opening statement.[1]

The victim, a white college student, had been raped by a black man in her apartment. A few days later, she had helped a police artist draw a composite sketch of a black man with a full face and a moustache. She looked at thousands of photos of black men who had been arrested. One of those photos was of Cromedy. In fact, the police had him in mind as a suspect because he had been seen in the area, but she did not identify him.

Almost eight months later, she saw Cromedy crossing the street. She thought he was her attacker, partly because of his appearance but also because of his unusual way of walking due to a limp, "a swagger," as she put it. She called the police, who called her back fifteen minutes later to say that they had picked up a man matching her description. She then went to the police station, where police asked her to identify Cromedy, standing in a room behind one-way glass. She positively identified Cromedy as her attacker.

The police officer explained, "I've had a lot of experience with identifications and I'm not going to lead somebody. I asked her to see if she recognized this person." Yet there was no justification for conducting an inherently suggestive showup in which she viewed Cromedy one-on-one, rather than conduct a lineup.

Cromedy's lawyer argued that the identification was improper, saying that the showup was "like true or false, and to me that is about as suggestive as a procedure you can have. . . . She knows somebody was picked up. What could be more suggestive?"

The trial judge ruled that the identification was admissible, emphasizing, "she was very certain of her identification," and noting that her composite drawing looked like Cromedy and that "Mr. Cromedy has a very, very unique style of walking. It's a combination of a swagger and a roll."

At trial, the victim pointed to Cromedy in the courtroom and agreed she was "absolutely sure" he was her attacker.

Cromedy's defense lawyer then asked for a special jury instruction, asking the jury to consider "whether the cross-racial nature of the identification has affected the accuracy of the witness's original perception and/or accuracy of a subsequent identification." The trial judge denied the request.

Cromedy was convicted. On appeal, though, the New Jersey Supreme Court reversed his conviction. The court ruled in 1999 that "forty years" of empirical studies documented a risk of heightened error when white eyewitnesses try to identify black subjects. The court noted that some courts, such as in California, Massachusetts, and Utah, had permitted such instructions. The court ruled that under the facts of his case, it was "reversible error not to have given an instruction that informed the jury about the possible significance of the cross-racial identification factor, a factor the jury can observe in many cases with its own eyes."[2]

The court reversed McKinley Cromedy's conviction without knowing that he was in fact innocent. After the ruling, however, the prosecution agreed to conduct DNA tests. The results excluded him and he was exonerated. The victim later commented, "I couldn't believe that I was wrong."

CONVICTING THE INNOCENT

In my book, *Convicting the Innocent*, published in 2011 by Harvard University Press, I examined the cases of the first 250 people exonerated by postconviction DNA testing. With some difficulty, by contacting lawyers, court clerks, and court reporters around the country, I assembled the original trial records from their cases. I was able to obtain 88% of their trial transcripts (207 trial transcripts from the 234 that had a trial), as well as materials from hearings for 11 of the 16 who had pleaded guilty.[3] I wanted to know what went wrong. Why were these people convicted?

When I examined the records, I learned that cases like Cromedy's were not idiosyncratic. In fact, cases like his were quite typical. Most DNA exonerees had eyewitnesses evidence at their trials, since so many of the cases involving DNA post-conviction were rape cases. Thus, 76% had eyewitnesses misidentify them (190 of 250 exonerees). More to the point, eyewitnesses typically described how police used suggestive procedures, like the showup used in Cromedy's case. All but a handful of the eyewitnesses were certain at the time of trial. An eyewitness in Steven Avery's case testified, "[T]here is absolutely no question in my mind." In Thomas Doswell's case, the victim testified, "This is the man or it is his twin brother" and "That is one face I will never forget . . . ." In Dean Cage's case, the victim was "a hundred percent sure." In Willie Otis "Pete" Williams's case, the victim said she was "one hundred and twenty" percent sure.

Cromedy was one of 74 black or Hispanic exonerees misidentified by a white eyewitness, and almost half of the

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Footnotes
1. Trial transcript cites are from: Trial Transcript, 182, State of New Jersey v. McKinley Cromedy, Ind. No. 1243- 07-93 (N.J. Super. Ct. July 27, 1994) (on file with the author). A discussion of this case and a more detailed discussion of eyewitness misidentifications and postconviction rulings in the first 250 DNA-exoneration cases appears in my book. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).
2. State v. Cromedy, 727 A.2d 457 (N.J. 1999).
3. I have made the data from these 250 exoneree cases and appendices to the book available online at a resource webpage: http://www.law.virginia.edu/html/librarysite/garrett_innocent.htm.

identifications were cross-racial. As the New Jersey Supreme Court noted, studies have long shown how cross-racial identifications are especially error-prone.

Decades of social science can tell us much more about what went wrong in Cromedy's case. Not only was he convicted based on a cross-racial identification, but as discussed, police used a suggestive showup identification. The eyewitness had earlier seen Cromedy's picture but had been unable to identify him. Yet her confidence had increased by the time of trial, when she was absolutely sure, though she was wrong. I saw exactly the same pattern in other cases of people later cleared by DNA tests. Just as social scientists would have predicted based on upwards of 2,000 studies, as well as meta-analyses and field studies, suggestive lineup procedures can cement eyewitness mistakes. Almost without exception, the eyewitnesses who misidentified innocent people were completely confident at trial, though they were wrong. Most had earlier been uncertain, when first shown the defendant's photo at an array, or seeing the defendant at a lineup. In 57% of the trials studied (92 of 161 cases), witnesses reported they had not been certain at the earlier identifications, or identified other people.

Where did that false confidence come from? In 78% of those trials (125 of the 161 cases involving eyewitnesses in which trial records could be located), there was evidence that police contaminated the identifications. Many of those eyewitnesses were asked to pick out the suspect using suggestive methods long known to increase risks of error. Police made remarks that indicated who should be selected, used unnecessary showups, or used lineups that made the defendant stand out.

NEW JERSEY'S RESPONSE

In response to such exonerations, New Jersey began a project of revamping its criminal-procedure rules. The New Jersey Attorney General's Office issued guidelines to all law-enforcement agencies in the state requiring that detailed procedures be followed when eyewitnesses are asked to identify a suspect.[4] These guidelines were a landmark reform. New Jersey became the first state in the country to adopt double-blind lineups. That simple reform, having an officer administer the lineup who does not know which one is the suspect, is the most important improvement to lineups. Feedback from police, even unintentional can dramatically increase the confidence of an eyewitness, even when the eyewitness is wrong.[5] It is easy to adopt, and smaller departments that cannot spare another administrator can easily make a lineup blind by using the "folder method": simply placing the photos in folders and shuffling them, with a few blanks, so that the administrator cannot see inside the folders that the witness is examining.

New Jersey adopted a second key reform: sequential photo arrays, showing photos one at a time to prevent "comparison shopping." More recent field studies have shown how sequential lineups reduce false identifications of "fillers" in lineups, making them an important improvement for police, whose witnesses lose credibility if they identify fillers.[6] Eyewitnesses were to be instructed that the perpetrator might not appear in the lineup, along with other improvements.

> **[T]he New Jersey Supreme Court adopted a comprehensive social-science framework for evaluating eyewitness-identification evidence.**

The New Jersey Supreme Court did more. In 2006, the court required that police similarly record or document all eyewitness identifications. The court noted, "Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country."[7] In 2007, the court addressed jury instructions. The court adopted a Model Jury Instruction charging all jurors not to rely on "the confidence level" of an eyewitness, at least not "standing alone."[8]

Finally, the court asked that a special master explore something more fundamental: the U.S. Supreme Court's *Manson v. Brathwaite* test[9] for evaluating admissibility of eyewitness identifications.The master held hearings, with the participation of the New Jersey Office of the Public Defender, Attorney General, Association of Criminal Defense Lawyers, and the Innocence Project. He recommended that the court adopt a new test for evaluating eyewitness identification evidence and require pretrial hearings to evaluate all eyewitness identifications.[10]

In the landmark decision of *New Jersey v. Henderson,*[11] the New Jersey Supreme Court adopted a comprehensive social-science framework for evaluating eyewitness-identification evidence. Detailed jury instructions are now required to educate jurors on the factors that affect an eyewitnesses' memory. While the U.S. Supreme Court in *Perry v. New Hampshire* declined to further regulate eyewitness identifications, albeit in a case with marginal facts involving an identification not "arranged" by police, reform is now occurring in the states.[12] Most recently, the Oregon Supreme Court in *Oregon v. Lawson*[13] abandoned the *Manson* test and recommended careful examination of factors informed by social science. As I describe in my book, *Convicting the Innocent,* other states have enacted statutes to improve lineup procedures or have adopted detailed model policies for police departments to follow.

4. Office of the Attorney General, N.J. Department of Law and Public Safety, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001)
5. *See, e.g.* Gary L. Wells & Amy L. Bradfield, "*Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience,* 83 J. APPLIED PSYCHOL. 360, 360 (1998).
6. *See generally* GARY L. WELLS, MANCY K. STEBLAY & JENNIFER E. DYSART, A TEST OF THE SIMULTANEOUS VS. SEQUENTIAL LINEUP METHODS (2011) (American Judicature Society), available at www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf.
7. State v. Delgado, 902 A.2d 888, 896-97 (N.J. 2006).
8. State v. Romero, 922 A.2d 693, 703 (N.J. 2007).
9. 432 U.S. 98, 114 (1977).
10. Report of the Special Master, State of New Jersey v. Henderson, No. A-8 (2010).
11. 27 A.3d 872 (N.J. 2011).
12. 132 S. Ct. 716 (2012).
13. ___ P.3d ___, 2012 WL 5955056 (Ore. 2012).

> **One of the central questions . . . was this: Why was it so hard for innocent people to challenge their flawed convictions?**

New Jersey now provides a leading model for the country, beginning with improving the lineups themselves, but extending to how judges can ensure that more accurate identification evidence is presented in their courtrooms—and it all began with the terrible lesson learned from the case of McKinley Cromedy.

HARMLESS ERROR

One of the central questions that I posed when examining the cases of these innocent people was this: Why was it so hard for innocent people to challenge their flawed convictions? I did not just study trials, but also all of the claims that exonerees asserted postconviction before they obtained the DNA tests that ultimately led to the vacatur of their convictions.

One of the most difficult tasks of a judge is deciding which mistakes matter and which do not. Legendary California Supreme Court Chief Judge Roger Traynor poetically described the plight of the appellate or postconviction judge confronted by thousands and thousands of claims of trial errors:

> Errors are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness.[14]

The cases brought by DNA exonerees, who we now know to have been innocent, provided me with a unique opportunity to examine how judges sort out harmful errors from the harmless. When I reviewed the records in these unusual cases of DNA exonerees, I asked myself why the judges hearing these cases on appeal or habeas review did not correct these errors, long before DNA testing entered the picture.

Of course, asking that the question assumes that these people could somehow show a judge that they were innocent even without getting DNA testing. But at a more fundamental level, the question assumes that after a conviction, higher courts will review the trial record and look for mistakes, to make sure that a miscarriage of justice did not occur. That second assumption is not a very good one. Judge Jerome Frank and Barbara Frank, in their 1957 book about wrongful convictions, called the notion that the court on appeal will correct the mistaken conviction of the innocent the "Upper Court Myth." They pointed out that the appellate court "knows no more than the jury and the trial judge" and has a limited role. It is "obliged to accept the jury's verdict" and must typically accept the testimony of the witnesses as true rather than reconsider the case based on a cold record.[15]

In the decades after they wrote, a criminal-procedure revo-

lution has changed the face of appellate and postconviction litigation, creating a host of new avenues to challenge a conviction, but still, very few cases are ever reversed on appeal and postconviction review—no more than 1% or 2%. While Judge Henry Friendly famously and provocatively asked in a 1970 law review article why innocence is not more relevant to habeas review, innocence remains salient mostly when denying relief by finding error harmless;[16] the U.S. Supreme Court has yet to recognize, except hypothetically, a claim of actual innocence.

The exonerees, who in hindsight we know are actually innocent, did earn high numbers of reversals—a 13% reversal rate—in criminal appeals and postconviction proceedings they brought before they obtained the DNA testing that exonerated them. I then discovered that this 13% reversal rate was not unusual. When I compared them to a matched group of defendants with reported decisions involving similar crimes, years, and states, I discovered that the reversal rate in these exonerees' cases was no different from the reversal rates of other rape and murder trials. The implication is that rape and murder trials may simply produce higher rates of reversible errors. Because courts issued written decisions in about two-thirds of the cases (165 of 250 cases, or 66%), combing through this mass of opinions does not tell us what happened in every case, but it can allow us to make some generalizations about how courts judged innocence.

CHALLENGING TRIAL EVIDENCE

Cromedy's case was unusual in that he actually challenged the eyewitness identification in his case, and his case was extremely unusual in that he was able to earn a reversal even before he obtained DNA testing to prove his innocence. Of the 124 exonerees who were convicted on the basis of an eyewitness identification and obtained a judge's written decision, only 56% challenged the eyewitness identification (70 of 124 cases). Only 7% were successful (5 of 70 cases). Similarly, only 32% of those who had forensic evidence at trial challenged the forensic evidence (36 of 112 cases) and 17% succeeded (6 of 36 cases). Only 36% challenged informant testimony (16 of 45 cases) and 25% succeeded (4 of 16 cases). The largest proportion, 59%, challenged false confessions (13 of 22 cases), but only 8% had any success (just 1 of 13 cases).

I discuss all of these cases in greater detail in my book, and in a law-review article titled *Judging Innocence*.[17] The cases involving forensic evidence are troubling, where invalid forensic analysis and false statistics were apparent just from reading the trial transcripts; still worse, many of the traditional techniques used at the time were invalid and unreliable. Yet judges rarely granted relief, failing to screen unscientific forensic testimony at trial and frequently finding error harmless on appeal or postconviction.

Take the confession cases, for example. One would think that confession evidence would be central at trial and would be a crucial subject for postconviction challenges. However, of the 22 innocent people who were convicted based on false confes-

14. Roger J. Traynor, The Riddle of Harmless Error ix (1969).
15. Jerome Frank & Barbara Frank, Not Guilty 33 (1957).
16. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on*

Criminal Judgments, 38 U. Chi. L. Rev. 142, 159-60 (1970).
17. Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76 (2008).

sions and had written decisions in their cases, only seven raised Fifth Amendment claims that their confessions were involuntary, and three more alleged their confessions were obtained in violation of *Miranda*. None of these claims was successful.

The exception among the confession cases—Ronald Williamson's case—instead involved an ineffective-assistance-of-counsel claim, and failures by his lawyer to challenge the confession, but also a range of failures by his lawyer to challenge other important evidence in the case. Indeed, before trial his lawyer had begged the judge to let him withdraw from the case. "I can't represent him Judge; I just can't do it," his lawyer had insisted. "I'm too damned old for it, Judge. I don't want anything to do with him, not under any circumstances."

More representative of the rulings in cases involving false confessions, the Illinois Supreme Court stated that Alejandro Hernandez "did not present an argument which convinces us that he learned the details of the crime contained in his 'vision' from law enforcement officers."[18] A series of other courts similarly emphasized how detailed the confessions were and how overwhelming the evidence of guilt was. Perhaps most remarkable was Nathaniel Hatchett's case, in which the judge convicted him at a bench trial—despite the fact that DNA tests even at the time excluded him—in the case of a victim raped by a single person. Despite the DNA exclusion, which the judge could not explain, the judge emphasized, "[I]n this case there is an abundance of corroboration for the statements made by Mr. Hatchett to the police after his arrest," which the judge found "to be of overwhelming importance in determining the outcome of the trial."[19] His appeal was denied by a court similarly emphasizing how "the prosecution presented overwhelming evidence" and how the detectives had "testified that defendant's statement included information that only the perpetrator of the crimes would know," including facts "fully corroborative" of the victim's account.[20]

Now we know that these false confessions included details that could only have come from law enforcement. All but two of the 40 false confessions that I examined included such details. They were contaminated, but judges did not credit those allegations, failing to believe that police would feed facts to a compliant suspect. Absent any complete recording of the entire interrogations, there was no proof of who said what. Recantations by these innocent people were disbelieved. In response, more and more states and police departments are requiring videotaping of complete interrogations. Whether judges will do more to examine the reliability of confession statements, however, is another question. Judges should insist on a completely recorded and documented interrogation and examine "fit" and whether, although voluntary, the suspect could in fact volunteer corroborated information about the crime. Otherwise, innocent people may be simply fed the facts to make their words fit the crime. Contamination of a confession can happen unintentionally, even, during complex interrogations using psychological techniques. Unless interroga-

tions are recorded and judges carefully screen confessions for reliability, seemingly "overwhelming" evidence may convict the innocent.

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JUDGING GUILT

Of 165 exonerees who had written decisions on appeal or postconviction, harmless error-type rulings were pervasive. In 62% of the cases, judges commented on guilt or found error harmless. In 30% of the cases, judges found error harmless. In 10% of the cases, judges called evidence of guilt "overwhelming." To be sure, some errors truly are harmless. However, what I describe in these DNA-exoneree cases is a system in which they had little incentive to claim innocence: all who brought innocence claims before obtaining DNA testing lost. They had few incentives to challenge the reliability of the evidence at their trials: despite clear problems with eyewitness procedures used, outright invalid forensics (another subject of my book, which I do not discuss here for lack of space), and the problems described with the confessions, many did not challenge central evidence at trial, and few had any success.

MISSING EVIDENCE

It has come to light in a host of these exonerees' cases that evidence that went missing or that was concealed by law enforcement could have supported their claims of innocence at trial. Violations of *Brady v. Maryland* may be far more common than we would like to think: I came across dozens of cases in which exculpatory forensics had been uncovered only after the exoneration, or the fact that eyewitnesses were hypnotized, or deals with informants, and other crucial evidence of innocence.

One high-profile case highlights the importance of ensuring careful preservation and disclosure of evidence. The U.S. Supreme Court did not hear most of these DNA exonerees' appeals or habeas petitions claims, but it did rule on 38 certiorari petitions filed by these innocent people. It summarily denied each of these petitions without giving reasons, except Larry Youngblood's. In Youngblood's case, the Court heard oral arguments and issued a written opinion explaining why it rejected his claim that he should receive a new trial because law enforcement failed to properly preserve biological evidence from the crime scene.[21] Twelve years later, DNA technology had improved enough that the very evidence that had been degraded through law enforcement's negligence was now testable. The DNA tests exonerated Youngblood and matched another man. The State of Arizona spent more than $109,000 to keep him behind bars for six and a half years, while the true perpetrator remained free. The DNA test that freed him cost $32.[22]

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18. People v. Cruz, 521 N.E.2d 18, 25 (Ill.1988).
19. *See* discussion in Brandon L. Garrett, *The Substantive of False Confessions*, 62 STAN. L. REV. 1051 (2010).
20. People v. Hatchett, No. 211131, 2000 WL 33419396, at *1 (Mich.

Ct. App. May 19, 2000).
21. Arizona v. Youngblood, 488 U.S. 51, 57–59 (1988).
22. Gabrielle Fimbres, *Lab Work a Lot Cheaper Than Lockup*, TUCSON (ARIZ.) CITIZEN, August 23, 2000.

BETTER JUDGING INNOCENCE

The truth is humbling. These DNA exonerees' cases looked strong at the time. Many of us would have convicted these defendants had we been the jurors. Yet judges are uniquely positioned to prevent evidence from contamination that may make the weak appear strong and allowing fiction to replace truth. Social science research may increasingly help to identify ways to improve the accuracy of evidence at criminal trials.[23] Rulings like those from the New Jersey Supreme Court and the Oregon Supreme Court, and state legislation and efforts at the local level to improve the accuracy of evidence collected early on in criminal investigations, may prevent the tragic miscarriage of justice in our courtrooms.

DNA testing cannot be used in the vast majority of criminal cases. These 250 exonerations (now there have been more than 300 such DNA exonerations) are just the tip of a larger iceberg. However, we do not know which seemingly innocuous routine cases today will be proven false tomorrow. The DNA exonerees' cases provide a set of cautionary tales: we need to more rigorously screen the evidence and adopt more accurate and better-documented investigative procedures. If evidence is contaminated very early in an investigation, it may be impossible to undo the damage at trial or postconviction. Unless judges take on a more active role as gatekeepers to insist on improved practices, however, the same contaminated confessions, suggestive eyewitness misidentifications, flawed forensics, and false informant testimony will continue to cause wrongful convictions.

Upon vacating convictions, trial judges have often offered the newly exonerated an apology. In James Waller's case, the judge said: "On behalf of any and all public officials at that time, I want to apologize."[24] Nobody can give back to these people the years they lost. But what we can do is work hard to make sure that it does not happen again.

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23. *See, e.g.* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 16 (2012) (providing an overview of recommendations to rely on more "accurate and transparent evidence" permitting "the legal actors' trust in the evidence and limit their ability to distort and hide it" and "narrowing the opportunities for both unjust prosecutions and frivolous defenses").

24. Ralph Blumenthal, *A 12th Dallas Convict Is Exonerated by DNA,* N.Y. TIMES, Jan. 18, 2007, at A14.