2015

Wrongful Confictions and Due Process Violations

Cheryl Page

Wrongful Convictions and Due Process Violations

Cheryl (Shelly) Taylor George, Duncan School of Law, Lincoln Memorial University

Abstract

This analytical essay looks at the myriad of ways innocent people are wrongfully convicted and how the criminal justice system fails to truly reach a fair and equitable result. The article looks at how at the initial stages of a criminal proceeding, a defendant can be prejudiced to the point of sufficient harm to his chances at being given a fair and impartial judicial proceeding. This article examines how fatal mistakes can be made and reveals that there can be flaws in the science of DNA testing, including fraud, criminologist bias, improper laboratory procedures, and human error. This article seeks to point out major factors that can contribute to an innocent individual being erroneously convicted of a crime and how that happens more times than one may think.

There is no more serious error or representation of the flaws of the American criminal justice system than when an innocent man, after spending years on death row, away from his family, friends, and the life that he knows, makes that long walk to the death chambers, says his final goodbyes, is strapped to a bed, and is lethally injected until his heart stops beating. Not only has the system, which is designed to keep criminals away from society, failed by taking an innocent man's life, but it has allowed a guilty man to stay on the streets, dwelling among unsuspecting citizens.

The Fifth and Fourteenth Amendments to the U.S. Constitution clearly establish that everyone is entitled to the due process of the law; this concept precedes the creation of our institutions (*Powell v. Alabama*, 1932). Due process "embodies one of the broadest and most far reaching guarantees of personal and property rights. It is necessary for the enjoyment of life, liberty and property" (*Powell v. Alabama*, 1932). While the courts have not set out a standard definition of due process in a criminal proceeding, it generally consists of the right to a fair trial, conducted in a competent manner; right to be present at trial; right to an impartial jury; and the right to be heard in one's own defense. In *Powell*, the U.S. Supreme Court illustrated that a defendant in a criminal case is afforded due process when there is a defined law, a competent court, accusation in due form, notice of the charges against the defendant and the right to answer those charges, a trial conducted according to established procedure, and the assurance that the defendant will be discharged if found not guilty. Opponents of the death penalty argue that the process in which a defendant is tried violates this fundamental right that the framers of the Constitution gave the citizens of our country. In light of recent exonerations of many men and women wrongfully convicted, that argument carries weight.

Many jurisdictions are working toward reducing wrongful convictions—especially in capital murder cases. However, the U.S. Supreme Court decision in *Kansas v. Marsh* (2006), which upheld Kansas's death penalty

law, may prove to be more of a hurdle and a hindrance than an improvement in decreasing wrongful convictions: "Kansas law provides that if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty shall be imposed" ("Sentencing," *Kansas Statutes Annotated*, 1995; repealed 2010). The Kansas Supreme Court found that the law violated the Eighth and Fourteenth Amendments of the U.S. Constitution because in the event of equipoise, the mitigating factors weigh equally with the aggravating circumstances; in this event, the death penalty must be imposed. *Marsh* argued that the statute was unconstitutional because it established a presumption of death. However, the U.S. Supreme Court overruled the Kansas decision and upheld the constitutionality of the statute. The Court reasoned that the statute actually works in the defendant's favor because it requires "the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate; it places no additional evidentiary burden on the capital defendant" (*Kansas v. Marsh*, 2006).

Justice Scalia, in a concurring opinion, noted that "reversal of an erroneous conviction on appeal or on *habeas*, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success" (*Kansas v. Marsh*, 2006). Even so, how can a system be just if the innocent man has to fight for his life? If one is innocent until proven guilty beyond a reasonable doubt, how are innocent people being convicted?

Scalia praised the criminal justice system for functioning correctly when an innocent person is pardoned through appeal or clemency. While it is favorable that an innocent man is released, the detriment a wrongful conviction can have on a man's life and liberty, in addition to the stigma that is attached to convicted criminals, is irreversible. Anyone can agree with Scalia that justice is served when an innocent man is exonerated from a crime that he did not commit. However, allowing an innocent man to remain incarcerated for years does not prove that the criminal justice system functions correctly. Our system provides that any man that is accused of a crime is innocent until he is found guilty by a jury of his peers beyond a reasonable doubt. It follows logically, therefore, that when an innocent man is convicted, there must be error somewhere in the judicial process when an innocent man is convicted.

Unfortunately, it is a sad fact that due process violations are infiltrating the system at every stage of the judicial process. To highlight some of these violations, this article will examine real-life cases in which an innocent man was convicted and, subsequently, his conviction was questioned.

The Arrest and Investigation: Police and Prosecutorial Misconduct in the Early Stages of a Case

A fundamental principle in criminal procedure is that you cannot make an arrest without probable cause (*Book v. Ohio*, 1964). Considering the number of convictions that are being overturned due to actual innocence, a fair question to ask is "How was an innocent man arrested in the first place?" The case of Ruben Cantu highlights how police misconduct may have led to a wrongful arrest, and even worse, to an innocent man's execution.

Ruben Montoya Cantu: Executed August 24, 1993

There is more than one reason why Ruben Cantu should be alive today. When two young men broke into a house and shot at Pedro Gomez and Juan Moreno, killing Pedro and severely injuring Juan, Ruben was just 17 years old. He was also 17 at the time he was arrested for capital murder, and he was 26 when he was executed for a crime that the surviving victim, the co-defendant, and other

people from his community say that he never committed. Cantu claimed his innocence up until his final moments of his life, just after midnight August 24, 1993.

There was talk at Cantu's high school that he was the shooter. Based on this hearsay, officers took photos of Juan Moreno, the surviving victim. As he lay in bed recovering from being shot over 15 times, Officer Bill Ewell showed Moreno pictures of Cantu and other Mexican men, but Moreno insisted that none of the photos matched the robber. The officers tried several other times to show photos of Cantu, but every time Moreno insisted it was not Cantu who did the shooting.

The case appeared to be closed until four months later. Cantu was at a bar and was involved in a physical altercation with an off-duty officer. After the officer flashed his gun, Cantu fired his gun at the officer. The officer was injured, but all charges against Cantu were dismissed because he was acting in self-defense. This act infuriated other police officers as well as Officer Ewell. This incident prompted Ewell to reopen the Gomez murder case. Ewell went back to Juan Moreno with photographs of Cantu, but this time Moreno was told that law enforcement had solid evidence that Cantu was the murderer and that they needed him to testify in court. Moreno eventually did testify, and Cantu was convicted on the basis of the in-court identification by Moreno. Moreno was the only testifying witness against Cantu.

It also must be noted that, at the time, Moreno was a 15-year-old undocumented person living illegally in the United States, and he spoke no English. He must have been terrified at the police coming to his home multiple times attempting to get him to identify a person as a shooter when he initially stood by his statement that the shooter was not Ruben Cantu. The record also reflected that Cantu had what appeared to be a solid alibi: he was in a different city on the day of the shooting. He also had no prior convictions and had not had any problems with the law.

Ruben Cantu's case is not the only example of how the police can manipulate an investigation: "Innocent defendants are sometimes pressured into confessing to crimes they did not commit, especially when the prospect of a plea bargain is presented to them" (Blackerby, 2003, p. 1190).

The Hearing: The Right to an Impartial Proceeding

It is a right that anyone accused of a crime be heard by an impartial, competent judiciary, and it is essential that the appearance of justice be present throughout the entire judicial process (*Bradshaw v. McCotter*, 1986, p. 1329). But recent studies are proving that this right is more of a fiction than fact. While the circumstances of each capital case are different, so are the methods being used to convict. Thus, there is no single factor that can be specifically identified that has led to erroneous convictions. Blackerby (2003) lists some of the factors that can be specified as variables in these wrongful convictions: (1) faulty forensics (also known as "junk science"); (2) prosecutorial, judicial, and police misconduct; (3) racial prejudice; and (4) ineffective assistance of counsel (predominantly harmful to impoverished defendants who take court-appointed counsel) (p. 1186). Blackerby also cites a study examining the most common errors in capital cases between 1973 and 1995 and found that the rate of prejudicial error was 68% (p. 1186). However, the Supreme Court held in *Bordenkircher v. Hays* (1978) that a coerced plea bargain does not violate due process (p. 365).

Evidence Gathering

A 1996 Department of Justice study reported that 28 persons had been released from prison as a result of post-trial DNA testing (p. 2). The state's expert witness in four of these cases

was Fred Zain. Even though Zain had been discredited by the West Virginia Supreme Court and was tried on charges of theft of services based upon his routine perjurious testimony, Texas has continued to fight and save convictions supported by Zain's testimony that has been shown to be unreliable and fallacious.

Another known case of an expert witness lying on the stand is forensic scientist Joyce Gilchrist in Oklahoma. During her 21-year career at the Oklahoma City Police Department, she helped the prosecution send 23 defendants to death row (Kofman, 2001). All of these cases were re-examined once it was revealed that her testimony was flawed or false. Tragically, 11 of the men had already been executed.

Recently, generally accepted methods of forensic testing have come under close examination. Unfortunately, when these types of methods have become so prevalent in the courtroom, how does one effectively exclude them at this point? Moreover, what happens when unsubstantiated scientific theory is allowed into evidence at trial?

In 2004, Lavelle Davis was sentenced to 45 years after Stephen McKasson explained to jurors that lip prints left at the crime scene on a piece of duct tape linked him to the crime. As one juror put it, "the lip print . . . 'proved that he had actually committed the crime'" (McRoberts, Mills, & Possley, 2004). The only problem: the assertion about the lip print was not true. These are just some examples of how easily forensic science's false impression of infallibility has the power to distort the system of true justice.

The legal system, in its pursuit of justice, cannot count on local forensic labs to provide competent forensic testing or accept DNA, ballistics, fingerprint, odontology, bullet lead analysis, or any other "science" without closely examining the scientific methods involved in obtaining the evidence.

We live in an age where the media undeniably can have a profound influence on the general public and jurors. Television shows such as *CSI* and *Law & Order*, which are filled with every new and old method of forensic testing, have the general public convinced that these methods are infallible.

DNA Testing

DNA testing can be an essential link between a crime and convicting the right person; however, a defendant's ability to access DNA testing is a procedural challenge to proving his innocence. While proponents of DNA testing have done an excellent job making it appear to be reliable, the evidence has been under close scrutiny in the legal and scientific communities (Faigman, Kaye, Saks, & Sanders, 2002, pp. 208-209).

In cases in which innocent men were exonerated by post-conviction DNA tests, misleading forensic science came in second place behind mistaken eyewitness testimony as a cause of false conviction (Nethercott, 2003; Scheck, Neufield, & Dwyer, 2000). Even if a DNA method of testing is generally accepted, there are other factors that must be called into question. These depend on the specific circumstances in each individual case. Flaws in the science of DNA testing are not the only source of improper conclusions; fraud, criminologist bias, improper lab procedures, and human error exacerbate the problem.

Criminologist Bias

While DNA analysis relies heavily on computer equipment, interpreting the results is occasionally determined by an examiner's subjective judgment. One must look to psychology to understand how bias plays a role in scientific testing: "An elementary principle of modern psychology is that the desires and expectations people possess influence their perceptions and interpretations of what they observe" (Risinger, Saks, Thompson, &

Rosenthal, 2002, p. 6). Since this holds true when the observer has a mild expectation, it is understandable that when someone has a strong desire to see a particular result, there is an increased likelihood that it will be seen (p. 6).

In criminal cases, this poses a serious problem when DNA is interpreted by laboratory workers who have an underlying desire to play an integral part in crime solving: "When faced with an ambiguous situation, where the call could go either way, crime lab analysis frequently slant their interpretations in ways that support prosecution theories" (Thompson, Ford, Doom, Raymer, & Krane, 2003). A simple examination of a crime lab's notes has revealed that analysts are often aware of more facts than necessary to make a scientific judgment about evidence. Even more dangerous, they may be aware of which results will aid the prosecution's case and those that will hurt it (Thompson et al., 2003). One analyst's notes stated, "Suspect known Crip gang member keeps 'skating' on charges—never serves time. This robbery he gets hit in head with bar stool—left blood trail. [Detective] Miller wants to connect this guy to scene w/DNA" (Thompson et al., 2003).

Directors of crime labs in Cleveland, Houston and Montana have all been accused of giving misleading testimony which led to false convictions (Nethercott, 2003). An astounding number of these cases have come to light and cast serious doubt on DNA testing, despite its benefits.

Improper Lab Procedures

In 2003, the Houston Police Department was forced to close the DNA and serology section of its crime labs after television journalists exposed serious flaws in its procedures: "Two men who were falsely incriminated by botched lab work have been released after subsequent DNA testing proved their innocence" (Thompson & Nethercott, 2004). Unfortunately, what happened in Houston is not an isolated incident. California, Illinois, Minnesota, Nevada, North Carolina, Pennsylvania, Virginia, and Washington State also have documented cases of error. Generally, these problems are due to cross-contamination, mislabeling, and human mistakes (Thompson & Nethercott, 2004).

In addition to their bias, criminologists far too often form conclusions about evidence based on beliefs and assertions they derive from training, knowledge, and experience but have not been adequately tested to be supported by concrete scientific data (Thompson & Nethercott, 2004). Some criminologist training has come from the directors of their labs; the same directors who have been found guilty of misrepresenting testing in favor of the prosecution.

Fingerprint Analysis

Fingerprint analysis has been finding its way into criminal trials since 1910 when the first man was convicted by matching his fingerprints to prints left at the scene. Examiners proffer that the craft is flawless, even denying the possibility that a trained examiner who follows procedure could reach a wrong conclusion (Thompson & Cole, 2005). The problem is that fingerprint analysis makes sense because there is the belief that no two fingerprints are alike; therefore, the fingerprint evidence is inherently correct: "The real question is not whether all fingerprints are different, but, rather, how accurate are fingerprint examiners at matching the small, fragmentary prints you find at crime scenes" (Humes, 2004). There have been false fingerprint identifications, but professionals in the field attribute it to incompetent examiners, thus, allowing the method to remain perfect (Thompson & Cole, 2005).

The debate behind fingerprinting is led by the question "What is the science?" Simon Cole, a Social Science professor at the University of California, Irvine, answers the question by explaining "No one knows because there has

never been a scientific study to find out. They have never allowed it" (Humes, 2004). Many leading fingerprint examiners have agreed with Cole's response. The reality is there is no concrete standard used to determine what portion of a print must be recovered before it is suitable for comparison. Even more troubling is that there is no significant research available to say whether or not people share fingerprint patterns: "In 1995, one of the only independent proficiency tests of fingerprint examiners in U.S. crime labs found that nearly a quarter reported false positives" (McRoberts et al., 2004).

The Case of Brandon Mayfield

In 2004, federal prosecutors claimed they were 100% sure of the positive identification of fingerprints lifted from a bag linking a Portland, Oregon, attorney to the Madrid Tower bombing case (Wax & Schatz, 2004, p. 6). A few weeks later, the FBI was embarrassed to admit that it was wrong due to an erroneous fingerprint comparison (p. 6). If investigators from Spain had not linked the fingerprints to a known terrorist, Brandon Mayfield, the Oregon attorney who had never even been to Spain, could still be locked up in a federal correctional facility. This incident disproved the theory that errors result from examiner incompetence because three of the most highly experienced examiners working for the FBI all came to the same erroneous conclusion (Thompson & Cole, 2005).

Several theories came out of the Mayfield case. One in particular raised the issue of bias. Mayfield was an immediate suspect because he had converted to Islam, had an Egyptian wife, had military training, and had represented a member of a group of Muslims suspected of terrorist conspiracy (Thompson & Cole, 2005). In addition to this possible instance of bias, in 1997, an investigation conducted on the FBI proved that "FBI examiners had relied on collateral evidence when making key 'scientific' determinations" (Thompson & Cole, 2005).

In light of the turnover of the Mayfield case, the FBI reviewed the case and issued a report. Part of the report blames "confirmation bias," which is when one perceives what one expects or desires (Thompson & Cole, 2005). The report also concluded that because the initial examiner was highly respected, the two subsequent examiners tended to agree without a thoroughly complete and accurate examination. As with DNA testing, human bias can negatively impact the outcome.

Forensic Odontology

Bite-Mark Analysis

Bite-mark analysis is an extension of odontology which entered forensics in 1970. Usually, dental experts are used to identify the remains of unknown corpses using dental records. However, evaluating bite marks frequently occurs in violent cases in which the alleged perpetrator leaves bite marks on his victim. Judges allow forensic dentists to testify regarding bite marks despite "having no accepted way to measure their rate of error or the benefit of peer review" (McRoberts et al., 2004). Bite-mark analysis also lacks reviewed research and scientific validation, which are essential elements of distinguishing science from guesswork (McRoberts & Mills, 2004).

During the trial of Ted Bundy, forensic dental experts testified for the prosecutors that bite marks left on one victim's body was a match to Bundy's teeth. Twenty-five years after the trial, the prosecutor's expert confessed "that the Bundy trial left a problematic legacy. It catapulted bite-mark evidence to the point where [many] were saying, 'A bite mark is as good as a fingerprint'" (McRoberts & Mills, 2004). Now, he claims that this belief is wrong and warns against using it (McRoberts & Mills, 2004).

Bite-mark analysis is truly an opinion, with no supporting mathematical or scientific research supporting a human's observation.

While a bite mark and a wound can be similar, one should never assume that they are identical.

Ray Krone: Spent Over 10 Years in Prison for a Murder He Did Not Commit

Ray Krone was charged with murder, kidnapping, and sexual assault in 1991, but his conviction was overturned, and he was released 10 years later (Hansen, 2005, p. 48). Kim Ancona's naked body was found laid across the men's bathroom of the bar where she worked. She had been stabbed 11 times. There were few clues to help investigators find the attacker. There was no semen, and there were no fingerprints; however, the police did find bite marks on the victim's neck and breast.

Krone became a suspect because he was a regular customer at the bar and a friend of Kim's. After taking a styrofoam impression of Krone's teeth, he was charged with murder. Krone, who was a 35-year-old mailman, had no prior convictions. During trial, an expert testified that the impression from Krone's teeth was a match to the bite marks left on the victim's body. Despite maintaining his innocence, Krone was convicted and sentenced to death. Three years later, his conviction was overturned; and he was granted a new trial based on a procedural technicality. But, once again, Krone was convicted and sentenced to life in prison due to the bite-mark expert's testimony.

Luckily, traces of saliva were recovered from the victim's body. In 2002, a DNA exam was finally conducted, and Krone's cry of innocence was finally heard (Hansen, 2005, p. 48).

Gunshot Residue Testing

The moment a gun is fired, particles of gunpowder leave the gun. The premise that gunshot residue (hereinafter GSR) testing is based on is that the powder blows onto the shooter's hands and body (Nethercott & Thompson, 2005). Although this may be true, recent studies have revealed that the powder does not stay confined to the shooter's body. Forensic scientists have been testifying that evidence of gunpowder is conclusive to establish that the person was the shooter.

Today, many scientists have done a significant amount of research to disprove this claim. Peter DeForest of John Jay College of Criminal Justice in New York argues, "I don't think [gunshot residue testing is] a very valuable technique to begin with. It's great chemistry. It's great microscopy. The question is, how did the particle get there?" (Mejia, 2005). The answer is, as modern research has proven, GSR can be transferred through a number of means.

At the Institute of Criminalistics in Prague, Czech Republic, scientists found that a nonshooter may come into contact with GSR without going near a firearm (Mejia, 2005). The scientists fired a gun in a closed room and then collected particles two meters from the place of the shooting: "They detected unique particles up to eight minutes after a shot was fired, suggesting that someone [who] entered the scene after a shooting could have more particles on them than a shooter who runs away immediately" (Mejia, 2005).

Several police departments throughout the country have conducted their own internal investigations on GSR; all of them have seen similar, disturbing results. In 2000, the Los Angeles County Coroner's Department revealed a suspect could become contaminated with GSR by riding in the back of a police car: "Of 50 samples from the back seats of patrol cars, they found 45 contained particles consistent with GSR and four had 'highly specific' GSR particles" (Mejia, 2005).

In 2001, after conducting an internal investigation, the Baltimore City Police Department found high levels of GSR contamination in areas of the police station where suspects were processed for GSR collection. Samples collected from the furniture where suspects

were held, surfaces that suspects would touch, and even the air in the process area were positive for GSR particles (Nethercott & Thompson, 2005).

In addition to these findings at the police station, materials found in the GSR can also be found in the environment. Fireworks and industrial tools use materials with compositions similar to those found in GSR particles. Car mechanics are most likely to be falsely identified as having GSR on their bodies because some brake linings contain heavy metals that may be confused and misidentified as GSR particles (Mejia, 2005).

A main concern is not with how reliable GSR testing can be, but with the scientific methods of testing and procedure: "As currently practiced . . . there are no definitive standards for distinguishing gunshot residue from other substances" (Nethercott & Thompson, 2005). Up until 2000, most labs found positive GSR samples if they detected particles of barium and antimony. But, studies revealed that these particles are found in substances in nature that are completely unrelated to firearms (Nethercott & Thompson, 2005). In 2002, scientists "identified a substance as 'unique GSR' only if they found a combination of barium, antimony and lead fused together in a single particle" (Nethercott & Thompson, 2005). But, yet again, that theory was doubted after a demonstration that these particles could be found in brake linings.

If examiners who take the samples from the suspects would also take control samples from the area where the suspect was exposed, this could help detect GSR contamination: "If GSR can be detected all over the environment that the suspect has been exposed to, then it would be foolish to claim that finding GSR on the suspect is a sure sign that he fired the gun" (Nethercott & Thompson, 2005). Most scientists never bother taking a sample from any other location than the suspect's hands. Janine Arvizu, an independent lab auditor from New Mexico, conducted a reviews of the Baltimore City Police Department (BCPD). She concluded that "The BCPD lab routinely reported gunshot residue collected from a subject's hands most probably arose from proximity to a discharging firearm, despite the fact that comparable levels of gunshot residue were detected in the laboratory's contamination studies" (Mejia, 2005). Not only was the BCPD using improper procedures, "the department's sole GSR analyst was giving deceptive and misleading testimony in criminal trials" (Nethercott & Thompson, 2005).

A combination of factors, such as insufficient scientific proof, inconsistent lab procedures, and analysts willing to make unsupported conclusions, makes GSR testing an unreliable source of forensic science.

Ineffective Assistance of Counsel

> *My uneasiness about the verdict in the Amrine case has to do with the fact that the defense attorney gave us very little to work with. . . . I got the impression that when he was presenting the defense case, he was meeting witnesses for the very first time.*
> – Larry Hildebrand, death penalty juror
> (the defendant was later exonerated)

The Sixth Amendment provides that anyone accused of a crime shall enjoy the right "to have the assistance of counsel for his defense." Although this is a right clearly established in the U.S. Constitution, most states have adopted the concept into their states' constitutions, even though the Supreme Court has held that, by way of the Fourteenth Amendment, due process rights, including the Sixth Amendment right to counsel, applies to states as well.

Justice Black in *Gideon v. Wainwright* stated,

> *The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state*

and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Murder trials can be very expensive and time consuming, and they require a great deal of experience. Unfortunately, many people accused of murder are indigent and cannot afford the best legal representation. Gerry Spence, one of the most well-known trial attorneys in America, wrote in his book, *The Smoking Gun*, about a woman and her son accused of murder in Lincoln County, Oregon:

If a trial lawyer won't take on a murder case because he doesn't want to get his hands dirty or because there isn't any money in it, the system fails. It not only fails the accused, it fails the rest of us. Some day when some fair-haired prosecutor with the governor's chair glowing in his mind's eye decides to charge one of us or one of our kids with a crime – well, that hated, scorned, and damned of the legal profession, the trial lawyer, better be around to see that we get a fair trial, and that if we're innocent, we walk out of the courtroom free. (p. 3)

It appears that many trial lawyers are keeping their hands clean, while men and women are faced with proceedings that do not meet constitutional guarantees.

The Scottsboro Boys

In 1932, seven young African-American males were sentenced to death for the rape of two young, white females. At that time, the sentence of rape in Alabama could range from 10 years' confinement to death. The young, illiterate boys were arraigned one week after the alleged rapes took place, and all pled not guilty. The boys were tried in three separate trials, and all three were completed in one single day. One of the rape victims later, while testifying for the defense in open court, stated that she had lied about the rapes to get herself out of trouble. The Alabama Supreme Court upheld the conviction; and only the Chief Justice, in a vigorous dissent, found that the trials were unfair and that the boys had been denied due process of law and equal protection rights (*Powell v. Alabama*, 1932, p. 50).

The Supreme Court took the case on appeal and only looked at the second claim raised: that the young boys "were denied the right to counsel with the accustomed incidents of consultation and opportunity of preparation for trial" (*Powell v. Alabama*, 1932, p. 50). Although the court had appointed counsel for the defendants during arraignment, none was appointed afterwards. On the day the trial was to begin, appearing without attorneys, the boys were never asked if they had counsel or whether they had been given the opportunity to contact relatives who could have assisted them in obtaining counsel. The trial began six days after the indictment: "No one answered for the defendants or appeared to represent or defend them" (*Powell v. Alabama*, 1932, p. 53).

The morning of the trial, one attorney who was just there to observe said that he would represent them if no one else would. The trial judge allowed him to proceed as the defense attorney. As the Supreme Court rightfully found, "During perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself" (*Powell v. Alabama*, 1932, p. 57). As noted by the Chief Justice of Alabama's dissent, "the appearance was rather *pro forma* than zealous and active" (p. 58).

The Supreme Court held that

> *[I]n a capital case in which the defendant is unable to employ counsel and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.* (*Powell v. Alabama*, 1932, p. 71)

Although the Supreme Court did not give a definite example of what qualifies as adequate representation, it clearly established that counsel is essential during the investigatory phase of trial in order for an accused to sufficiently present his defense. The argument, thus, can be made that, in order to be effective, counsel must do an investigation before going to trial.

However, we are seeing a disheartening phenomenon in capital murder cases. Defendants are being sentenced not on the merits of their cases but on the effectiveness of their counsel: "A member of the Georgia Board of Pardons and Paroles has said that if the files of 100 cases punished by death and 100 punished by life were shuffled, it would be impossible to sort them out by sentence based upon information in the files about the crime and the offender" (Bright, 1994, p. 1840).

There are countless examples of murder cases that are factually similar but with opposite sentencing results. This means that capital murder defendants are not being sentenced based on the merits of the case or severity of the crime but, rather, on whether their *trial* counsel was effective in presenting their defense. There is a right to counsel during hearings, but there is no right to counsel in post-conviction proceedings. The consequence of poor legal representation in capital murder cases is that a large population of death row inmates (as opposed to inmates serving life or less than life sentences) is made up of people who are not distinguished by their crime but by their lawyer's ineffectiveness.

In 1984, the Supreme Court in *Strickland v. Washington* held that the proper standard to determine whether counsel was effective was whether he was reasonably effective: "The benchmark for judging whether any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" (p. 686). To establish ineffectiveness, a defendant must show, first, that the counsel's performance was deficient, and second, that the errors were so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment (p. 687). Unfortunately, case law reveals that the courts have set an extremely low standard for defense counsel to meet.

According to Bright (1994),

> *Death sentences have been imposed in cases in which defense lawyers had not even read the state's death penalty statute or did not know that a capital trial is bifurcated into separate determinations of guilt and punishment.*[1] *State trial judges and prosecutors—who have taken oaths to uphold the law,*[2] *including the Sixth Amendment—have allowed capital trials to proceed and death sentences to be imposed even when defense counsel fought among themselves or presented conflicting defenses for the same client; referred to the clients by a racial slur*[3]*; or cross-examined a witness whose direct testimony counsel missed because he was parking his car, slept through portions of the trial,*[4] *or was intoxicated during trial.*[5] *Appellate courts often review and decide capital cases on the basis of appellate briefs that would be rejected in a first-year legal writing course in law school.* (pp. 1842-1843)

It has been over 70 years since the Supreme Court found in *Powell* that an attorney is

ineffective if he fails to conduct any investigation but merely accompanies the accused to court. It is an abomination that our legal profession renders our colleagues effective when they have done nothing more than sit next to their client in court. Representation in many trials today is no better than that provided to the boys of Scottsboro. The only difference is that today we are holding these members of the Bar to be effective counsel.

The financial costs of defending a capital case are extremely high. Paying for court-appointed counsel is a burden that the State bears, thus, naturally, it tries to keep costs to a minimum. However, we must also keep in mind that a prosecutor's role is not to see that a conviction is made, but to see that justice is served. Justice is not served when a defendant whose life is at stake is not afforded quality representation:

> *So long as juries and judges are equally deprived of critical information and the Bill of Rights is ignored in the most emotionally and politically charged cases due to deficient legal representation, the courts should not be authorized to impose the extreme and irrevocable penalty of death. Otherwise, the death penalty will continue to be imposed, not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.* (Bright, 1994, p. 1883)

Conclusion

> *The enemy was the endemic meanness of the system. Every day the state hauls in the dregs of society. These miscreants fill the courtrooms with the sounds of their contrived excuses and their tinny pleas for mercy. We despise them for their injuries and pain they impose upon us. The accused are mean. Murder is mean. And meanness is contagious. The system has caught it.* (Spence, 2003, p. 27)

If our society is to continue to execute criminals, we must ensure that every person accused of a capital crime is afforded the best legal representation and a fair, impartial trial. At a minimum, this is what the constitutional right to due process provides. Taking away someone's life as a penalty for committing a crime is the most serious and final punishment. Unlike other sentences, once the execution is completed, it cannot be undone. Therefore, regardless of our moral and political beliefs, the death penalty is not for those who are innocent. It is the role of the criminal process to separate the innocent from the guilty. Unfortunately, the system has not been perfect, or even close to it.

I disagree with Justice Scalia's argument that "reversal of an erroneous conviction on appeal or on *habeas*, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success" (*Kansas v. Marsh*, 2006). Of the hundreds of guilty men who are rightfully convicted, if only one innocent man had to spend years on death row until his innocence was proven, there would be a plausible argument that our system was fair and constitutional. However, the number of men and women who have been released from death row due to post-conviction innocence is devastating. *Habeas* relief should not be the stage of a case where innocence is determined; the trial should. Proving innocence through appeal should be the exception, not the rule.

When an innocent man is convicted, two severe injustices occur: (1) an innocent man loses a basic human right that is guaranteed to him by our Constitution: life and liberty; and (2) a guilty man is free to dwell in society, living in our communities and being capable of committing more heinous crimes.

My concern is not that the structure of our system is inadequate but that there are so many hurdles placed in the way of the accused on his quest to prove his innocence. Hurdles such as ineffective assistance of counsel, judicial bias, prosecutorial misconduct, and inadequate forensic evidence being used against

him. If we are going to take away a man's life by imposing such a final punishment as the death penalty, at the very least we must do so firmly adhering to the guidelines of our Constitution.

Endnotes

[1] "An Alabama defense lawyer asked for time between the guilt and penalty phases so that he could read the state's death penalty statute." (*State v. Smith*, 1990).

[2] "A judge in a Florida case took a defense lawyer in chambers during the penalty phase to explain what it was about. The lawyer responded: 'I'm at a total loss. I really don't know what to do in this type of proceeding. If I had been through one, I would, but I've never handled one except this time.'" (*Douglas v. Wainwright*, 1983)

[3] Defendant was called a "little nigger boy" by his own counsel during closing arguments (*Goodwin v. Balkcom*, 1982).

[4] "A judge in Harris County, Texas, responded to a capital defendant's complaints about his lawyer sleeping during trial at which death was imposed, stating: 'The Constitution does not state that the lawyer has to be awake.'" Bright, 1994)

[5] Counsel, an alcoholic, was arrested on his way to court and found to be well over the legal limit, but the court was not willing to presume ineffective assistance of counsel against attorneys who were under the influence (*People v. Garrison*, 1986).

References

Blackerby, J. C. (2003). Life after death row: Preventing wrongful capital convictions and restoring innocence after exoneration. *Vanderbilt Law Review*, *56*, 1179-1226.

Bright, S. B. (1994). Counsel for the poor: The death sentence not for the worst crime but for the worst lawyer. *Yale Law Journal*, *103*, 1835-1883.

Faigman, D., Kaye D., Saks, M., & Sanders, J. (Eds.). (2002). *Modern scientific evidence: The law and science of expert testimony* (Vol. 3, pp. 208-209). Minneapolis, MN: West Publishing.

Hansen, M. (2005). The uncertain science of evidence: Some testimony from expert witnesses in criminal trials is having trouble standing up to tougher scrutiny from the courts. *American Bar Association Journal*, *91*(7), 48-53.

Humes, E. (2004, October). Fingerprint evidence not good science, scholar says. *Orange County Register*. Retrieved from www.network54.com

Kofman, J. (2001, August 14). Oklahoma death sentence overturned. *ABC News*. Retrieved from http://abcnews.go.com/US/story?id=92649

McRoberts, F., & Mills, S. (2004, October). From the start, a faulty science. *The Chicago Tribune*. Retrieved from www.chicagotribune.com/news/watchdog/chi-041019forensics-story.html

McRoberts, F., Mills, S., & Possley, M. (2004, October 17). Unproven forensic techniques sway courts, erode justice. *The Chicago Tribune*. Retrieved from http://articles.chicagotribune.com/2004-10-17/news/0410170393_1_bite-mark-comparison-forensic-lip-prints

Mejia, R. (2005, November). You can't rely on firearms forensics. *EurekaAlert!* Retrieved from www.eurekalert.org/pub_releases/2005-11/ns-ycr112305.php

Nethercott, M. (2003, June). Faulty forensic evidence. *The Champion*. Retrieved from http://www.nacdl.org/Champion.aspx?id=816

Nethercott, M., & Thompson, W. C. (2005, June). Forensic: Lessons from Baltimore's GSR

debacle. *The Champion*. Retrieved from www.nlada.org/forensics/for_lib/Documents/1120066091.01/GSRChampion%20article%20by%20nethercott%20and%20thompson.pdf

Risinger, D., Saks, M., Thompson, W., & Rosenthal, R. (2002, January). The Daubert/Kumho implications of observer effects in forensic science: Hidden problems of expectation and suggestions. *California Law Review*, *90*, 1-56.

Scheck, B., Neufield, P., & Dwyer, J. (2000). *Actual innocence: Five days to execution, and other dispatches from the wrongly convicted*. New York: Random House.

Spence, G. (1993). *The smoking gun: Day by day through a shocking murder trial with Gerry Spence*. New York: Simon & Schuster.

Thompson, W., & Cole, S. (2005, April). Forensics. *The Champion*. Retrieved from www.nacdl.org/Champion

Thompson, W., Ford, S., Doom, T., Raymer, M., & Krane, D. (2003, April). Evaluating forensic DNA evidence: Essential elements of a competent defense review. *The Champion*. Retrieved from www.nacdl.org/champion.aspx?id=771

Thompson, W., & Nethercott, M. (2004, September/October). The challenge of forensic evidence. *The Champion*. Retrieved from www.nacdl.org/Champion.aspx?id=1340

U.S. Department of Justice, Office of Justice Programs, National Institute of Justice. (1996). *Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial*. Retrieved from www.ncjrs.gov/pdffiles/dnaevid.pdf

Wax, S., & Schatz, C. (2004, September/October). A multitude of errors: The Brandon Mayfield case. *The Champion*. Retrieved from www.nacdl.org/Champion.aspx?id=1344

Cases Cited

Book v. Ohio, 85 S. Ct. 223 (1964).

Bordenkircher v. Hays, 98 S. Ct. 663, 669 (1978).

Bradshaw v. McCotter, 785 F.2d 1327, 1329 (5th Cir. 1986).

Douglas v. Wainwright, 714 F.2d 1532, 1556 (11th Cir. 1983).

Gideon v. Wainwright, 83 S. Ct. 792 (1963).

Goodwin v. Balkcom, 684 F.2d 794, 808 (11th Cir. 1982.

Kansas Stat. Ann. § 21-4624(e) (1995; repealed 2010).

Kansas v. Marsh, 126 S. Ct. 2516 (2006).

People v. Garrison, 254 Cal. Rptr. 257 (1986).

Powell v. Alabama, 53 S. Ct. 55 (1932).

State v. Smith, 581 So.2d 497 (Ala. Crim. App. 1990).

Strickland v. Washington, 103 S. Ct. 2052 (1984).

Cheryl (Shelly) Taylor George has been a licensed attorney since 1993 and a law professor for more than 12 years. She worked for six years at St. Mary's School of Law in San Antonio, Texas and now heads up the Criminal Law Department at the Duncan School of Law as a tenured full Professor (as of July 1, 2016). She has been in Knoxville since 2010. Prior to teaching, she served as a criminal prosecutor in Austin, Texas, and a staff attorney for a state agency (State Board for Educator Certification) also in Austin, Texas.

As an attorney, Shelly specializes in sex trafficking, human trafficking, criminal law, human rights, education law, domestic

violence law, and civil rights. She has taught *International Human Rights: Global Sex Trafficking* in Innsbruck, Austria, for two semesters and currently researches in the area of sex trafficking. Shelly speaks internationally at conferences on the topic of sex trafficking. She has spoken in Austria, England, China, Turkey, Czech Republic, Africa, and Greece. She was also asked to chair a session at the 2012 International Conference on Law & Society. This conference was co-sponsored by the Canadian Law and Society Association, the Japanese Association of Sociology of Law, and the Socio-Legal Studies Association of the United Kingdom and was held in Honolulu, Hawaii, in 2012.

Contact Information
Cheryl (Shelly) Taylor George
Duncan School of Law
Lincoln Memorial University
cheryl.george@lmunet.edu