

## THREE Defending Capital Defendants Who Are Innocent

On January 31, 2000, Illinois governor George Ryan, a longtime supporter of the death penalty, declared a moratorium on Illinois executions because of his “grave concerns about our state’s shameful record of convicting innocent people and putting them on Death Row.”<sup>1</sup> The Illinois moratorium was a watershed event because it was the first time during the post-*Furman* era in which an elected official concluded that our system of capital punishment is producing an unacceptable level of erroneous death sentences and took action designed to correct that problem. Governor Ryan’s declaration of the Illinois moratorium had a significant ripple effect. In the wake of his action, other public officials commented on the extent to which innocent capital defendants have been convicted, sentenced to death, and possibly executed;<sup>2</sup> as a result, the public became increasingly aware of the extent to which death row defendants have been wrongfully convicted.

The number of death row defendants who have been wrongfully convicted has in fact been extraordinarily high. The Death Penalty Information Center (DPIC) reports that 119 death row defendants have been exon-

1. “*My Concern Is Saving Lives, Innocent Lives*,” Chi. Trib., Jan. 31, 2000, at 8. Governor Ryan later pardoned four additional death row defendants and commuted the sentences of the other death row inmates to life sentences. Maurice Possley & Steve Mills, *Clemency for All; Ryan Commutes 164 Death Sentences to Life in Prison without Parole*, Chi. Trib., Jan. 12, 2003, at 1.

2. Eighteen months later, for example, Justice O’Connor told a group of lawyers that there were “serious questions” about whether the death penalty was being fairly administered in the United States and that “[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed.” See Maria Elena Baca, *O’Connor Critical of Death Penalty: The First Female Supreme Court Justice Spoke in Minneapolis to a Lawyers’ Group*, Star Trib. (Minneapolis-St. Paul), July 3, 2001, at 1A.

erated since 1973.<sup>3</sup> Critics maintain that this number overstates the number of factually innocent defendants who have been released from death row.<sup>4</sup> The DPIC's criteria for inclusion on its list of exonerated death row defendants are that either the defendant's "conviction was overturned and [he or she was] acquitted at a re-trial, or all charges were dropped"; or the defendant was "given an absolute pardon by the governor based on new evidence of innocence."<sup>5</sup> In addition, DPIC's list includes five cases in which "a compromise was reached and the defendants were immediately released upon pleading to a lesser offense; the defendant was released when the parole board became convinced of his innocence; or the defendant was acquitted at a retrial of the capital charge but convicted of lesser related charges."<sup>6</sup>

The 119 exonerations reported by DPIC include 14 cases in which death row defendants were released on the basis of DNA testing,<sup>7</sup> 66 cases in which the defendant's conviction was reversed and the defendant was not retried (including 3 in which the defendant pleaded guilty to a noncapital charge and was immediately released),<sup>8</sup> and 39 in which the defendant was released after being retried and acquitted of the capital charge.<sup>9</sup> While most people would agree that the great majority of the defendants in the first two groups are indisputably innocent,<sup>10</sup> law enforcement officials can legitimately argue that capital defendants acquitted at retrials may in fact be guilty because the time between the original trial and the retrial—nearly always at least five years and in some cases more than two decades—makes it substantially more difficult for the prosecutor to reestablish the defendant's guilt.

Defense lawyers who have represented death row defendants during

3. Death Penalty Information Center, *Innocence and the Death Penalty*, at <http://www.death-penaltyinfo.org/article.php?scid=6&did=412> (last modified Oct. 8, 2004).

4. See, e.g., Ward A. Campbell, *Critique of DPIC List* ("Innocence: Freed from Death Row"), at <http://www.prodeathpenalty.com/DPIC.htm> (last visited Sept. 3, 2004).

5. Death Penalty Information Center, *Cases of Innocence 1973–Present*, at <http://www.death-penaltyinfo.org/article.php?scid=6&did=109> (last modified Oct. 8, 2004) [hereinafter DPIC, *Cases of Innocence*].

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Law enforcement officials, however, sometimes dispute the innocence of even DNA-exonerated defendants. In Earl Washington's case, for example, despite Governor Gilmore's pardon of Washington, the county's chief prosecutor "continue[s] to believe Washington played some role in the murder." Steve Mills & Maurice Possley, *After Exonerations, Hunt for Killer Rare; Police, Prosecutors Cling to Original Theories, Seldom Pursue New Leads, Suspects*, Chi. Trib., Oct. 27, 2003, at 1.

their retrials maintain, however, that in the great majority of these cases the defendants were in fact innocent of the capital crimes. In some of the retrial cases, the government's case was substantially weaker than it was at the original trial not because time had eroded the quality of the government's case but because a reviewing court concluded that significant evidence, which the prosecution improperly introduced at the first trial, would be inadmissible at the retrial.<sup>11</sup> In other retrials, the defense's case was substantially stronger because a reviewing court ruled that exculpatory evidence not introduced by the defense at the first trial would be admissible at the retrial.<sup>12</sup> In both of these types of cases, there is a strong basis for concluding that the jury's not guilty verdict at the retrial was more likely to be accurate than the original jury's guilty verdict.

In other retrial cases, the reviewing court's reversal was based on grounds that have less impact on the quality of the government's evidence at the second trial: the judge improperly instructed the jury,<sup>13</sup> for example, or the prosecutor introduced prejudicial evidence at the defendant's trial.<sup>14</sup> Even in these cases, defense attorneys assert that the not guilty verdict at the defendant's retrial is more likely than the original verdict to be an accurate indicator of the defendant's actual guilt.

During a five-year period, Richard Jaffe, an Alabama defense attorney, represented three former death row defendants at their retrials after their convictions had been reversed on grounds unrelated to the reviewing court's view of their possible innocence.<sup>15</sup> Although Jaffe does not usually

11. See James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do With It?*, 33 Colum. Hum. Rts. L. Rev. 527, 544 & n.62 (2002).

12. *Id.* at 544.

13. *King v. State*, 784 So. 2d 884, 889–90 (Miss. 2001).

14. See, e.g., *Ex parte Drinkard*, 777 So. 2d 295, 306 (Ala. 2000).

15. The three defendants were James "Bo" Cochran, Randall Padgett, and Gary Wayne Drinkard. Telephone Interview with Richard Jaffe (Mar. 4, 2003) [hereinafter Jaffe Interview].

"Bo" Cochran was convicted and sentenced to death in Alabama in 1978 and again in 1982 for the murder of a police officer during a robbery that occurred on November 4, 1976. In 1996, the Northern District of Alabama reversed his conviction and death sentence on the ground that the prosecutor had improperly exercised peremptory challenges so as to exclude potential African American jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). At his second retrial in 1997, he was acquitted of murder (the only charge for which he was retried).

Randall Padgett was convicted and sentenced to death in 1992 for the murder of his wife Cathy on August 16, 1990. The Alabama Supreme Court reversed Padgett's conviction and death sentence on the ground that the prosecutor failed to disclose material exculpatory evidence to the defense. At his retrial in 1997, the jury deliberated only two and a half hours before acquitting him of all charges.

For a summary of Gary Drinkard's case, see *infra* notes 16–17.

try to ascertain the actual guilt or innocence of the criminal defendants he represents, he concluded that in all three of these cases the defendants were actually innocent of the capital crimes with which they were charged. In all three cases, the evidence presented by the government at the retrial was essentially the same as the evidence presented at the original trial. In all three, however, Jaffe cross-examined key government witnesses more effectively than they had been cross-examined at the first trial and introduced significant exculpatory evidence that had not been introduced at the original trial; in all three cases, the juries acquitted. Jaffe attributes his success at the retrials at least in part to the fact that he had significantly more resources for investigation at his disposal than the original trial attorneys did at the defendants' first trials.

In 2002, for example, Jaffe represented Gary Drinkard at his retrial after Drinkard's conviction and death sentence had been reversed. Drinkard had been convicted of the July 30, 1990, robbery and murder of Dalton Pace, a junkyard dealer who was known to carry large amounts of cash on his person. In 1995, the Alabama Supreme Court reversed Drinkard's conviction and death sentence on the ground that prejudicial evidence had been improperly admitted at his trial.<sup>16</sup> The government's chief witnesses against Drinkard were his half sister, Beverly Robinson; his best friend, Rex Segars; and his stepdaughter, Kelly Harville; all three testified that Drinkard had confessed to killing and robbing the junkyard dealer. At Drinkard's second trial, Jaffe cross-examined the government witnesses, all of whom had motives to lie, much more effectively than Drinkard's original trial attorney. In particular, Jaffe showed that Robinson and Segars, who were possibly guilty of the crimes themselves, volunteered to testify against Drinkard in order to avoid prosecution for other serious crimes. In addition, Jaffe called two disinterested alibi witnesses who testified that they had been with Drinkard in his home at the time of the killings. The jury not only acquitted Drinkard but, after returning the not guilty verdict, took the extraordinary step of providing an affidavit in which they stated that Drinkard was actually innocent of the crime.<sup>17</sup>

Jaffe's experience suggests that the reason death row defendants' retrials result in acquittals often has to do with the quality of the defense at the second trial. At the retrial, the defendant is generally represented by a new attorney who more effectively challenges the government's case and intro-

16. See, e.g., *Ex parte Drinkard*, 777 So. 2d at 306.

17. Jaffe Interview, *supra* note 15.

duces new evidence relating to the defendant's innocence. As a result, the jury acquits.

Even if the great majority of the DPIC's reported exonerations involved death row defendants who were actually innocent of the capital offenses, there are undoubtedly some in which the defendants were guilty. As several commentators have noted,<sup>18</sup> however, there is also substantial reason to believe that other death row defendants who have not been exonerated are in fact *not* guilty of the capital offenses for which they were convicted. Perhaps the strongest support for this is provided by the 14 DNA exonerations. DNA testing is only possible when biological evidence is left by the crime's perpetrator, typically in rape or sexual assault cases.<sup>19</sup> Since most murder cases do not involve rape or sexual assault, DNA testing is available only in a small percentage of capital murder cases.<sup>20</sup> In the 14 cases in which death row defendants were exonerated through DNA testing, a reviewing court did not determine that the defendant's conviction was erroneous. Rather, as Liebman has pointed out, "[i]f it were not for the sheer accident that a biological sample happened to be available, the miscarriage never would have been discovered."<sup>21</sup> Because DNA testing is so rarely available in capital cases, there is reason to believe that the 14 cases in which capital defendants have been exonerated through DNA testing are just the tip of an iceberg. There may be many more cases in which death row defendants unable to reverse their convictions are in fact innocent.

Providing an accurate estimate of former or present death row defendants who are factually innocent is almost certainly impossible. Serious doubts have been raised, however, as to the guilt of death row defendants whose convictions have not been reversed. In some of these cases, the defendant's death sentence has been commuted. In a federal death penalty case, for example, David Ronald Chandler was convicted of a capital crime and sentenced to death.<sup>22</sup> After the media raised substantial questions relating to his guilt,<sup>23</sup> President Clinton commuted his death sentence to life imprisonment.<sup>24</sup> In other cases, defendants whose guilt

18. See, e.g., Hugo Adam Bedau, Michael L. Radelet & Constance E. Putnam, *Convicting the Innocent in Capital Cases: Criteria, Evidence and Inference*, 52 Drake L. Rev. 587, 588-90 (2004); Richard A. Rosen, *Innocence and Death*, 82 N.C. L. Rev. 61, 73 (2003).

19. See Liebman, *supra* note 11, at 541-42.

20. *Id.*

21. *Id.* at 546-47.

22. *United States v. Chandler*, 996 F.2d 1073, 1082 (11th Cir. 1993).

23. For an account of the *Chandler* case, see Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 Mich. L. Rev. 202, 203-07 (2004).

24. See *id.* at 207.

has been seriously questioned either remain on death row or have been executed.<sup>25</sup>

In order to provide insight into both the quality of representation provided to some exonerated death row defendants and courts' monitoring of these attorneys' representation, I will provide relatively full accounts of three cases in which capital defendants were wrongfully convicted and sentenced to death, focusing especially on the defense provided to these defendants at their trials and the reviewing courts' treatment of issues relating to their trial counsels' representation. After presenting these cases, I will reflect on the lessons to be drawn from them.

*Earl Washington Jr.*

On June 4, 1982, police found Rebecca Lynn Williams, a nineteen-year-old wife and mother of three, naked and bleeding from multiple stab wounds in her apartment in Culpeper, Virginia.<sup>26</sup> Before being taken to the hospital where she died at 2:05 P.M., Williams told a police officer that a black man acting alone had raped her.<sup>27</sup> The cause of death was thirty-eight stab wounds to the neck, chest, and abdomen.<sup>28</sup> Vaginal smears uncovered the presence of sperm and male prostatic enzyme.<sup>29</sup>

The crime remained unsolved until Earl Washington Jr. was arrested about a year later in a nearby town for unrelated crimes.<sup>30</sup> These crimes arose out of a drunken argument in which Washington allegedly hit his neighbor Hazel Weeks with a chair and shot his brother in the foot.<sup>31</sup> Washington had the mentality of a ten-year-old and an IQ of about sixty-nine.<sup>32</sup> Detectives gave him his *Miranda* warnings at 9:40 A.M. and then asked him about the attacks on his neighbor and brother.<sup>33</sup> Washington confessed to these crimes, admitting to everything the detectives asked him

25. See Mandy Welch & Richard Burr, *The Politics of Finality and the Execution of the Innocent: The Case of Gary Graham*, in *Machinery of Death* 127 (David R. Dow & Mark Dow eds., 2002) (describing the case of Gary Graham); Bob Burtman, *Innocence Lost*, in *Machinery of Death* 145 (David R. Dow & Mark Dow eds., 2002) (describing the case of Odell Barnes).

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

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 581–82.

31. Eric M. Freedman, *Earl Washington's Ordeal*, 29 Hofstra L. Rev. 1089, 1090 (2001).

32. Bill Miller & Steve Bates, *DNA Test Could Lead to Man's Release; Death Row Inmate May be Innocent of '82 Murder*, *Va. Officials Say*, Wash. Post, Oct. 26, 1993, at A1.

33. *Washington*, 323 S.E.2d at 582.

about them.<sup>34</sup> The interview ended at about noon and Washington was given lunch.<sup>35</sup>

After lunch, the detectives interrogated Washington about other crimes.<sup>36</sup> Before being asked about the Williams rape-murder, Washington confessed to four other crimes,<sup>37</sup> including three rapes that the police later determined he could not have committed.<sup>38</sup> The detectives then decided to ask him about the Williams murder.<sup>39</sup> One of the detectives wrote, “We decided to ask him about the murder which occurred in Culpeper in 1982. . . . I asked Earl—‘Earl, did you kill that girl in Culpeper?’ Earl sat there silent for about five seconds and then shook his head yes, and started crying.”<sup>40</sup> The detectives then asked Washington leading questions about the crime, supplying many of the facts about the case and asking Washington if he agreed.<sup>41</sup> Washington gave affirmative responses.<sup>42</sup>

Despite the detectives’ leading questions, Washington’s confession contained many incorrect details.<sup>43</sup> He told the police the victim was black; she was white.<sup>44</sup> He described her as short, but she was five feet eight inches tall.<sup>45</sup> He said that he had stabbed her two or three times, but she had been stabbed thirty-eight times.<sup>46</sup> Moreover, the police drove Washington to several apartment buildings in Culpeper, trying to get him to identify the crime scene.<sup>47</sup> They drove into Williams’s apartment complex three times

34. Jim Dwyer, *Testing the Rush to Death Row*, N.Y. Daily News, Sept. 7, 2000, at 20 [hereinafter Dwyer, *Testing*]. After getting into a drunken argument with his brother, Washington went to Hazel Weeks’s house next door to get his elderly neighbor’s gun. *Id.* Weeks surprised him, and he hit her with a chair. *Id.* He then ran next door and shot his brother in the foot. *Id.* Washington confessed to the attack on Weeks and said that he also tried to sexually assault her. Brooke A. Masters, *DNA Clears Inmate in 1982 Slaying; Gilmore Pardon Doesn’t Ensure Va. Man’s Freedom*, Wash. Post, Oct. 3, 2000, at A1 [hereinafter *DNA Clears Inmate*]. Later, prosecutors dropped the sexual assault charge because Weeks said Washington did not try to rape her. *Id.*

35. *Washington*, 323 S.E.2d at 582.

36. *Id.*

37. *DNA Clears Inmate*, *supra* note 34.

38. Paul T. Hourihan, Note, *Earl Washington’s Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471, 1472 n.3 (1995).

39. *Washington*, 323 S.E.2d at 582.

40. Dwyer, *Testing*, *supra* note 34.

41. Freedman, *supra* note 31, at 1092–93.

42. *Id.*

43. *Id.* at 1093.

44. *Id.*

45. *Id.*

46. Dwyer, *Testing*, *supra* note 34.

47. Freedman, *supra* note 31, at 1094.

without getting any reaction.<sup>48</sup> On the third try, an officer asked Washington to point to the scene of the crime.<sup>49</sup> Washington chose an apartment on the opposite end from Williams's apartment.<sup>50</sup> Finally, an officer pointed to Williams's apartment and asked directly if that was the one.<sup>51</sup> Washington said it was.<sup>52</sup> The police also asked Washington if a blue shirt found at the crime scene belonged to him.<sup>53</sup> He said it did.<sup>54</sup>

Washington's family hired John Scott, a Virginia attorney who had a good reputation, to represent him at his trial.<sup>55</sup> Because Washington's family could not afford to pay much, Scott's entire fee was probably less than \$2,000.<sup>56</sup> When he represented Washington, Scott had had no prior experience with capital murder trials.

Washington was tried in Culpeper County, a small rural community. His trial was brief. The government's case depended almost entirely on Washington's confession and his statement that the shirt found at the crime scene belonged to him.<sup>57</sup> The prosecutor presented his case in four hours, calling fourteen witnesses. Special Agent Reese Wilmore was the most important government witness. Wilmore "read into the court record the full transcript of Washington's signed confession."<sup>58</sup> He also produced the blue shirt, which was "the only piece of physical evidence introduced at the trial,"<sup>59</sup> and testified that, during the initial interview, he and another officer asked Washington if he had left anything at the victim's apartment and Washington replied, "A shirt."<sup>60</sup>

John Scott called two witnesses in Washington's defense: Washington's sister, Alfreda Pendleton, testified that she was familiar with her brother's clothes and the blue shirt found in the victim's apartment did not belong to him.<sup>61</sup> Washington then testified in his own defense. He denied almost

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. See Margaret Edds, *An Expendable Man: The Near-execution of Earl Washington Jr.* 47-48 (2003).

56. *Id.* at 199.

57. William Raspberry, *Full Pardon for Earl Washington, Jr.*, *Wash. Post*, Jan. 5, 1994, at A19.

58. Edds, *supra* note 55, at 53.

59. *Id.* at 59.

60. *Id.*

61. *Id.* at 60.



everything relating to his confession, including the fact that he gave it.<sup>62</sup> The prosecutor's cross-examination was devastating. Among other things, he asked Washington why the investigator, who had worked with the state police for twenty-five years, would write out a twelve-page statement containing numerous facts (including objectively verifiable ones, such as the name of Washington's sister) that Washington had never stated. Washington did not have an answer.<sup>63</sup>

Scott's strategy seemed to be based on persuading the jury that Washington's confession was unreliable because of his mental impairment.<sup>64</sup> Perhaps because of his limited resources, however, Scott failed to call an expert witness who would testify that Washington was incapable of understanding the *Miranda* warnings.<sup>65</sup> In addition, he failed to investigate forensic evidence found at the crime scene, including semen stains on a royal blue blanket found on the victim's bed in the room where she was raped and killed.<sup>66</sup>

In his closing argument, the prosecutor argued that Washington knew four things that only the perpetrator could have known: first, Washington said that the door to Williams's apartment was open when he entered it, which was confirmed by the lack of damage to the door; second, Washington said the radio in the apartment was on, which was correct; third, Washington said that he took the victim into the back bedroom, and the evidence showed that the bedroom where the rape occurred was in the back of the house; and fourth, Washington admitted he left a shirt at the crime scene "because it had blood on it," and the blue shirt found at the crime scene did have spots on it that appeared to be bloodstains.<sup>67</sup>

All of these conclusions were based on questionable interpretations of the evidence. When he was asked if the door to Williams's apartment was locked, for example, Washington had said, "I don't think so," which is clearly different than saying it was open.<sup>68</sup> And, since Washington had been asked whether the radio was off or on, he obviously had a 50 percent chance of providing accurate information on that point. The prosecutor's

62. *Id.*

63. *Id.* at 64.

64. *Id.* at 50.

65. *Id.* at 106. Scott later recalled that he had probably received between \$1,000 and \$2,000 for his work at the trial and on direct appeal. He did not spend any money on investigators or expert witnesses. *Id.* at 199.

66. *The Fate of Earl Washington*, Wash. Post, Jan. 14, 1994, at A22.

67. Edds, *supra* note 55, at 64-65.

68. *Id.*

arguments, moreover, were based on the interrogator's testimony relating to what Washington had said in his formal confession.<sup>69</sup> Prior to giving this statement, Washington's answers to the interrogators' questions had contained numerous mistakes that he later corrected, and, in fact, he revealed no information that had not been previously known to the police.<sup>70</sup>

In his closing argument, however, Scott did not attempt to rebut any of the prosecutor's conclusions or to point out Washington's many inconsistencies and errors. He simply told the jury, "You observed the testimony or heard the testimony of the police officers who allegedly took Mr. Washington's statement, and you observed and heard Mr. Washington . . . and . . . you are entitled, as jurors to give that statement as much weight or as little weight as you deem appropriate."<sup>71</sup> In less than a hour, the jury returned with a verdict. Washington was guilty of capital murder.<sup>72</sup>

At the penalty trial, the defense called two witnesses: Washington's sister Alfreda testified that her brother had always done his share of work around the house,<sup>73</sup> and the state clinical psychologist presented school records that showed that "from earliest grades [Washington] was noted to be functioning on a retarded level."<sup>74</sup>

On behalf of the government, Helen Richards, the victim's mother, testified and described the trauma her granddaughters had suffered. She testified that the victim's middle daughter "had not grown in size for almost a year" and that her oldest daughter "had been tested as emotionally disturbed and learning disabled."<sup>75</sup> Both girls had received psychiatric help and, as part of their therapy, sometimes used a phone to talk "to their mama in heaven . . . about their problems."<sup>76</sup> At the time of Washington's

69. For example, the prosecutor said in his closing argument that in order to enter the victim's house, Washington said he "kicked on the door, but the door was open." The prosecutor went on to say that the door had not been locked or closed, which gave the impression that Washington had accurate knowledge that the victim's door had been standing ajar. In fact, Washington's formal confession indicated that he said he "kicked the door open" and that he "didn't think" it was locked. Therefore, Washington's confession did not state that the victim's door had actually been open; it was consistent with the door having been shut. See Edds, *supra* note 55, at 64-65.

70. *Id.* at 65.

71. *Id.* at 66-67.

72. *Id.* at 67.

73. *Id.*

74. *Id.*

75. *Id.* at 68.

76. *Id.*

trial, Virginia law did not authorize the admission of victim impact statements. Nevertheless, Scott made no objection to Richards's testimony.<sup>77</sup>

After deliberating for an hour and a half, the jury returned with a sentence of death. Scott appealed Washington's conviction to the Virginia Supreme Court, which upheld the jury's verdict and death sentence. The U.S. Supreme Court denied certiorari, and Washington's execution date was set for September 5, 1985.

On death row, Washington caught the attention of fellow inmate Joseph Giarratano. Giarratano knew that Virginia provided representation for indigent prisoners only during trial and direct appeals, not for state or federal postconviction petitions. This struck Giarratano as unjust, particularly for Washington, with his obviously limited intelligence. Giarratano filed a class action lawsuit, claiming that the state's failure to provide postconviction attorneys violated indigent defendants' constitutional rights.

When Washington's execution date was only three weeks away, a New York law firm that was representing the plaintiffs in Giarratano's class action case agreed to handle Washington's state habeas petition pro bono. Under the direction of Eric Freedman, a team of attorneys worked around the clock and hand-delivered Washington's petition to the appropriate court nine days before Washington's execution date. Unexpectedly, the court granted a stay of execution. Bob Hall, a Virginia attorney, agreed to represent Washington on the state habeas appeal. Hall soon found that a state lab report indicated that the semen stains on the royal blue blanket from the victim's bed could not have come from Washington. This information had apparently been overlooked or misunderstood by Washington's trial attorney, John Scott.

In Washington's state habeas petition, Hall alleged that Scott's performance at trial, including his failure to present the DNA evidence from the blanket, constituted ineffective assistance of counsel. The Virginia trial judge dismissed Washington's habeas petition without a hearing, and the Virginia Supreme Court affirmed.<sup>78</sup> Hall then made the same claim in a petition for federal habeas corpus. The federal district court also denied the petition without a hearing. The Fourth Circuit, however, sent Washington's petition back to the district court for an evidentiary hearing on the question "whether Scott's failure to present evidence about the . . . blanket . . . stains to the jury amounted to ineffectiveness of counsel."<sup>79</sup>

77. *Id.*

78. *Id.* at 110-11.

79. *Id.* at 117.

At the hearing, Jerry Zerkin, Washington's new attorney, questioned Scott with respect to his failure to introduce evidence relating to the semen stains. Scott, who was now a state district judge, testified that he had detected nothing exculpatory in the forensic reports.<sup>80</sup> On cross-examination, the government attorney asked Scott to assume that expert testimony relating to the semen stains on the blanket could have shown the stains were not caused by Earl Washington but probably were caused by the husband of the victim and asked him what, if anything, he would have done in that case. Scott responded that he would not have called the victim's husband as a witness because "[t]he last thing I would have wanted to present to a jury would have been a family member testifying."<sup>81</sup> Based on this testimony, the district court judge ruled that Scott's trial representation was not unreasonable because his failure to investigate or to introduce the forensic evidence was a strategic choice.<sup>82</sup> In addition, he ruled that Washington had not established prejudice because introducing the forensic evidence would not have changed the jury's verdict.

On appeal, the Fourth Circuit affirmed solely on the ground that Washington had failed to establish prejudice. In a 2–1 decision, the court concluded that Scott's failure to introduce evidence that semen stains on the blanket did not come from Washington would not have been likely to affect the jury's verdict. In reaching this conclusion, the majority accepted the premise that the victim's husband most likely produced the semen, a view that seemed inconsistent with the expert testimony.<sup>83</sup> The majority's primary point, however, was that it would be apparent to the jury that Washington's confession clearly established his guilt. Echoing the trial prosecutor's closing argument, the majority emphasized that "[t]he strength of the prosecution's case . . . rests in the numerous details of the crime that Washington provided to the officers as they talked with him."<sup>84</sup> Among other things, the majority referred to the fact that Washington volunteered that a radio had been playing in the house and that he "took (the victim) to the back bedroom" to rape her.<sup>85</sup>

In the meantime, an unexpected development occurred. After reviewing Washington's case, Steven D. Rosenthal, the interim Virginia attorney

80. *Id.* at 121.

81. *Id.* at 122.

82. *Id.* at 126.

83. *Id.*

84. *Washington v. Murray*, 4 F.3d 1285, 1290 (4th Cir. 1993).

85. *Id.* at 1290–91.

general, requested that a more accurate form of DNA testing, which had not been available at the time of Washington's trial, now be performed in order to determine Washington's guilt or innocence. After the Fourth Circuit rejected Washington's ineffective assistance claim, Washington's defense attorneys agreed.

The new DNA test revealed that Washington could not have been the sole contributor of genetic material found on the victim's body. Attorney General Rosenthal then held a press conference at which he said it was "too early to judge the precise meaning" of the tests. The tests did not exclude the possibility that Washington could have committed the crime with the assistance of a previously unknown second attacker. Because the victim's dying words had indicated that she was attacked by only one man, Washington's defense team dismissed this possibility as preposterous.<sup>86</sup>

Nevertheless, Douglas Wilder, the Virginia governor, refused to pardon Washington. Instead, on January 15, 1994, he "offered Washington a Hobson's choice with a two-hour deadline: accept commutation to a life sentence and end his appeal, or remain on death row and hope that the Virginia legislature would pass a new law" allowing him to challenge his conviction on the basis of newly discovered evidence.<sup>87</sup> Washington accepted the governor's offer of commutation.

Seven years later, more sophisticated DNA tests proved that the semen found at the crime scene could not have belonged to Washington under any circumstances.<sup>88</sup> Upon learning of these results, Virginia governor James Gilmore granted Washington a full pardon on October 2, 2000.<sup>89</sup> When the pardon was granted, however, Washington remained in jail, serving a thirty-year sentence for the attack on his neighbor, Hazel Weeks.<sup>90</sup> Washington was finally released from prison in February 2001 after he was granted parole for his offense against Weeks.<sup>91</sup>

86. Edds, *supra* note 55, at 140-41.

87. Hourihan, *supra* note 38, at 1472.

88. Tim McGlone, *The Earl Washington Case. A Chance at Freedom despite Gilmore's Pardon, the Former Death Row Inmate Will Have to Wait at Least Another Month before He Finds Out if He's Paroled*, *Virginian-Pilot* (Norfolk, Va.), Oct. 4, 2000, at A1.

89. *Id.*

90. *Id.*; see also Freedman, *supra* note 31, at 1103. In connection with the attack on his neighbor, Washington pled guilty to burglary and malicious wounding and received consecutive fifteen-year prison terms. *Id.* at 1091.

91. Freedman, *supra* note 31, at 1112; Bob Herbert, *In America; The Confession*, *N.Y. Times*, June 21, 2001, at A25.

*Anthony Porter*

At 1:00 A.M. on August 15, 1982, nineteen-year-old Marilyn Green and eighteen-year-old Jerry Hilliard were shot to death in a set of bleachers overlooking the swimming pool in Washington Park on Chicago's South Side. When the police interviewed Green's mother, she told them Alstory Simon, a local drug distributor, might be responsible. The police, however, quickly focused their investigation on Anthony Porter. Porter, who was then twenty-seven years old, was a natural suspect. He was a gang member<sup>92</sup> who had a criminal record that included a robbery committed in the same Washington Park bleachers where Green and Hilliard were killed.<sup>93</sup>

When Porter heard the police were looking for him, he voluntarily went to the police station on August 17, 1982. Subsequently, he was charged with the two murders. Porter's family believed a private attorney would provide better representation than a public defender; so they hired E. Duke McNeil. Porter's case went to trial in the Circuit Court of Cook County in August 1983 before Judge Robert Sklodowski. McNeil's associate, Akim Gursel, who had clashed with Judge Sklodowski before,<sup>94</sup> became Porter's principal trial attorney.

At the trial, the state's two most important witnesses were Henry Williams and William Taylor, both of whom had been swimming in the Washington Park pool when Green and Hilliard were killed. Both testified that they lived in the same neighborhood as Porter and had known him for years. Williams testified that Porter robbed him at gunpoint and made off with two dollars just prior to the killings. Taylor testified that he saw Porter in the bleachers pointing a gun at Hilliard. He heard shots and saw Hilliard fall backward. He did not see Green being shot.<sup>95</sup>

Taylor admitted that his prior statements to the police were inconsistent with his trial testimony. He had first told the police that he saw nothing; later, he said he saw Porter run past him just after he heard the shots. Finally, after seventeen hours of interrogation at the police station, Taylor told the police that he had seen Porter actually shoot Hilliard. Although

92. *People v. Porter*, 647 N.E.2d 972, 975-76 (Ill. 1995).

93. *People v. Porter*, 489 N.E.2d 1329, 1332 (Ill. 1986).

94. In 1999, sixteen years later, Gursel stated that he and Judge Sklodowski had "clashed bitterly in earlier trials," and that Gursel had called Sklodowski a "racist." Charles Nicodemus, *How Porter Case Went Awry*, Chi. Sun-Times, Feb. 14, 1999, at 8.

95. *Porter*, 489 N.E.2d at 1330.

Gursel impeached Taylor by showing his prior inconsistent statements, he failed to bring out that Taylor did not identify Porter as the killer until after he was interrogated for seventeen hours.<sup>96</sup>

Anthony Liace, a Chicago police officer, also testified for the prosecution. Liace testified that he went to Washington Park as a result of the report of the shootings. While running toward the crime scene, he encountered Porter running in the opposite direction. Liace stopped Porter, frisked him, but then let him go when he found he had no weapons. Liace never filed a report about this incident and did not see Porter between August 15, 1982, and the trial in August 1983. He never identified Porter in a mug book or a lineup, and he never saw him at a “showup.” Nevertheless, he identified Porter in court as the man he had frisked in the middle of the night a year before.<sup>97</sup>

Porter’s defense was that he had been at his mother’s house at the time of the shootings. Gursel called two alibi witnesses. Kenneth Doyle testified that he was with Porter throughout the entire night of August 15, first at Porter’s mother’s house and then at a playground. On cross-examination, however, Doyle admitted that he had initially told the police that he was only with Porter until 10:30 P.M., which left Porter with plenty of time to commit the murders. Doyle later stated that he had lied to the police because “he was afraid he was going to be ‘locked up.’” The second alibi witness was Georgia Moody, Porter’s common-law sister-in-law. Moody testified that Porter had been at his mother’s home until 2:30 A.M., after the murders had taken place.<sup>98</sup>

Gursel called only one other witness, a professional photographer who testified about the layout of Washington Park, including the pool and bleachers area. Gursel later said that he called only three witnesses because McNeil had only received \$3,000 of his \$10,000 fee, and therefore he did not have the funds for further investigation and trial preparation.<sup>99</sup>

The jury deliberated for nine hours before finding Porter guilty of all charges, including the two murders.<sup>100</sup> After the jury’s verdict, McNeil instructed Gursel to opt for sentencing by Judge Sklodowski because

96. Shawn Armbrust, *Chance and the Exoneration of Anthony Porter*, in *The Machinery of Death* 159 (David R. Dow & Mark Dow eds., 2002).

97. Nicodemus, *supra* note 94.

98. *Porter*, 489 N.E.2d at 1331.

99. Steve Mills, *Porter Case Had Wrongs at Each Turn*, *Chi. Trib.*, Feb. 12, 1999, at 1.

100. *Porter*, 489 N.E.2d at 1332.

McNeil's fee had not been paid and a bench trial would be quicker and less work than a jury penalty trial. After hearing the aggravating and mitigating circumstances, Sklodowski sentenced Porter to death, calling him a "perverse shark."<sup>101</sup>

After his conviction, Porter pursued all possible avenues of appeal. He appealed to the Illinois Supreme Court and, when he lost, sought certiorari from the U.S. Supreme Court, which declined to hear his case. After that, Porter petitioned for state postconviction relief in the Illinois courts; when that failed, he sought federal habeas relief in the federal courts, which was also denied.

In Porter's state and federal postconviction petitions, Porter's new attorneys alleged, among other things, that Gursel's trial representation had been ineffective. Most important, they claimed that Gursel should have introduced evidence showing that Alstory Simon and Inez Jackson were responsible for murdering Green and Hilliard. In support of this claim, they offered affidavits and sworn statements by people in the neighborhood stating that Simon and Jackson went to the park on August 15 with Green and Hilliard; that Simon, who had recently been released from the penitentiary, had had a financial dispute with Hilliard relating to drug dealing; that Hilliard was seen arguing in the park that night with a man who was not Porter; and that, after the shootings, Simon had threatened someone who asked Inez Jackson what had happened at the park.<sup>102</sup>

In considering this claim, the state courts assumed that Gursel's failure to seek and introduce the exculpatory evidence was unreasonable and focused solely on whether the defense was able to meet *Strickland's* prejudice prong. It concluded that "none of the alleged mistakes would cast enough doubt on the outcome to warrant a new trial."<sup>103</sup> The state courts therefore dismissed Porter's ineffective assistance claim without holding a hearing in which Porter's new attorneys would have an opportunity to introduce the exculpatory evidence that Gursel could have presented at his trial.<sup>104</sup>

In assessing the reasonableness of the state court's ruling on the *Strick-*

101. Mills, *supra* note 99.

102. Porter v. Gramley, 112 F.3d 1308, 1313 (7th Cir. 1997). The Court mistakenly refers to Inez Jackson as "Inez Johnson" or "Johnson."

103. *Id.* (citing with approval the finding of the Supreme Court of Illinois in *People v. Porter*, 647 N.E. 2d 972, 976 (Ill.1995)).

104. *People v. Porter*, 647 N.E.2d 972, 974 (Ill. 1995).



land claim,<sup>105</sup> the Seventh Circuit Court of Appeals stated that the affidavits and sworn statements offered on behalf of Porter were “at best, circumstantial evidence that is overwhelmed by the direct, eyewitness testimony offered at trial.”<sup>106</sup> The court justified this conclusion by pointing out that some of the affidavits were “barely comprehensible and often second- or even third-hand” information that should not weigh heavily in comparison with the government’s eyewitness testimony.<sup>107</sup> The Court thus denied Porter’s petition for federal postconviction relief. Porter again sought relief from the Supreme Court, but the Court again denied his petition for certiorari.

At this point—with Porter’s appeals exhausted and his execution date set for September 23, 1998—attorney Dan Sanders agreed to represent Porter pro bono. Because he hoped to prove that his client could not be executed because the threat of his impending execution had rendered him mentally incompetent,<sup>108</sup> Sanders sought and obtained a mental health assessment for Porter. He was surprised when the evaluating physician said, “You know, you have a guy here with an IQ of fifty-one.”<sup>109</sup>

Finding that Porter had such a low IQ made an immediate difference. As Sanders recalled, “Suddenly, I had a major legal issue that for sixteen and a half years nobody had noticed, and that I had noticed somewhat accidentally.” On the basis of the new finding of Porter’s possible mental retardation, the Illinois Supreme Court granted Porter a stay of execution on September 21, 1998—just fifty hours before he was to have been executed.<sup>110</sup>

With a reprieve from the immediate peril of execution, Sanders decided to call David Protess, a professor at Northwestern University’s school of journalism, who taught a “Media and Capital Punishment” class in which undergraduates investigated the cases of prisoners on Illinois’s death row.

105. One year prior to the Seventh Circuit’s decision, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA amended 28 U.S.C. § 2254(d)(1) so that the Seventh Circuit could “grant habeas relief on [ineffective assistance of counsel] only if the state court judgment involved an unreasonable application of clearly established federal law.” For further discussion of this statute, see *infra* Chapter 7.

106. *Porter*, 112 F.3d at 1313.

107. *Id.*

108. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court held “that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.” *Id.* at 409.

109. Armbrust, *supra* note 96, at 158–59.

110. *Id.* at 164.

Protes's students had already proven the innocence of several prisoners, and Sanders wondered if they might be able to help Porter.

On September 28, 1998, four students from Protes's "Media and Capital Punishment" class signed up to work on Porter's case. As Protes required, one of their early projects was to visit the scene of the crime and reenact what had happened. Although they were skeptical as to the value of this assignment, the students went to Washington Park. Two stood on the bleachers, while two went to the opposite end of the pool where Henry Williams and William Taylor had been swimming. The students quickly realized that the distance was too great for a reliable identification even in daylight, much less an hour after midnight when the crimes had occurred. They concluded, moreover, that, if William Taylor had been standing where he said he was, his view of the bleachers would have been blocked by a fence, making it impossible for him to see anyone there.

Armed with the belief that the eyewitness testimony against Porter was unreliable, the students decided to interview the individuals who had testified about the shootings. Although Henry Williams had died, they were able to locate William Taylor. By pointing out inconsistencies in Taylor's story, the students persuaded him to admit that the police had pressured him into testifying falsely against Porter and to sign an affidavit recanting his testimony.

Because Protes told them that a witness's recantation would generally not be sufficient to exonerate a convicted defendant, the students then set out to discover what had really happened on August 15, 1982. First, they interviewed Walter Jackson in prison. In 1982, Walter had been living with Inez Jackson, his aunt, and Alstory Simon. Jackson immediately told the students, "Alstory's your man." He said that Simon had come home from the park in the early morning of August 15 and told him that Jerry Hilliard had been "taken care of." Simon then had Jackson stand guard at the door of the apartment with a gun for the rest of the night. The family left the neighborhood shortly thereafter and eventually moved to Milwaukee.

With Jackson's help, the students located other Jackson family members who directed them to the home of Inez Jackson, who was now divorced from Alstory Simon. On January 29, 1999, the students, Professor Protes, and a private investigator took Inez Jackson to a restaurant to talk with her. After they had engaged in some polite small talk, Professor Protes said, "Inez, we know what happened that night in Washington Park, so why don't you just tell us?" Stunned, Inez told them the whole story. She had been sitting in the bleachers with Green, Simon, and Hilliard when Simon and Hilliard began to argue. She heard shots, looked up, and saw the two

victims slumped over. Simon was stuffing his gun into his pants. At that point, he grabbed her, pulled her out of the bleachers, and threatened to kill her too if she said anything. Inez Jackson signed an affidavit and made a videotaped statement that was aired on the *CBS Evening News* three days later.

The morning after that, the private investigator who was helping the Northwestern students went to the home of Alstory Simon to confront him with Inez Jackson's information. At first, Simon didn't believe what the investigator told him. However, his television happened to be tuned to the *CBS Morning News*, and as the two men talked, Inez Jackson's videotaped statement was aired again—to the surprise of both Simon and the investigator. Seizing the moment, the investigator then encouraged Simon to “be a man” and free Porter from death row. Simon agreed to make a videotaped statement. In that statement, he confessed to the shootings, claiming he had killed Green and Hilliard in self-defense.<sup>111</sup>

Two days later, on February 5, 1999, Anthony Porter was freed from prison on his own recognizance. In mid-March, his murder convictions were vacated. Later, Governor George Ryan stated that the Porter exoneration was an important factor in his January 2000 decision to suspend the death penalty in Illinois. “How do you prevent another Anthony Porter . . .?” he asked. “Today I cannot answer that question.”<sup>112</sup>

### *Ernest Willis*

In the early morning hours of June 11, 1986, a fire destroyed a house in Iraan, Texas. At the time of the fire, four people, all of whom were guests of Michael and Cheryl Robinson, the house's tenants, were present: Elizabeth Belue, Gail Allison, Ernest Willis, and Billy Willis, his cousin. Belue and Allison died in the fire. Billy Willis, who was severely injured, escaped death by jumping naked out of the bedroom window. Ernest Willis, who did not appear to be injured, claimed he was sleeping in the living room at the time of the fire. He told investigators the smell of the fire awakened him, and he ran through the house trying to awaken the other occupants. He said that he eventually ran outside and broke the windows in an attempt to secure an escape route for those inside.<sup>113</sup>

111. *Id.*

112. “*My Concern Is Saving Lives, Innocent Lives*,” *supra* note 1.

113. *Willis v. Cockrell*, No. P-01-CA-20, 2004 U.S. Dist. LEXIS 13764, at \*3-4 (W.D. Tex. July 21, 2004).

Deputy sheriff Larry Jackson was the principal investigator in the case.<sup>114</sup> Although Jackson was not an arson expert, he investigated the physical evidence for the purpose of determining how the fire started. He concluded that the fire started as a result of someone pouring a liquid accelerant in various parts of the house, including the living room and dining room. Deputy state fire marshals, who arrived later at the scene, conducted a cursory investigation<sup>115</sup> and essentially agreed with Jackson's conclusions. Based on these findings, Willis's account of his actions during the fire appeared false. If the fire had been started as a result of someone pouring accelerant in various parts of the house, including the living room where Willis was supposedly asleep on a couch, Willis would have been killed or seriously injured if he had run through the house after the fire commenced.

Willis was charged with capital murder. The prosecution claimed that Willis intentionally poured a flammable liquid accelerant on the floor of the house and set it on fire. The prosecutor's arson experts testified that a flammable liquid was poured on the floor of the house in various locations, including beneath and on top of the sofa in the living room where Willis claimed to have been sleeping at the time of the fire.<sup>116</sup> One expert testified that if Willis had been sleeping on the sofa when the fire started, he would have been severely burned.<sup>117</sup> Investigators also testified that Willis's claim that he had broken the windows from the outside was inconsistent with the evidence because no broken glass was found inside the house. The prosecutor's case was thus based on the theory that the physical evidence in the case showed that Willis had lied to investigators concerning his actions at the time of the fire. His lies, his lack of apparent injuries, and the absence of any other viable suspect provided the basis for the government's argument that he had started the fire.

At his jury trial, Willis was represented by Steven Woolard and Kenneth P. DeHart. While both attorneys were defending their first capital defen-

114. The following account of the *Willis* case is drawn primarily from telephone interviews with Robert Owen on Oct. 20, 2004 [hereinafter Owen Interview], Walter Loughlin on Nov. 8, 2004 [hereinafter Loughlin Interview], and Noreen Kelly-Najah on Nov. 8, 2004. In addition, I examined Exhibits attached to the District Attorney's Motion to Dismiss the Case Against Ernest Ray Willis dated Oct. 4, 2004 [hereinafter District Attorney's Motion to Dismiss], which was granted on Oct. 4, 2004, by Judge Brock Jones.

115. According to a subsequent investigation by an independent arson investigator, the fire marshals took no photos of the scene and their report contained several significant errors. District Attorney's Motion to Dismiss, *supra* note 114, at 10.

116. *Willis v. State*, 785 S.W.2d 378 (Tex. Crim. App. 1989).

117. *Id.* at 381.

dant, DeHart was considered a “seasoned veteran.”<sup>118</sup> He had previously been an assistant district attorney for four years, and he later became presiding judge of the 384th District Court in Alpine, Texas. At Willis’s trial, DeHart and Woolard vigorously attacked the state’s case. They called their own arson expert who disputed the government experts’ theory as to the path of the fire. They pointed out that there were numerous discrepancies in the state’s witnesses’ testimony and no physical evidence corroborating the claim that Willis started the fire. Most important, they emphasized that Willis had no motive for setting the fire. There was no evidence that Willis would gain from the home’s destruction or that he had any animosity toward any of the people who were asleep in the house on the night of the fire. Indeed, Willis was on good terms with his cousin and had just met the two victims on the day of the fire.

The prosecutor tried to surmount the problems with his case by focusing the jury’s attention on the defendant’s demeanor. During the trial, Willis, who did not testify, displayed no emotion; he seemed impassive, “zombie-like,” totally disinterested in the proceedings. In his closing argument, the prosecutor made several comments relating to the defendant’s extraordinary lack of affect. At the end of his argument, the prosecutor said, “he sat right here through the entire trial with this dead pan, insensitive, expressionless face—.”<sup>119</sup> After being interrupted by an objection from one of the defense attorneys, he concluded, “With his cold fish eyes on everybody and everything that has come in here, and he just merely stared and watched very impassively, very coldheartedly, much like he probably did that morning outside the fire when he watched and listened.”<sup>120</sup>

Through portraying Willis as a cold-blooded monster, devoid of empathy or feelings of any kind, the prosecutor hoped to counter the defense’s argument relating to Willis’s absence of motive. Since Willis was lacking in ordinary human emotions, he might not need any reason for starting the fire. Because his emotional reactions were so divergent from the norm, the jury should not expect his reasoning process to accord with common experience.

Nevertheless, both Willis’s attorneys and the prosecutor anticipated that Willis would be acquitted. The defense attorneys believed that the government’s case was simply too weak to obtain a conviction. And the prosecutor had estimated his chances at only “about 10 percent going into [the

118. *Willis*, 2004 U.S. Dist. LEXIS 13764, at \*94.

119. *Willis*, 785 S.W.2d at 385.

120. *Id.*

trial].”<sup>121</sup> Even though Willis appeared to be the most plausible suspect, the prosecutor lacked physical evidence that could connect him to the fire. Moreover, the government’s forensic evidence, which tended to show the defendant was lying about his actions at the time of the fire, had been vigorously disputed by the defense expert. The government’s case thus seemed “too thin” to convince a jury that Willis was guilty beyond a reasonable doubt.

Juries, however, are unpredictable. Willis’s jury adjudicated him guilty of capital murder on August 4, 1987; after a brief penalty trial, it sentenced him to death the next day. The prosecutor was surprised but pleased. Shortly after the verdict, he told a Texas newspaper, “We are just tickled pink. We didn’t have any eyewitnesses. We didn’t know what type of flammable material was used. It was all circumstantial material.”<sup>122</sup> Willis’s trial attorneys appealed his conviction, but on June 7, 1989, the Texas Court of Appeals affirmed his conviction,<sup>123</sup> and the Supreme Court denied certiorari on October 9, 1990.

Subsequently, Willis’s case was sent to the Texas Capital Punishment Resource Center where Robert Owen was working. Until 1995, an indigent Texas death row inmate had no right to an attorney’s assistance in state postconviction proceedings. When Owen became involved with Willis’s case in 1990 or 1991, his primary task was to find Willis an attorney who could represent him throughout his postconviction proceedings. At the same time, however, he also had to file an initial state habeas petition that, while not fully developed, would raise enough issues to stave off the immediate threat of execution.

In seeking attorneys for indigent death row defendants, the Texas Resource Center reached out to a variety of private attorneys, including attorneys from law firms in other states. In trying to attract lawyers’ interest in these cases, Owen recalls that he and other Resource Center lawyers tried to “market these cases” so that the best lawyers would be interested in them. According to Owen, in talking to a lawyer from an out-of-state law firm, “you might have a dozen cases and you are trying to interest [the lawyer] in taking one or more of them.”<sup>124</sup> When you had a case where the defendant had a strong claim (especially a claim that he might be inno-

121. Bruce Balestier, *Latham Attorneys Take on Texas’s Infamous Death Row; A Murder Conviction Has Been Overturned*, 223 N.Y. L.J. 24 (June 30, 2000).

122. *See id.*

123. *Willis v. State*, 785 S.W.2d at 378 (Tex. Crim. App. 1989).

124. Owen Interview, *supra* note 114.

cent), “that’s a much easier case to get the lawyer to say, ‘I want to help.’”<sup>125</sup>

By the time Owen was seeking an outside attorney to represent Ernest Willis, Willis’s case had a strong selling point. On September 11, 1990, David Martin Long, who was then an inmate on Texas’s death row, made a three-hour videotaped confession in which he admitted setting the fire that resulted in the deaths of Elizabeth Belue and Gail Allison. Long stated that he had set the fire because he wanted to hurt or kill Billy Willis, who had participated with him in various criminal activities. He stated that he had parked his truck about a block away from the Robinson house where he knew Billy was staying. After sitting in his truck for about twenty minutes, he started the fire by pouring a mixture of Wild Turkey and Everclear “on the carpet around the dining room table and around the living room.”<sup>126</sup> Even before Long’s confession, the government’s weak case suggested that Willis might have been wrongfully convicted. The addition of Long’s confession strengthened Willis’s claim of innocence and made his case one that would attract significant interest from outside attorneys.

In the early 1990s, Jim Blank, a young lawyer just out of law school, and Walter P. Loughlin, a former federal prosecutor and partner at Mudge, Rose, Guthrie, Alexander & Ferdon, became Willis’s attorneys. In 1995, Loughlin and Blank moved to the New York office of Latham & Watkins LLP, where other Latham lawyers, including Noreen Kelly-Najah, joined the Willis team. During the nearly thirteen years in which these attorneys represented Willis in his postconviction proceedings, they devoted approximately ten thousand hours to his case. Had he been a paying client, the estimated cost of their work on his behalf would have been between three and five million dollars.

The Latham attorneys initially focused on David Long’s confession. Even though Willis’s postconviction petition alleged that Willis was innocent and referred to Long’s confession, Judge Brock Jones, who had presided at Willis’s jury trial, denied Willis’s petition for postconviction relief without a hearing. The Texas Court of Appeals, however, was concerned about Willis’s claim of innocence and remanded his case to Judge Jones for an evidentiary hearing relating to all of his claims. After the remand, Judge Jones considered several preliminary issues relating to Long’s confession. At one point, Willis’s attorneys called Long as a witness; on advice of counsel, however, Long refused to testify. Judge Jones indicated he would allow the defense to introduce the videotape of

<sup>125.</sup> *Id.*

<sup>126.</sup> *Willis*, 2004 U.S. Dist. LEXIS 13764, at \*32–33.

Long's confession; he also indicated, however, that the defense could not expect to prevail unless it could corroborate significant parts of the confession.

Over the next several years, the defense sought to corroborate Long's confession. After an extensive investigation, several important details were corroborated: a witness was able to testify to the presence of a vehicle near the Robinson house at the time of the fire, which tended to corroborate Long's claim that he was in a truck near the Robinson house before and after the fire; Long was shown to be a longtime criminal associate of Billy Willis, thus providing support for Long's claim that his animus toward Billy—which occurred as a result of their prior criminal activity together—was his motive for starting the fire; Marshall Smyth, an arson expert, conducted experiments that showed the fire could have been started through the use of a mixture of Everclear and Wild Turkey, which Long claimed to have used; and Long had started another fire in Bay City, Texas, using what appeared to be a *modus operandi* similar to the one he claimed to have used in starting the fire in the Robinson house.

In addition to investigating for the purpose of corroborating Long's confession, the defense also investigated other aspects of the case, including mitigating evidence that could have been introduced at Willis's penalty trial, forensic evidence relating to the path of the Robinson house fire, and the explanation for Willis's "zombie-like" demeanor at trial. When the defense examined Willis's prison medical records, they learned that the state had been unnecessarily medicating Willis with two strong antipsychotic medications (Haldol and Perphenazine) throughout the trial. Although these records had been available to Willis's trial attorneys, the attorneys never examined them. This new information gave rise to two strong constitutional claims: the state violated Willis's rights by unnecessarily medicating him throughout his trial; and Willis's trial attorneys were ineffective in failing to discover the cause of Willis's "zombie-like" demeanor.

At evidentiary hearings scheduled periodically over several years, Judge Brock Jones, the Texas state court judge who had presided at Willis's 1987 capital trial, heard testimony from witnesses who tended to corroborate David Long's confession as well as witnesses and documentary evidence supporting the other grounds on which habeas relief was sought. Although the New York attorneys believed there were several strong bases for attacking the conviction, Owen and other Texas attorneys warned them that,



since 1974, less than 2 percent of all Texas death row defendants had “been freed through the reversal of their convictions.”<sup>127</sup>

Faced with these formidable odds, the New York attorneys sought to prevail by emphasizing the significance of Willis’s demeanor during the trial. At the state postconviction hearing, the attorneys showed that, while his trial attorneys had noticed and been concerned about Willis’s “zombie-like” demeanor, they had failed to investigate its cause. If the attorneys had conducted a reasonable investigation, they would have found the prison medical records showing that government doctors had been unnecessarily medicating Willis throughout the trial. Willis’s trial attorneys’ failure to investigate the reason for Willis’s demeanor had had a pervasive effect on the trial. Since the government’s case was entirely circumstantial, evidence relating to whether Willis was the kind of person who would start a fire likely to cause two or three people’s deaths was vitally important. Willis’s “zombie-like” demeanor allowed the prosecutor to argue that, because he lacked normal human emotions, Willis was perfectly capable of committing an atrocious crime for no reason or for reasons that ordinary people would find incomprehensible. The attorneys’ failure to address the problems caused by Willis’s medication thus drastically altered the dynamics of the trial.

Under *Strickland*, however, Willis’s postconviction attorneys also had to show that, if the attorneys had properly addressed the problem of Willis’s demeanor, there was a reasonable probability that the jury’s verdict would have been different. As to this issue, the evidence that Long had confessed was critically important. Owen, who has had personal experience with the difficulty of persuading Texas courts to reverse capital defendants’ convictions on the ground of ineffective assistance of counsel, states that many such ineffective assistance claims fail because, even if the state has a weak case, the reviewing court may still think “this is the likeliest guy to have committed the crime.”<sup>128</sup> The court will then conclude that, even if the trial attorney’s representation had been better, the jury would have still found the defendant guilty because they would view him as the only plausible suspect. In Willis’s case, however, the postconviction attorneys were able to present a plausible alternative scenario. Even though Long’s confession

127. “Data from the Texas Department of Criminal Justice shows that, since 1974, 854 people have been sentenced to death in Texas and only 15 have been freed through the reversal of their convictions.” Balestier, *supra* note 121, at 27.

128. Owen Interview, *supra* note 114.

had not been before the original jury, the attorneys could now say to the court, “We know who committed this crime. It’s the guy who confessed to it.”<sup>129</sup> With this knowledge, a reviewing court could feel comfortable in granting relief.

Based on Long’s confession, Willis’s postconviction attorneys thus also presented the claim that Willis was entitled to have his conviction reversed because he was actually innocent of the crime of which he had been convicted. While the attorneys knew that obtaining relief on this ground alone would be difficult, they believed that presenting evidence in support of this claim would enhance the likelihood that either the state or federal courts would reverse Willis’s conviction on some other ground.<sup>130</sup>

Texas has an unusual procedure for adjudicating state postconviction claims. Although the hearing takes place before a trial judge, that judge does not have jurisdiction to grant or deny the relief requested by the defendant. After hearing the evidence, the judge makes relevant findings of fact and conclusions of law. Those findings and the judge’s recommendation as to whether postconviction relief should be granted are then submitted to the Texas Court of Criminal Appeals, which makes the ultimate determination as to what, if any, postconviction relief will be granted.

In Willis’s case, Judge Jones’s findings were mixed but ultimately favorable to the defendant. While he found that Willis’s attorneys had not established that Willis was actually innocent of the murder, he ruled in Willis’s favor on several other issues relating to the conviction. Most important, he ruled that the state had unnecessarily medicated Willis throughout the trial, thus producing the defendant’s “zombie-like” demeanor; that Willis’s lawyers provided deficient representation in failing to investigate the cause of the defendant’s demeanor at trial; and that the attorneys’ failure resulted in prejudice at the guilt stage because there was a reasonable probability that the jury would not have convicted Willis if he had not had such an aberrational demeanor. Based on these findings, Willis would be entitled to have his conviction reversed.

The Texas Court of Appeals, however, declined to accept any of Judge Jones’s findings. That court concluded that the state had not improperly

<sup>129</sup> *Id.*

<sup>130</sup> The attorneys also attacked Willis’s conviction on the ground that his trial attorneys were ineffective in failing to object to the prosecutor’s closing argument relating to Willis’s demeanor. They attacked his death sentence on several grounds, including that his attorneys’ failure to introduce mitigating evidence constituted ineffective assistance of counsel and that the prosecutor violated his constitutional rights by failing to disclose exculpatory evidence relating to punishment. *Willis*, 2004 U.S. Dist. LEXIS 13764, at \*2.

medicated Willis during the trial because the “record fails to reveal a motion to terminate use of the medication or an objection to the medication.”<sup>131</sup> The court held, moreover, that Willis had not established his attorneys’ ineffective representation because he failed to satisfy his burden of showing both his attorneys had been ineffective. The basis for this conclusion appeared to be that DeHart, Willis’s more experienced attorney, had not testified at the postconviction hearing. Although Woolard had testified as to what both he and DeHart had done or failed to do at Willis’s trial, the Court of Appeals concluded that “nothing in the instant record overcomes the presumption DeHart provided [Willis] with effective assistance of counsel.”<sup>132</sup> Since the court also rejected Willis’s claims relating to his death sentence, Willis remained on death row.

Willis’s attorneys next filed a petition for federal habeas postconviction relief. In order to obtain relief, the attorneys would have to show that the Texas Court of Appeals’ decision was an unreasonable application of federal law.<sup>133</sup> Nevertheless, the federal district court granted the writ as to both Willis’s conviction and death sentence.<sup>134</sup> As to the defendant’s conviction, the district court accepted Judge Jones’s critical findings of facts, including the finding that the state unnecessarily medicated Willis and that Willis’s attorneys’ failure to investigate the cause of Willis’s demeanor was ineffective assistance of counsel. Based on these findings, the court concluded that the Texas Court of Appeals’ decision was an unreasonable application of federal law.

The federal district court also discussed Willis’s actual innocence claim at length. Although Judge Jones had found that David Long’s confession was “not sufficiently corroborated to be admissible,” the district court judge observed that the corroborating circumstances presented by Willis’s attorneys<sup>135</sup> seemed to substantiate the confession’s trustworthiness.<sup>136</sup> In addition, the judge examined the defense evidence contradicting the state’s theory of the fire. Marshall Smyth, a fire investigator, testified that the state’s theory as to the path of the fire in the Robinson house was mistaken. At the trial, the government’s witnesses had testified to a “pour pattern” theory of the fire, meaning that an accelerant had been poured in every part of the

131. *Ex parte Willis*, No. 27, 787–01 Order at 2 (Tex. Crim. App. 2000).

132. *Id.* at 5.

133. *See supra* note 105.

134. *Willis*, 2004 U.S. Dist. LEXIS 13764 at 1.

135. *See supra* text accompanying note 126.

136. *See Willis*, 2004 U.S. Dist. LEXIS 13764, at \*32–36.

house where there was burn damage. Smyth testified, however, that the “pour pattern” theory was physically impossible; instead, the damage throughout the house occurred as a result of “flashover” conditions throughout the house during various points of the fire.<sup>137</sup> Smyth’s testimony obliterated the government’s claim that Willis had lied about his movements during the fire. If the fire had progressed as Smyth said it did, Willis would have had time to exit the house without serious injury if, as he claimed, he had been asleep on the living room couch when the fire started.

Other evidence also corroborated Willis’s account of what happened after the fire. As one example, the defense showed that the “windows of the Robinson house were of a particular type that prevented the glass from falling into the house.”<sup>138</sup> This evidence refuted the government investigator’s trial testimony that Willis’s claim that he broke the Robinson house’s windows from the outside must be false because the window’s glass was found outside the house.

After meticulously examining the evidence relating to Willis’s innocence, the federal judge concluded that “while both parties’ presentations to the Court . . . raise strong reason to be concerned that Willis may be actually innocent,”<sup>139</sup> it would be inappropriate to decide this question for two reasons: first, under the Supreme Court’s decisions, a defendant’s innocence is “not a cognizable claim on [federal] habeas,” and, second, deciding the question was unnecessary because Willis’s conviction had to be reversed on other grounds.<sup>140</sup>

The court’s discussion of Willis’s innocence nevertheless provided a strong signal that it believed there was serious doubt as to Willis’s guilt. In response to the court’s ruling, Ori White, the present district attorney of Pecos County, undertook a rigorous examination of the case. In addition to reviewing the evidence introduced at Willis’s trial and postconviction hearing, he hired two arson investigators who had not been previously involved in the case and asked them to make an independent determination as to how the Robinson house fire had been started.

After carefully examining the evidence, the new arson investigators came

137. As Dr. Gerald Hurst, another arson expert, stated, the theory that the fire must have had multiple origins was “based on the flawed concept that physically separate pours of flammable liquid puddles requires multiple ignitions.” District Attorney’s Motion to Dismiss, *supra* note 114, at 12.

138. See *Willis*, 2004 U.S. Dist. LEXIS 13764, at \*32–36.

139. *Id.* at \*45.

140. *Id.* at \*45–46.

to a surprising conclusion: the fire “probably wasn’t caused by arson at all. . . . Most likely, [it] was caused by an electrical problem—a broken ceiling fan or a faulty outlet.”<sup>141</sup> In his report, one of the experts stated, “There is not a single item of physical evidence in this case which supports a finding of arson.”<sup>142</sup> District Attorney White dismissed all charges against Willis. In explaining his action, White said, “He simply did not do the crime. . . . I’m sorry this man was on death row for so long and there were so many lost years.”<sup>143</sup>

### *Reflections on the Cases*

Of the death row defendants who have been exonerated, Earl Washington, Anthony Porter, and Ernest Willis are among the most famous. Washington’s and Porter’s cases have become well known because both defendants came so close to execution—Earl Washington less than three weeks and Anthony Porter within fifty hours. Ernest Willis’s case has become notorious because he spent seventeen years on death row, the longest of any exonerated death row defendant.<sup>144</sup>

In all three cases, the circumstances that led to the defendant’s exoneration were extraordinarily adventitious. Earl Washington did not even have an attorney until his execution date was three weeks away. And, even after his lawyer filed a postconviction petition on his behalf, the judge’s decision to stay his execution was quite surprising. Washington could have been executed before the inquiry that led to his exoneration was ever started. The revelation that Porter was mentally retarded, moreover, was totally unexpected. Prior to his mental health examination, none of his attorneys saw signs that his IQ was substantially below the norm. And, as Ken Armstrong and Steve Mills have said, “[t]ack twenty more points onto Anthony Porter’s IQ and you put him in his grave.”<sup>145</sup> In Ernest Willis’s case, David Long’s confession was the catalyst that precipitated the massive investiga-

141. Scott Gold & Liane Hart, *The Nation: Inmate Freed after 17 years; Prosecutors Once Called Him a “Satanic Demon”; But Fatal Fire Probably Wasn’t Even Arson*, L.A. Times, Oct. 7, 2004, at A14.

142. District Attorney’s Motion to Dismiss, *supra* note 114, at 3.

143. *Id.*

144. Maureen Balleza, Abstracts, *After 17 Years on Death Row, Texas Inmate Walks Free*, N.Y. Times, Oct. 8, 2004, at A18.

145. Ken Armstrong & Steve Mills, “*Until I Can Be Sure*”: *How the Threat of Executing the Innocent Has Transformed the Death Penalty Debate*, in *Beyond Repair: America’s Death Penalty* 94 (Stephen P. Garvey ed., 2003).

tion that resulted in Willis's exoneration. In retrospect, however, it appears that Long's confession was very likely false. All three cases thus provide cautionary signals for our system of capital punishment, suggesting that our safeguards for protecting innocent defendants from execution are insufficient.

Beyond that, what lessons can be drawn from the three cases? Based on studies of larger numbers of exonerated capital defendants, all three cases were in some ways atypical. The prosecution did not introduce testimony from jailhouse informants or forensic experts who compared the defendant's hair with hair from the crime scene, for example.<sup>146</sup> Although both Washington and Porter were African American, moreover, they were not tried before all-white juries.<sup>147</sup> Nevertheless, the exonerations in the three cases do provide insight into the sources of error in capital cases, some of the ways in which deficient attorneys' representation contributes to errors in capital cases, and the problems with the ways in which reviewing courts monitor such attorneys' performance.

#### *Sources of Error in Capital Cases*

Mistaken eyewitness testimony and false confessions, the sources of the errors in Porter's and Washington's cases, respectively, have long been recognized as two of the leading sources of error in potentially capital cases.<sup>148</sup> Indeed, mistaken eyewitness testimony has been shown to be the leading source of wrongful convictions in all criminal cases.<sup>149</sup> In Porter's case, the eyewitness testimony may have seemed relatively strong because the two eyewitnesses knew the defendant. On the other hand, the witnesses' credibility was undermined by their criminal background, their prior inconsis-

146. In their studies of exonerated death row defendants in Illinois and Texas, Mills & Armstrong found that these two factors were frequently present in exonerations in both states. *See id.* at 106-07, 111-13.

147. In *Washington*, the racial composition of the jury was 10 white and 2 African American jurors. *See Edds, supra* note 55, at 49. In *Porter*, the racial composition of the jury was never stated; it appears clear, however, that African Americans were on the jury.

148. *See generally* Hugo Adam Bedau & Michael R. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21, 173-79 (1987) (concluding that mistaken eyewitness identifications and police-induced false confessions were among the leading causes of wrongful convictions in potentially capital cases from 1900 to 1985).

149. *See United States v. Wade*, 388 U.S. 218, 229 (1967) (quoting Wall's assertion that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined"). *See generally* Patrick M. Wall, *Eye-witness Identification in Criminal Cases* 26 (1965).

tent statements to the police, and the pressure exerted by the police to obtain their statements. Since the government's case was based almost entirely on eyewitness testimony, the Illinois Supreme Court's conclusion that the case against Porter was "overwhelming"<sup>150</sup> was clearly an exaggeration. The case suggests not only that mistaken eyewitness testimony continues to be a source of error in capital cases, but also that courts are insufficiently sensitive to the possibility of such error.

Although many people find it difficult to believe a person would confess to a murder he didn't commit, studies of wrongful convictions, including DNA exonerations, demonstrate that police-induced false confessions are also a leading source of error in potentially capital cases.<sup>151</sup> Huy Dao, the assistant director of the Innocence Project at Cardozo University, has concluded that in homicide cases, it "appears . . . that false confessions or admissions are a main, if not the major, cause of wrongful convictions in DNA-exonerated cases."<sup>152</sup> Earl Washington's confession should have been viewed as particularly suspect, moreover, not only because of the many inconsistencies and errors in his original statements to the police, but also because mentally retarded suspects are one of the populations most likely to falsely confess in response to police interrogation.<sup>153</sup> Washington's case thus provides a paradigm example of a case in which a police-induced confession resulted in an innocent defendant's conviction and near-execution.

Prior to the modern era of capital punishment, mistaken forensic testimony, the source of error in Willis's case, was not viewed as a likely source of error in capital cases.<sup>154</sup> Over the past two decades, however, the surprisingly high number of exonerated death row defendants convicted as a result of such testimony indicates that this source of error is now one of the most frequent sources of error in capital cases.<sup>155</sup>

Mistaken forensic testimony is likely to occur either because the science

150. *People v. Porter*, 489 N.E.2d 1329, 1337 (Ill. 1986).

151. See generally Welsh S. White, *Confessions in Capital Cases*, 2003 Ill. L. Rev. 979, 982 [hereinafter White, *Confessions*].

152. E-mail from Huy Dao to Welsh S. White (Aug. 25, 2002, 20:41 EST) (on file with author).

153. White, *Confessions*, *supra* note 151, at 989–90.

154. See Bedau & Radelet, *supra* note 148.

155. See generally Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. Dayton L. Rev. 265, 279 (2004) (listing "unreliable 'scientific' testimony of state 'experts'" as one of the leading causes of erroneous convictions in serious criminal cases).

relied on by the forensic “expert” is not reliable, as in the case of microscopic hair analysis,<sup>156</sup> or because “the prosecution experts are sloppy, incompetent, or deceptive in rendering results.”<sup>157</sup> In Willis’s case, both factors were involved. When the investigation of the Robinson house fire took place in 1987, “fire investigation was treated as an ‘art’ based on experience rather than science.”<sup>158</sup> As a result, the prosecutor’s arson experts accepted the now discredited “pour pattern” theory under which it was assumed an accelerant had been poured in every part of the house where there was significant burn damage. In addition, the government’s arson investigation was imprecise. Deputy Sheriff Jackson, who was not an arson expert, reached his conclusion as to how the fire started by examining the physical evidence at the scene of the fire. Instead of rigorously examining all of the physical evidence, the deputy state fire marshals accepted Jackson’s conclusions after conducting a cursory investigation that included significant errors and omissions.<sup>159</sup> The experts’ erroneous testimony could thus be attributed both to the embryonic state of fire investigation in 1987 and to an investigation that was “bungled from the beginning.”<sup>160</sup>

While the most immediate sources of error in Washington’s, Porter’s, and Willis’s cases may be identified as mistaken identification, false confession, and unreliable forensic testimony, in all three cases a more pervasive source of error, sometimes characterized as the “prosecution complex,”<sup>161</sup> was also involved. The prosecution complex occurs when police or prosecutors feel pressure to solve a case and either have only one suspect or have decided to focus on a particular suspect. In such cases, overzealous police or prosecutors prematurely become convinced they have the right suspect and become narrowly focused on strengthening the case against that suspect.

The prosecution complex is most likely to apply in capital cases because, as Professor Samuel Gross has pointed out,<sup>162</sup> in such cases the public often places pressure on the police and prosecutor to find and convict the perpetrator.

As a result, the police or prosecutor will be likely to prematurely focus on a particular suspect, engage in overzealous tactics to strengthen the case

156. *Id.* at 267.

157. *Id.* at 279.

158. District Attorney’s Motion to Dismiss, *supra* note 114, at 14 [statement of Dr. Hurst].

159. *See supra* note 115.

160. Loughlin Interview, *supra* note 114.

161. *See* Thomas Frisbie & Randy Garrett, *Victims of Justice: The True Story of Two Innocent Men Condemned to Die and a Prosecution Out of Control* 478 (Avon Books, Inc. 1998).

162. *Id.* at 478–79, 485–86.



against that suspect, and fail to consider evidence that could exculpate that suspect or incriminate others.<sup>163</sup> In preparing the case against the suspect, the police's or prosecutor's overzealous tactics may produce evidence that appears strong but is in fact of dubious reliability. The investigators' failure to investigate other possibilities, moreover, may lend an air of inevitability to the government's case. Unless the defense is able to counter the government's case by introducing persuasive exculpatory evidence, the jury may believe that the defendant must be guilty because, based on the evidence presented, there is no viable alternative.

This source of error played an important part in producing all three wrongful convictions. In Washington's case, the police, who had been frustrated by their failure to solve the rape and murder of Rebecca Williams, viewed Washington as a viable suspect because his assault of Hazel Weeks had sexual overtones.<sup>164</sup> When Washington showed he was willing to admit to committing whatever crimes he was questioned about, the police asked him if he had committed the Williams rape-murder and Washington readily acquiesced. Because of their eagerness to solve this crime, the police apparently discounted the significance of Washington's contemporaneous false confessions to three other rapes and his inability to provide them with accurate details relating to the Williams rape-murder. In addition, they failed to give sufficient attention to forensic evidence suggesting that someone other than Washington was responsible for the crime.

Because Washington's defense attorney failed to challenge the government's evidence at trial, the prosecutor was able to present a case that appeared to convincingly establish the defendant's guilt. Even though jurors are disinclined to doubt the reliability of a defendant's incriminating admissions, Washington's original statements might have appeared problematic because of his many mistakes. The prosecutor did not offer these statements, however, but instead introduced only Washington's final written confession and the principal interrogator's self-serving (and in some cases inaccurate) summary of that confession. The government's case thus seemed unassailable: the defendant had confessed to the crime, there were details that corroborated his confession, and there was no evidence that suggested anyone other than the defendant could have committed the crime. Not surprisingly, the jury readily found the defendant guilty.

The prosecution complex also played a significant part in producing Porter's wrongful conviction. Although there were certainly other viable

<sup>163</sup> *Id.*

<sup>164</sup> Edds, *supra* note 55, at 35.

suspects—most notably Alstory Simon, the actual perpetrator—the police decided to focus their investigation exclusively on Porter. As a result of their belief in Porter’s guilt, they exerted inordinate pressure on at least two witnesses: through the use of coercive interrogation techniques, they produced Taylor’s identification of Porter as the killer, which strengthened the government’s case, and Doyle’s admission that he had not been with Porter throughout the night of the murder, which weakened the defendant’s alibi.

As in Washington’s case, the prosecution’s evidence against Porter seemed much stronger when it was presented to the jury than it did earlier in the investigation. At Porter’s trial, the jury heard two witnesses identify Porter as the killer and a third identify him as someone who had been at the scene of the crime. Moreover, as in Washington’s case, the jury did not hear evidence suggesting anyone other than Porter might have committed the crime. The police’s failure to follow leads pointing toward other suspects eliminated the possibility that the prosecutor would be required to disclose exculpatory evidence relating to other suspects to the defense;<sup>165</sup> and the defense was unable to develop this evidence on its own. The defense did introduce Porter’s two alibi witnesses. Nevertheless, as in Washington’s case, the absence of evidence pointing to any suspect other than Porter might have predisposed the jury toward accepting the government’s version of the relevant events.

In Willis’s case also, the prosecution complex seemed to shape the Texas prosecutor’s approach. If the original prosecutor had conducted the careful review of the forensic evidence that Ori White ultimately conducted, it seems unlikely that criminal charges would have been brought against Willis. Even if the “pour pattern” theory was accepted as a probable hypothesis, a complete examination of the physical evidence would have shown that some of Deputy Sheriff Jackson’s conclusions were mistaken and, therefore, that the government’s case against Willis was too speculative to establish his guilt beyond a reasonable doubt.

Even if Deputy Sheriff Jackson’s conclusions were accepted, moreover, the original prosecutor realized that the government’s case against Willis was so weak that the chances of conviction were only about one in ten.

165. Under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the prosecution is required to disclose exculpatory evidence to the defense when there is a sufficient likelihood that the exculpatory evidence could affect the outcome of the trial. In *United States v. Bagley*, the Court defines the level of materiality necessary to require the disclosure of exculpatory evidence by the prosecution as “a reasonable probability” that the outcome would have been different “had the evidence been disclosed to the defense.” 473 U.S. 667, 682 (1985).

When the chances of convicting a suspect are so low, an ethical prosecutor might be expected to have qualms about bringing the case or at least about seeking a death sentence.<sup>166</sup> The original Texas prosecutor obviously had no such qualms. Prior to trial, he failed to disclose relevant exculpatory evidence relating to the penalty determination to Willis's attorneys.<sup>167</sup> In his closing argument, he made improper comments relating to the defendant's demeanor.<sup>168</sup> And, after the trial was over, he told the media that he was "tickled pink" to obtain a death sentence in such a weak case. The prosecutor's exuberance may indicate that he shared the view—attributed to another Texas prosecutor—that "[a]ny prosecutor can convict a guilty man. It takes a great prosecutor to convict an innocent man."<sup>169</sup>

### *The Defendants' Representation*

The attorneys who represented Washington, Porter, and Willis at their trials do not fit within the category of capital defense attorneys characterized by the ABA as "abysmal" or "deplorable." They did not engage in inexcusable conduct, such as falling asleep at their client's trial; and, in contrast to other exonerated defendants' attorneys who were disbarred either before or around the time they represented the capital defendant,<sup>170</sup> their professional reputations appear to have been good.

Nevertheless, the attorneys' performances in these cases provide examples of representation that increases the risk of an innocent capital defendant's conviction. In contrast to most capital defendants' lawyers, both Scott and McNeil (who delegated trial responsibility to Gursel) were retained by the defendant's family rather than appointed by the court to represent an indigent defendant. In both cases, the lawyer's meager fee impaired his ability to present a defense. Gursel frankly admitted that he

166. See Model Rules of Prof'l Conduct R. 3.8(a) (2004) (providing that the prosecutor should not bring charges unless he concludes there is probable cause to believe the defendant is guilty).

167. Prior to Willis's trial, Dr. Jarvis Wright, a forensic psychologist, examined Willis for the purpose of determining, among other things, the likelihood that he would be a future danger. Dr. Wright concluded that there was no evidence to support a conclusion of future dangerousness and forwarded this conclusion to the prosecutor. Although this conclusion constituted exculpatory evidence with respect to punishment, the prosecutor never disclosed Dr. Wright's conclusion to Willis's trial attorneys. In accordance with Judge Jones's recommendations, the federal district court concluded that the prosecutor's failure to disclose this evidence to the defense resulted in a violation of Willis's constitutional rights. See *Willis*, 2004 U.S. Dist. LEXIS 13764, at 75.

168. See *id.* at \*109–12.

169. Welsh S. White, *The Death Penalty in the Nineties* 42 (1991).

170. See *Armstrong & Mills*, *supra* note 145, at 107, 111.

called only three witnesses because he did not have the funds for further investigation and trial preparation. “I had very limited resources,” he explained in an interview. “There were people I would have liked to have followed up with, but I couldn’t.”<sup>171</sup> Scott’s resources were even more limited, which perhaps explains his failure to consider retaining an expert witness who could testify to Washington’s inability to understand the *Miranda* warnings or to make a fuller examination of the forensic evidence.

In addition, both lawyers’ inexperience in defending capital cases led to some serious problems. Scott’s weak closing argument, particularly his inability to respond to the prosecutor’s argument that Washington’s confession revealed facts that would only be known to the perpetrator, justified Washington’s later lawyers’ conclusion that, in defending Washington, Scott had been “totally out of his league.”<sup>172</sup>

If Gursel and Scott had been more experienced, moreover, they would have realized that their limited funds would not necessarily preclude them from obtaining the investigators and expert witnesses necessary to assist them in preparing the defense. They could have requested that the trial judge appoint and provide adequate funding for such experts and investigators, arguing that a criminal defendant (and especially a capital defendant) unable to afford such professional services is entitled to have them provided by the court. Indeed, the ABA Guidelines now specifically provide that “all expert, investigative, and other ancillary professional services” needed for high quality representation should be provided “to private attorneys whose clients are financially unable to afford them.”<sup>173</sup> Because neither lawyer sought such assistance, however, the defenses they presented on behalf of their clients were very limited.

Woolard and DeHart, both of whom were appointed to represent Willis, were also inexperienced in representing capital defendants. If they had been more experienced, they would have conducted a fuller investigation relating to the defendant’s history and present situation. One of the basic components of such an investigation would have been to examine the defendant’s prison medical records so that the defense could obtain a bet-

171. Mills, *supra* note 99.

172. Edds, *supra* note 55, at 30.

173. The Commentary to ABA Guideline 4.1 (2003) speaks directly to this point: “Finally, in the relatively rare case in which a capital defendant retains counsel, jurisdictions must ensure that the defendant has access to necessary investigative and expert services if the defendant cannot afford them.” See *American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 952 (2003).

ter understanding of the defendant's past or present physical or mental problems. If they had conducted such an examination, they would have learned that Willis's "zombie-like" demeanor was occurring because prison officials were unnecessarily medicating him. The attorneys then could have addressed this problem, thereby significantly reducing the likelihood of Willis's conviction.

*The Criminal Justice System's Monitoring of  
Capital Defense Attorneys' Representation*

While all three defendants challenged their convictions on the ground that they had had received ineffective representation from their defense attorneys at trial, Willis's challenge was the only one that was successful. As Willis's postconviction attorneys emphasized, Willis's ineffective assistance claim was unusually strong because the defense was able to present compelling evidence that he was probably innocent. Even so, the Texas state courts rejected his claim. The federal district court judge, however, conducted an unusually meticulous examination of the evidence relating to both Willis's constitutional claims and his innocence, and then concluded that the state court's decision constituted an "unreasonable application of federal law."

State or federal decisions vacating Texas death row defendants' convictions on grounds of ineffective assistance of counsel have been very rare. Given the stricter standard for federal habeas review under the new statute, federal decisions vacating Texas convictions on this ground are likely to become even more rare. Willis's success may be attributed primarily to two factors: the evidence of his innocence was unusually strong, and the federal judge who reviewed his case was unusually conscientious.<sup>174</sup> If either of these factors had not been present, Willis might still be on death row.

Significantly, the courts that reviewed Washington's and Porter's attorneys' trial representations held or assumed that in both cases the attorney's performance was unreasonable within the meaning of *Strickland's* first prong. In both cases, however, the courts concluded that the defendants were unable to satisfy *Strickland's* second prong because the juries would have convicted the defendants of capital murder even if their attorneys had

174. For further discussion of the scrutiny federal judges afford state court decisions in federal habeas death penalty cases decided under the new statute, see *infra* Chapter 7.

introduced all of the potentially available exculpatory evidence at the trial. Since we now know that both defendants were in fact innocent, the courts' conclusions suggest that *Strickland* is not being applied in a way that will fulfill the Supreme Court's goal of ensuring reliable results.

In both cases, the exculpatory evidence that the attorneys should have introduced was in fact quite powerful. In Washington's case, evidence that semen stains on a blanket at the crime scene did not belong to Washington strongly suggested that someone else had raped the victim. Since the victim had indicated that she had been raped by only one person, this should have been enough to raise a serious doubt as to Washington's guilt. The Fourth Circuit concluded, however, that the exculpatory evidence would not have changed the result because Washington's confession provided such convincing evidence of his guilt. The Fourth Circuit's analysis perhaps indicates that courts, as well as juries, tend to overestimate the reliability of a defendant's police-induced confession.

In Washington's case, the Fourth Circuit majority's evaluation of the strength of the confession introduced by the prosecution seems seriously flawed. Even if the majority was unaware of the many errors in Washington's original statements, they were certainly aware of Washington's mental retardation and that at least some of his statements were made in response to leading questions from the police. They should have been aware that mentally retarded suspects' statements obtained under these circumstances have long been viewed as likely to be unreliable. In applying *Strickland's* test, their analysis thus seemed to give undue weight to the persuasive power of the prosecutor's evidence.

The Seventh Circuit's approach to analyzing the exculpatory evidence that Porter's trial attorney failed to introduce at trial was also problematic. That court justified its conclusion that the exculpatory evidence that Gursel should have presented would not have changed the result primarily on the ground that the affidavits and sworn testimony attesting to the new evidence seemed weak in comparison to the sworn testimony presented by the government at Porter's trial. In particular, some of the exculpatory evidence was double or triple hearsay, and some could be subject to interpretations that would not establish Porter's innocence. Comparing the affidavits and statement introduced by Porter's postconviction attorneys with the government witnesses' testimony at his trial was misguided, however, because courtroom testimony from witnesses who were prepared to testify by the police or prosecutors would almost inevitably appear stronger than out-of-court statements gathered by defense investigators.

In assessing the materiality of exculpatory evidence, the focus should be on what the evidence can lead to, not how strong the evidence would be when considered by itself.<sup>175</sup> In fact, some of the sworn testimony presented by Porter's postconviction attorneys seemed as if it would be likely to lead to strong exculpatory testimony. One of the affiants stated, for example, that Porter was innocent because Simon's girlfriend "told a woman (who later told the affiant) that Simon committed the murders."<sup>176</sup> While the affiant's statement would be double or triple hearsay, the statement indicates that Gursel should have investigated Simon's girlfriend, perhaps subpoenaing her as a witness so that she could testify and be cross-examined with respect to what she had seen at the time of the shooting and what she had said about it afterward. In order to assess the materiality of exculpatory evidence Gursel might have presented, the Illinois courts needed to hold an evidentiary hearing at which the defense exculpatory evidence could be fully presented. As in many postconviction ineffective assistance of counsel claims, however, the courts refused Porter's request for an evidentiary hearing.

The way in which the courts applied *Strickland's* prejudice prong in these two cases exemplifies the kind of review that is frequently provided to capital defendants who attack their convictions or death sentences on grounds of ineffective assistance of counsel. The Fourth Circuit's failure to carefully scrutinize the government's evidence and the Seventh Circuit's failure to properly evaluate exculpatory evidence offered by the defense indicates that courts' monitoring of counsel's representation under the *Strickland* test does not provide sufficient protection to innocent death row defendants.

175. See, e.g., *United States v. Bagley*, 473 U.S. 667, 683 (1985) (noting that "under the *Strickland* formulation the reviewing court may consider [the] adverse effect . . . on the preparation or presentation of the defendant's case").

176. *Porter v. Gramley*, 112 F.3d 1308, 1313 (7th Cir. 1997).