

January 2017

## Chasing Justice: The Monumental Task of Undoing a Capital Conviction and Death Sentence

Jennifer L. Givens  
*University of Virginia*

Follow this and additional works at: <http://scholarworks.uark.edu/alr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Jennifer L. Givens, *Chasing Justice: The Monumental Task of Undoing a Capital Conviction and Death Sentence*, 70 Ark. L. Rev. 255 (2017).

Available at: <http://scholarworks.uark.edu/alr/vol70/iss2/3>

This Article is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact [scholar@uark.edu](mailto:scholar@uark.edu), [ccmiddle@uark.edu](mailto:ccmiddle@uark.edu).

# Chasing Justice: The Monumental Task of Undoing a Capital Conviction and Death Sentence

Jennifer L. Givens\*

After the botched 2014 execution of Clayton Lockett in Oklahoma,<sup>1</sup> John Oliver tackled the issue of the death penalty on the second episode of his HBO show, *Last Week Tonight with John Oliver*.<sup>2</sup> Oliver opens the discussion with a sound bite from former U.S. Attorney General Alberto Gonzales, who says, “I [] do believe in the death penalty, but [] only with respect to those [that] are guilty of committing the crime.”<sup>3</sup> Oliver responds, “Okay, bold idea. We shouldn’t execute innocent people. I think most people would probably agree with that. You, sir, are a regular Atticus Finch. But [] executing the innocent is not really the tough question here.”<sup>4</sup>

Oliver was right, of course; this *should not* be a tough question, but the number of judicial and institutional hurdles—both procedural and substantive—currently in place should raise grave concerns about our commitment to ensuring that only the guilty are executed.

Since 1973, there have been 157 death row exonerations.<sup>5</sup> That is approximately one exoneration for every ten executions

---

\* Jennifer L. Givens is an Assistant Professor of Law and Legal Director of the Innocence Project at the University of Virginia School of Law.

1. Jeffrey E. Stern, *The Execution of Clayton Lockett*, ATLANTIC, June 2015, at 80, 80-82.

2. LastWeekTonight, *Death Penalty: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (May 4, 2014) [hereinafter LastWeekTonight], <https://youtu.be/Kye2oX-b39E> [<https://perma.cc/2569-MVJW>].

3. *Id.*

4. *Id.*

5. LastWeekTonight, *supra* note 2; *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> [<https://perma.cc/97LV-L76L>].

in this country.<sup>6</sup> Recent research suggests that the rate of wrongful convictions in capital cases where a death sentence was imposed is approximately four percent, which means that approximately 120 of the roughly 3,000 inmates on death row in this country are not guilty.<sup>7</sup> The fact that countless individuals sit behind bars for crimes they did not commit is troubling enough, but even more terrifying, obviously, is the prospect of their execution. There is every reason to believe that we already have executed innocent individuals.<sup>8</sup>

### I. WRONGFUL CONVICTIONS

The common causes of wrongful convictions are well documented: police and prosecutorial misconduct, mistaken eyewitness identifications, false confessions, lying incentivized witnesses (usually jailhouse snitches), junk or stale science, and bad lawyering on the part of defense counsel.<sup>9</sup> And the risk may be heightened in capital cases, where the guilty party is further incentivized to implicate someone else or testify falsely in order to avoid a death sentence, and where there is additional pressure on the police and prosecutors to swiftly arrest and convict someone in high-profile murder cases. This pressure often results in truncated investigations, coerced or false confessions, and willingness to employ jailhouse snitches in order to secure a death sentence.<sup>10</sup>

Once a death sentence is imposed, the state and federal post-conviction systems are designed to prevent the condemned

---

6. Samuel Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7234 (2014).

7. *Id.*

8. The National Coalition to Abolish the Death Penalty identifies and discusses the cases of four men who have been executed despite grave doubts about their guilt: Troy A. Davis (GA), Carlos DeLuna (TX), Gary Graham (TX), and Cameron Todd Willingham (TX). See *Exonerations of Innocent Men and Women*, NAT'L COAL. TO ABOLISH DEATH PENALTY, <http://www.ncadp.org/pages/innocence> [<https://perma.cc/73WR-MFZ3>]. Of course, this list is not an exhaustive one. See, e.g., Opinion, *Executed—But Innocent?*, L.A. TIMES, Oct. 20, 2016, at A16.

9. *Reform Through the Courts*, INNOCENCE PROJECT, [www.innocenceproject.org/policy](http://www.innocenceproject.org/policy) [<https://perma.cc/9XME-MBMJ>].

10. Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 693 (2010).

from obtaining subsequent relief. Indeed, despite the fact that we have seen a steady increase in the number of exonerations, Congress and the courts have insisted on speeding up the review process and curtailing the scope of federal habeas review in capital cases through legislation such as the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996 and the Streamlined Procedures Act of 2005, as well as Supreme Court decisions imposing limitations on the presentation of new evidence in federal habeas proceedings and further narrowing the available avenues for relief.<sup>11</sup> And while many states have created new paths to exoneration through additional innocence-based, post-conviction remedies, there remain unique challenges in capital cases that make these remedies far less viable for innocent individuals sitting on death row.<sup>12</sup>

## II. ESTABLISHING AN INNOCENCE GATEWAY

In *Herrera v. Collins*, the Supreme Court assumed without deciding that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.”<sup>13</sup> To date, the Court has not identified such a case.

---

11. See, e.g., *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *Harrington v. Richter*, 562 U.S. 86, 96 (2011).

12. For instance, one of the most important factors affecting the outcomes in post-conviction innocence cases is the position of the prosecutor. As Professor Laurie L. Levenson, Director of the Project for the Innocent at Loyola Law School, recently explained:

I have consistently witnessed senior prosecutors to be among the most resistant to believing their office made a mistake and one of their colleagues has helped convict an innocent person. Prosecutors often erect procedural hurdles to prevent petitioners having their habeas claims heard in court. They circle the wagons, even when their own investigating officers suggest that a mistake has been made.

Laurie L. Levenson, *The Problem with Cyclical Prosecutor’s Syndrome: Rethinking a Prosecutor’s Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 338 (2015). Capital cases present an added layer of difficulty because prosecutors are often more invested in defending their decision to seek the death penalty, particularly in light of the additional and significant resources expended in order to secure that death sentence.

13. 506 U.S. 390, 417 (1993).

In establishing a gateway through which innocent petitioners could obtain review of defaulted claims, the Supreme Court held that a petitioner must submit “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.”<sup>14</sup> A petitioner must then demonstrate that in light of this new evidence, “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.”<sup>15</sup> If the petitioner can clear this extraordinary hurdle, he is not entitled to relief; he is merely entitled to federal court consideration of his defaulted constitutional claims.<sup>16</sup>

### III. THE CASES OF EARL WASHINGTON, JR. AND CAMERON TODD WILLINGHAM

A brief and undeniably superficial review of two capital cases will serve to demonstrate the difficulty of obtaining innocence-based relief in capital cases. Earl Washington, Jr. and Cameron Todd Willingham were convicted of capital murder and spent years on death row in Virginia and Texas, respectively.<sup>17</sup> The basis of Washington’s claim of innocence was biological evidence.<sup>18</sup> The basis of Willingham’s claim of innocence was bad arson science.<sup>19</sup> In both cases, multiple courts and governors reviewed the available evidence of innocence, denied relief, and declined to intervene in the cases

---

14. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

15. *Id.* at 327.

16. *Id.* at 326-27.

17. *Earl Washington, Innocence Project*, <https://www.innocenceproject.org/cases/earl-washington> [https://perma.cc/AH99-AZU7]; *Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas*, INNOCENCE PROJECT (Sept. 13, 2010) [hereinafter *Willingham*], <https://www.innocenceproject.org/cameron-todd-willingham-wrongfully-convicted-and-executed-in-texas/> [https://perma.cc/ZW6T-N84T].

18. *Earl Washington*, *supra* note 17.

19. *Willingham*, *supra* note 17.

for years.<sup>20</sup> Willingham was executed in 2004; Washington was eventually exonerated in 2007.<sup>21</sup>

### A. Earl Washington

Earl Washington, Jr. was convicted and sentenced to death in 1984 for “the capital murder of Rebecca Lynn Williams” in Culpepper, Virginia.<sup>22</sup>

Mrs. Williams had been raped and repeatedly stabbed while in a bedroom of her apartment. Defendant, who has a general I.Q. in the range of 69 [which falls into the mild intellectual disability category], confessed no fewer than three times to the murder, and was convicted on the basis of these confessions and his acknowledgment that he owned a shirt linked to the crime scene.<sup>23</sup>

Though a blanket at the scene contained semen stains, “[n]either the blanket nor any evidence about the stains were introduced at Washington’s trial.”<sup>24</sup> Instead, the Commonwealth relied on Washington’s alleged confession.<sup>25</sup>

During post-conviction proceedings, Washington argued that neither he nor the victim’s husband could have contributed to semen samples found on the blanket.<sup>26</sup> Washington alleged that his trial attorney was ineffective for failing to present the testing results in support of a theory that a third man raped the victim and left the semen stains.<sup>27</sup> The state courts refused Washington’s request for an evidentiary hearing and denied relief.<sup>28</sup>

---

20. *Id.*; *Earl Washington*, *supra* note 17.

21. Maurice Possley, *Fresh Doubts over a Texas Execution*, WASH. POST (Aug. 3, 2014), [http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/?utm\\_term=.7a23b93e62d6](http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/?utm_term=.7a23b93e62d6) [https://perma.cc/BS9W-BYH8]; Maria Glod, *Former Death-Row Inmate Officially Declared Innocent*, WASH. POST (July 7, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070602051.html> [https://perma.cc/HHW3-XUYH].

22. *Washington v. Commonwealth*, 323 S.E.2d 577, 581 (Va. 1984).

23. *Washington v. Murray*, 4 F.3d 1285, 1286 (4th Cir. 1993).

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *Washington v. Murray*, 952 F.2d 1472, 1475 (4th Cir. 1991).

The case then wound its way through the federal courts. The U.S. District Court denied relief, but upon review by the Fourth Circuit, the case was remanded with instructions to conduct an evidentiary hearing on Washington's claim that trial counsel unreasonably failed to present evidence regarding the semen stains.<sup>29</sup> The Fourth Circuit recognized problems with the evidence presented at trial, noting that it "consisted essentially of a confession obtained by interrogation almost a year after the crime, from a mildly retarded person upon whom suspicion had not earlier focussed [sic] during the crime's investigation," and that the circumstances of the interrogation "raise[d] at least colorable questions of the voluntariness and intelligence with which they were given."<sup>30</sup>

After conducting the evidentiary hearing, the district court denied relief for a second time.<sup>31</sup> The Fourth Circuit affirmed, finding that the evidence regarding the semen stains was inconclusive.<sup>32</sup>

Fortunately, the following year (1994), Governor Wilder commuted Washington's death sentence and he was removed from death row.<sup>33</sup> He was, however, to spend the rest of his life in prison.<sup>34</sup> It was not until 2001, after Governor Gilmore

---

29. *Id.* at 1485.

30. *Id.* at 1477-78.

31. *Washington v. Murray*, 4 F.3d 1285, 1286 (4th Cir. 1993).

32. At the evidentiary hearing, Washington's post-conviction counsel presented testimony from Washington's trial attorney and two expert witnesses. *Id.* at 1286. The trial attorney acknowledged that he did not appreciate the significance of the forensic testing results and that he did not consult with an expert before trial. *Id.* Washington's expert witnesses explained that if the stains on the blanket were purely semen, then Washington could not have contributed to the sample. *Id.* at 1286-87. Both acknowledged, however, that if the stains were a mixture of seminal and vaginal fluid, it was possible that Mr. Washington was a contributor. *Id.* at 1287. The Court of Appeals found that the forensic evidence was inconclusive and, therefore, trial counsel's failure to present such evidence at trial did not prejudice Washington. *Washington*, 4 F.3d at 1288.

33. *Earl Washington*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3721> [<https://perma.cc/649E-JBDJ>].

34. The undeniable political considerations inherent in the clemency process often prevent Governors from fully remedying a wrong, as evidence by Governor Wilder's decision to commute Mr. Washington's death sentence, rather than pardon him. Recently, Virginia Governor Terry McAuliffe employed the same remedy, despite powerful evidence of innocence. *Governor McAuliffe Commutes Sentence of Ivan Teleguz to Life Imprisonment*, VA. GOVERNOR'S OFFICE (Apr. 20, 2017),

granted Washington's request for additional DNA testing, that Washington was conditionally pardoned and released from prison.<sup>35</sup> And it was not until 2007 that Washington was finally granted an absolute pardon and exonerated (after the actual killer pleaded guilty).<sup>36</sup>

Despite the fact that the biological evidence was not inculpatory and that the circumstances of his confession were, at best, suspicious, Earl Washington spent seventeen years in prison for a crime he did not commit, and it took twenty-two years for him to be exonerated.<sup>37</sup> While Washington survived death row, it can hardly be said that justice was served here.

If DNA technology had not advanced over the course of Washington's incarceration, there is every reason to believe that he would have been executed.

## B. Cameron Todd Willingham

The difficulty of demonstrating innocence in non-DNA cases cannot be overstated. If there is no biological evidence to be tested, the defendant is usually left to rely on (1) challenges

---

<https://governor.virginia.gov/newsroom/newsarticle?articleId=20103> [<https://perma.cc/X4EJ-GDPK>]. On April 20, 2017, Governor McAuliffe granted clemency to Ivan Teleguz, a man sentenced to die for the murder of his ex-girlfriend in Harrisonburg, Virginia in 2001. *Id.* (I represented Mr. Teleguz during his state post-conviction proceedings.) Mr. Teleguz has maintained his innocence since the time of his arrest, and his current attorneys mounted an international campaign in support of their pardon request based on compelling evidence of Mr. Teleguz's innocence. *See, e.g., Justice for Ivan Teleguz, IVAN'S PRAYER FOR JUSTICE*, <https://ivansprayerforjustice.org/> [<https://perma.cc/BB25-9QGV>]. There was no physical or forensic evidence connecting Mr. Teleguz to the crime, and he presented an alibi defense; the case rested on the testimony of three witnesses. *Teleguz v. Zook*, 806 F.3d 803, 805-06 (4th Cir. 2015). Two of those witnesses recanted their inculpatory testimony during post-conviction proceedings. *Id.* at 806. The third witness—the man who claimed that he was hired by Teleguz to kill the victim—was told that the only way that he could avoid a death sentence was to testify against Teleguz. VA. GOVERNOR'S OFFICE, *supra* note 34. At a post-conviction evidentiary hearing in the case, only this witness appeared and testified. *Teleguz*, 806 F.3d at 807.

In his statement commuting Mr. Teleguz's death sentence, Governor McAuliffe said that his "decision to deny Mr. Teleguz's petition for pardon is based on [his] belief that the reliable evidence continues to support his conviction," and he instead claimed that the commutation was based on the fact that "the sentencing phase of Mr. Teleguz's trial was flawed." VA. GOVERNOR'S OFFICE, *supra* note 34.

35. NAT'L REGISTRY EXONERATIONS, *supra* note 33.

36. Glod, *supra* note 21.

37. *Id.*



to expert witness testimony and junk or stale science; (2) witness recantations; or (3) a confession from the actual perpetrator. For a variety of reasons, courts have been reluctant to reverse convictions based on the presentation of one (or sometimes all) of these.<sup>38</sup> The Willingham case highlights the tragic role that junk science plays in wrongful convictions, as well as the difficulty in obtaining relief based on post-conviction challenges to forensic evidence.<sup>39</sup>

Cameron Todd Willingham was convicted of capital murder in Corsicana, Texas.<sup>40</sup> According to the state, he set fire to his house in order to kill his three young daughters two days before Christmas in 1991.<sup>41</sup>

---

38. In cases where defendants rely on recantations or confessions, rather than challenges to junk science, they often fare no better. First, courts consider witness recantations, particularly ones from “snitches,” to be inherently unreliable. See Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 82-94 (2008). Even post-trial confessions are no silver bullet. For example, the nature of the relationship between the recanter/confessor and the defendant is certainly a part of a court’s analysis. See, e.g., *Fentress v. Clarke*, No. 1:15CV965, 2016 WL 4118916, at \*3-4 (E.D. Va. July 28, 2016) (finding that Fentress failed to offer reliable new evidence under *Schlup v. Delo* when a subsequent confession to the crime was made by a man who was housed in the same prison unit as Fentress for two months, and concluding, therefore, that “petitioner and Doane [the confessor] had ample time to concoct the particulars of the crime included in the affidavit, and to make sure the affidavit contained details consistent with the evidence presented at petitioner’s trial.”). Courts also routinely consider whether the confessor has anything to lose by accepting responsibility for the crime. For instance, is the confessor already serving life on another conviction? See, e.g., *Id.* at \*4 (questioning whether the confessor’s admission was believable where he already is serving an extended prison sentence).

Post-trial affidavits containing exculpatory evidence, including recantations, confessions or other statements, are generally viewed with suspicion. In *Herrera v. Collins*, Justice O’Connor stated that “[a]ffidavits like these are not uncommon . . . . It seems that, when a prisoner’s life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism.” *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O’Connor, J., concurring). O’Connor set forth several factors that reviewing courts should take into consideration, including the amount of time that has elapsed since trial; whether the affidavit is consistent with the evidence presented at trial; and whether the new exculpatory evidence is outweighed by the proof of the defendant’s guilt at the time of trial. *Id.* at 423-24.

39. See *Willingham v. State*, 897 S.W.2d 351 (Tex. Crim. App. 1995).

40. *Id.* at 354.

41. *Id.*

During the course of the investigation, fire investigators became convinced that the fire had been started intentionally.<sup>42</sup> Willingham, the only one who made it out of the house alive (his wife was not home), became the prime suspect in this triple murder.<sup>43</sup> Despite the fact that witnesses initially attested that Willingham was screaming that his children were still inside and that he attempted to rush into the house to save them, investigators located witnesses in the neighborhood who later claimed that Willingham's behavior during and after the fire was suspicious.<sup>44</sup>

Police also found an inmate housed with Willingham who was willing to help their case. Inmate Johnny Webb claimed that Willingham confessed to him that he set the fire.<sup>45</sup> In addition to Webb's testimony, the State presented expert testimony that the fire was set intentionally and detailed multiple indicators of arson, including puddle configurations and pour patterns.<sup>46</sup> Willingham was convicted of three counts of capital murder and sentenced to die.<sup>47</sup>

During the next twelve years, Willingham's case worked its way through post-conviction proceedings in state and federal court.<sup>48</sup> Despite the presentation of expert testimony that demonstrated that the arson testimony at trial was not scientifically valid, Willingham was denied relief by the courts, and his clemency request was denied (unanimously).<sup>49</sup>

---

42. Willingham v. Johnson, No. Civ. A 3:98-CV-0409-L, 2001 WL 1677023, at \*7 (N.D. Tex. Dec. 31, 2001).

43. Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004), <http://www.chicagotribune.com/news/nationworld/chi-0412090169dec09-story.html> [<https://perma.cc/7ENJ-24TA?type=image>].

44. *Willingham*, 2001 WL 1677023, at \*7; see also David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 7, 2009), <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire> [<https://perma.cc/Z95T-7GGS>]; Mills & Possley, *supra* note 43.

45. Webb later recanted his testimony and admitted that Willingham did not, in fact, confess to setting the fire. Possley, *supra* note 21. Webb admitted that the prosecutor coerced him into testifying by threatening him with a life sentence on his pending robbery charge. *Id.*

46. *Willingham*, 2001 WL 1677023, at \*7.

47. *Id.* at \*5.

48. *Id.*

49. Grann, *supra* note 44.

After Willingham's execution, the Innocence Project asked several leading arson experts to review the case; these experts concluded that the fire that killed Willingham's children was an accidental fire and that "the indicators relied upon [at the time of trial] have since been scientifically proven to be invalid."<sup>50</sup> A Texas judge, who reviewed the case in 2010, intended to posthumously exonerate Willingham, but the inquiry was halted by an appellate court.<sup>51</sup>

#### IV. CONCLUSION

Our criminal justice system is broken, and the death-sentenced inmates that the system has failed are the most tragic casualties of its collapse. We certainly cannot, or at least *should* not, contend that the instances in which the 157 death-sentenced individuals were finally exonerated is any indication otherwise.<sup>52</sup> One can hardly argue that freeing someone after locking them up for decades for a crime they didn't commit—and after they have suffered the unimaginable torture of being forced to sit in a cell contemplating their eventual walk to the execution chamber—is an indication that the system functions as it should.

Countless scholars, practitioners, researchers, and even members of law enforcement have suggested reasonable remedies that would significantly minimize the risk of wrongful convictions.<sup>53</sup> Such reasonable steps include, but are certainly

---

50. DOUGLAS J. CARPENTER ET AL., ARSON REVIEW COMM., REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASES OF STATE OF TEXAS V. CAMERON TODD WILLINGHAM AND STATE OF TEXAS V. ERNEST RAY WILLIS 1, 3 (2006), <http://truthinjustice.org/ArsonReviewReport.pdf> [<https://perma.cc/8RHY-GK4A>].

51. Michael McLaughlin, *Cameron Todd Willingham Exoneration Was Written but Never Filed by Texas Judge*, HUFFINGTON POST (May 21, 2012), [http://www.huffingtonpost.com/2012/05/19/cameron-todd-willingham-exoneration\\_n\\_1524868.html](http://www.huffingtonpost.com/2012/05/19/cameron-todd-willingham-exoneration_n_1524868.html) [<https://perma.cc/WN5B-LFDG>].

52. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> [<https://perma.cc/7BFE-NNXA>] (last visited Apr. 13, 2017).

53. See, e.g., Spencer S. Hsu, *Police Chiefs Lead Effort to Prevent Wrongful Convictions by Altering Investigative Practices*, WASH. POST (Dec. 2, 2013), [https://www.washingtonpost.com/local/crime/police-chiefs-urge-changes-to-photo-lineups-other-tools-to-prevent-wrongful-convictions/2013/12/02/5d8e9af2-5b69-11e3-bf7e-f567ee61ae21\\_story.html](https://www.washingtonpost.com/local/crime/police-chiefs-urge-changes-to-photo-lineups-other-tools-to-prevent-wrongful-convictions/2013/12/02/5d8e9af2-5b69-11e3-bf7e-f567ee61ae21_story.html) [<https://perma.cc/5NUU-FE95>]. See generally JON GOULD ET AL., PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO

not limited to, the following: (1) every interrogation with suspects or witnesses should be videotaped;<sup>54</sup> (2) police should no longer be permitted to interview suspects using the interrogation techniques that are proven to increase the likelihood of a false confession, such as the Reid Technique;<sup>55</sup> (3) police departments should take steps to prevent tunnel vision;<sup>56</sup> (4) prosecutors and police should open their files to the defense;<sup>57</sup> (5) if the state cannot make out their case without the use of jailhouse informants, they should not bring a case (at a minimum, there should be a pre-trial reliability hearing in any case where informant testimony is anticipated);<sup>58</sup> (6) in any case in which eyewitness testimony is to be presented, the court should conduct a pre-trial reliability hearing, and if the testimony survives this inquiry, then expert testimony regarding eyewitness identifications should be permitted;<sup>59</sup> (7) all police lineups should be conducted blindly (by an officer who knows nothing about the case or the suspect);<sup>60</sup> and (8) law enforcement should employ simple steps to reduce or eliminate confirmation bias in forensic testing.<sup>61</sup>

While some may argue that these modifications to the way we investigate and prosecute crimes would make it more

---

MISCARRIAGES OF JUSTICE (2012), <http://www.american.edu/spa/jlc/prevent/upload/Predicting-Erroneous-Convictions.pdf> [<https://perma.cc/76CB-92MQ>] (identifying factors that are often associated with erroneous convictions); *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/eyewitness-misidentification> [<https://perma.cc/ZQ4M-UTF2>] (advocating reform of eyewitness identification methods).

54. GOULD ET AL., *supra* note 53, at 99.

55. The Reid Technique is a controversial method of interrogation that is designed to elicit a confession, rather than useful information, from a suspect. Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, NEW YORKER (Dec. 9, 2013), <http://www.newyorker.com/magazine/2013/12/09/the-interview-7> [<https://perma.cc/B6CV-FC6D>].

56. See GOULD ET AL., *supra* note 53, at 15-16, 101 (describing ways in which police departments can reduce wrongful arrests and “reduce potential sources of error or bias”).

57. *Id.* at 19.

58. *Id.* at 63-64.

59. *Eyewitness Misidentification*, *supra* note 53.

60. *Id.*

61. Obviously, improvements in criminal defense representation are also imperative, but focusing first on these other, perhaps simpler, steps may have a more immediate effect on the problem. GOULD ET AL., *supra* note 53, at 16-17.

difficult to secure convictions, I submit that such changes would serve only to increase transparency and minimize the risk of wrongful convictions and executions. To the extent that makes a prosecutor's job more difficult, it is for a good reason.