LESSONS NOT LEARNED

NEW YORK STATE LEADS IN THE NUMBER OF WRONGFUL CONVICTIONS BUT LAGS IN POLICY REFORMS THAT CAN PREVENT THEM

AN INNOCENCE PROJECT REPORT

BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY

INNOCENCE PROJECT

CONTENTS

EXECUTIVE SUMMARY.....3

23 CASES AND THEIR CONSEQUENCES:
A MANDATE FOR REFORM.....7

THE LESSONS:
CAUSES OF WRONGFUL CONVICTION IN NEW YORK AND NATIONWIDE.....17

THE LEARNING:
LEGISLATIVE REMEDIES THAT CAN REPAIR NEW YORK'S JUSTICE SYSTEM.....25

AN EXPERT COMMISSION'S POWERFUL CALL FOR REFORM.....32

CONCLUSION.....36

APPENDIX A: FULL PROFILES OF NY EXONERATIONS.....39

APPENDIX B: REPORT ON THE CONVICTION OF JEFFREY DESKOVIC.....79

EXECUTIVE SUMMARY

Throughout New York State, 23 people have been exonerated through DNA testing after being convicted of crimes they did not commit. Each one was arrested, jailed, convicted and served years in prison before the hard science of DNA proved innocence. Combined, they served 260 years in prison. Only two other states in the nation, Texas and Illinois, have seen more convictions overturned by DNA evidence.

Among these 23 New Yorkers whose lives were shattered by wrongful convictions, seven since 2000 were wrongfully convicted of murder – more than in any other state in the nation in the same period of time. Six of those seven men could have received the death penalty if it were an option at the time of their convictions or if prosecutors had sought it, and one of them was charged with a capital crime but escaped the death penalty.

SINCE 2000, SEVEN OF NEW YORK'S DNA EXONEREES WERE WRONGFULLY CONVICTED OF MURDER – MORE THAN IN ANY OTHER STATE IN THE NATION IN THE SAME PERIOD OF TIME.

The DNA exonerations in New York reveal serious problems in the state's criminal justice system – problems that profoundly impact individuals' lives and entire communities, and demand serious solutions. Common-sense remedies that are proven to decrease the potential for wrongful convictions have been introduced in the New York Legislature in various forms over the last several years. Last year, a comprehensive package of reforms was introduced in the Legislature but did not pass.

Every exoneration is a learning moment that can deepen our understanding of the criminal justice system's shortcomings and provide a roadmap for restoring integrity and confidence in the system. Collectively, DNA exonerations are irrefutable evidence of the system's flaws – and they are a mandate for reform. The lessons of the DNA exonerations in New York State can be drawn from the simple facts behind them:

- The 23 DNA exonerations in New York since 1991 represent more than 10% of all DNA exonerations nationwide.
- In the last seven years, there has been a particularly high number of DNA exonerations in New York State. Since 2000, 17 wrongfully convicted people in New York have been exonerated with DNA evidence; seven of the 17 were wrongfully convicted of murder.
- In 10 of New York's 23 DNA exonerations, the actual perpetrator was later identified.
- In nine of those 10 cases, the actual perpetrators of crimes for which innocent people were wrongfully convicted went on to commit additional crimes while an innocent person was in prison. According to law enforcement reports, five murders, seven rapes, two assaults and one robbery were committed by the actual perpetrators of crimes for which innocent people were committed – and each of those crimes was committed after the wrongful arrest or conviction, so they could have been prevented if wrongful convictions had not happened.
- Eyewitness misidentification played a role in 13 of the 23 wrongful convictions in New York that were overturned with DNA testing.
- In 10 of the 23 cases in New York, innocent people falsely confessed or admitted to crimes that DNA later proved they did not commit.
- Limited or unreliable forensic science played a role in 10 of the 23 wrongful convictions in New York that were overturned through DNA evidence.

Despite the large number of DNA exonerations – particularly since 2000 – and despite the fact that these 23 DNA exonerations are only the tip of the iceberg since so few cases involve DNA, New York has not learned the lessons of these exonerations and taken action to prevent future injustice. Many other states in the nation have enacted strong reforms that are proven to enhance the accuracy and fairness of the criminal justice system. For example:

- Six states – but not New York – have formed Innocence Commissions to identify the causes of wrongful convictions and develop remedies to prevent them. All but one of those states (Illinois) have far fewer wrongful convictions overturned through DNA than New York does.
- 22 states – but not New York – have statutes mandating the preservation of crime scene evidence. The 22 states with such laws include California, Florida, Texas, Virginia, Oklahoma, Montana and Kentucky.
- 33 states do not place time limits on when post-conviction DNA testing can be conducted to prove innocence. A proposal advanced in New York State earlier this year would impose time limits.
- Nine states – but not New York – require at least some interrogations to be recorded (either through state statute or ruling of the state high court). In addition, more than 500 local jurisdictions record at least some interrogations. Even though more people have been exonerated by DNA after falsely confessing to crimes in New York than in any other state, only two of these 500 local jurisdictions are in New York State.
- 17 states – but not New York – considered legislation this year to improve eyewitness identification procedures. Bills passed in five states and are pending in seven others.

NEW YORK HAS NOT LEARNED THE LESSONS OF THESE EXONERATIONS AND TAKEN ACTION TO PREVENT FUTURE INJUSTICE.

From across the political spectrum, leaders in dozens of states have begun to meaningfully address wrongful convictions and enhance the criminal justice system. But New York has not.

Leadership in New York State's executive, legislative and judicial branches must act promptly to enact reforms that can restore public confidence in the state's criminal justice system and improve public safety. The Innocence Project's review of these DNA exonerations clearly shows that in order to advance justice and safety, New York State must:

- Ensure proper preservation, cataloguing and retention of biological evidence.
- Avoid placing limits regarding when DNA can be retested to establish the innocence of the wrongfully convicted (or when other evidence of innocence can be introduced that could prove innocence post-conviction).
- Enable defendants to obtain comparisons of crime scene evidence to forensic databases.
- Require videotaping of custodial interrogations in their entirety.
- Mandate implementation of eyewitness identification procedures that are proven to increase accuracy and minimize the likelihood of misidentifications.
- Establish an independent commission to examine the causes of wrongful convictions and propose remedies to prevent them.

This report details the wrongful convictions in New York that have been overturned through DNA evidence. It provides background on each case – and the unimaginable toll each wrongful conviction had on ordinary New Yorkers and their families, the disservice these cases brought to victims of crime who were let down by a flawed system, and the tragic consequences these wrongful convictions had on communities from Buffalo to the Bronx. This report examines the causes of wrongful convictions in New York and nationwide – and explains how the system can be fixed with sensible, straightforward reforms by the executive, legislative and judicial branches in New York State.

23 CASES
AND THEIR CONSEQUENCES:
A MANDATE FOR REFORM

In each of the 23 DNA exoneration cases in New York State, DNA proved that an innocent man was convicted of a crime that someone else, who remained at large, actually committed. Following is a chronological listing of each of these cases, along with brief details of each wrongful conviction. (For full profiles of each case, see Appendix A.)

1 Charles Dabbs – Westchester County
Convicted in 1984 of a rape that happened in 1982
Sentenced to 12.5 to 20 years
Age at conviction: 29
Served 7 years; exonerated in 1991
Factors leading to wrongful conviction: eyewitness misidentification

2 Leonard Callace – Suffolk County
Convicted in 1987 of sodomy, sexual abuse, wrongful imprisonment and criminal possession of a weapon that happened in 1985
Sentenced to 25 to 50 years
Age at conviction: 33
Served 5.5 years; exonerated in 1992
Factors leading to wrongful conviction: eyewitness misidentification, unreliable/limited science

3 Kerry Kotler – Suffolk County

Convicted in 1982 of rape, burglary and robbery that happened in 1978
Sentenced to 25 to 50 years
Age at conviction: 23
Served 10.5 years; exonerated in 1992
Factors leading to wrongful conviction: eyewitness misidentification, unreliable/limited science, government misconduct

4 Terry Chalmers – Westchester County

Convicted in 1987 of rape, sodomy, robbery and grand larceny that happened in 1986
Sentenced to 12 to 24 years
Age at conviction: 19
Served 7.5 years; exonerated in 1995
Factors leading to wrongful conviction: eyewitness misidentification

5 Victor Ortiz – Orange County

Convicted in 1984 of rape and sodomy that happened in 1983
Sentenced to 25 years
Age at conviction: 28
Served 11.5 years; exonerated in 1996
Factors leading to wrongful conviction: eyewitness misidentification

6 Habib Wahir Abdal – Buffalo

Convicted in 1983 of a rape that happened in 1982
Sentenced to 20 years to life
Age at conviction: 44
Served 16 years; exonerated in 1999
Factors leading to wrongful conviction: eyewitness misidentification, government misconduct

7 James O'Donnell – Staten Island

Convicted in 1998 of attempted sodomy and assault that happened in 1997
Sentenced to 3 to 7 years
Age at conviction: 34
Served 2 years; exonerated in 2000
Factors leading to wrongful conviction: eyewitness misidentification

8 Hector Gonzalez – Brooklyn
Convicted in 1996 of a murder that happened in 1995
Sentenced to 15 years to life
Age at conviction: 18
Served 5.5 years; exonerated in 2002
Factors leading to wrongful conviction: eyewitness misidentification

9 Antron McCray – Manhattan
Convicted in 1990 of rape and assault that happened in 1989
Sentenced to 5 to 10 years
Age at conviction: 15
Served 6 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/limited science, false confession

10 Kevin Richardson – Manhattan
Convicted in 1990 of attempted murder, rape, sodomy and robbery that happened in 1989
Sentenced to 5 to 10 years
Age at conviction: 14
Served 5.5 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/limited science, false confession, government misconduct

11 Yusef Salaam – Manhattan
Convicted in 1990 of rape and assault that happened in 1989
Sentenced to 5 to 10 years
Age at conviction: 15
Served 5.5 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/limited science, false confession

12 Raymond Santana – Manhattan
Convicted in 1990 of rape and assault that happened in 1989
Sentenced to 5 to 10 years
Age at conviction: 14
Served 5 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/limited science, false confession

13 **Kharey Wise – Manhattan**
Convicted in 1990 of assault, sexual abuse and rioting that happened in 1989
Sentenced to 5 to 15 years
Age at conviction: 16
Served 11.5 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/limited science, false confession

14 **Michael Mercer – Manhattan**
Convicted in 1992 of rape, sodomy and robbery that happened in 1991
Sentenced to 20.5 to 41 years
Age at conviction: 41
Served 10.5 years; exonerated in 2003
Factors leading to wrongful conviction: eyewitness misidentification

15 **John Kogut – Nassau County**
Convicted in 1986 of murder and rape that happened in 1984
Sentenced to 31.5 years
Age at conviction: 24
Served 17 years; exonerated in 2005
Factors leading to wrongful conviction: unreliable/limited science, false confessions, forensic science misconduct, informants/snitches

16 **Dennis Halstead – Nassau County**
Convicted in 1987 of murder and rape that happened in 1984
Sentenced to 33.3 years to life
Age at conviction: 29
Served 16 years; exonerated in 2005
Factors leading to wrongful conviction: unreliable/limited science, false confessions, forensic science misconduct, informants/snitches

17 **John Restivo – Nassau County**
Convicted in 1987 of murder and rape that happened in 1984
Sentenced to 16 years
Age at conviction: 25
Served 16 years; exonerated in 2005
Factors leading to wrongful conviction: false confessions, forensic science misconduct, informants/snitches

18 Doug Warney – Rochester

Convicted in 1997 of second degree murder that happened in 1996
Sentenced to 25 years to life
Age at conviction: 35
Served 9 years; exonerated in 2006
Factor leading to wrongful conviction: false confession

19 Alan Newton – Bronx

Convicted in 1985 of rape, robbery and assault that happened in 1984
Sentenced to 13.5 to 40 years
Age at conviction: 22
Served 21 years; exonerated in 2006
Factors leading to wrongful conviction: eyewitness misidentification

20 Scott Fappiano – Brooklyn

Convicted in 1985 of rape, sodomy, burglary and sexual abuse that happened in 1983
Sentenced to 20 to 50 years
Age at conviction: 23
Served 21 years; exonerated in 2006
Factors leading to wrongful conviction: eyewitness misidentification

21 Jeffrey Deskovic – Westchester County

Convicted in 1990 of murder, rape and possession of a weapon that happened in 1989
Sentenced to 15 years to life
Age at conviction: 17
Served 15.5 years; exonerated in 2006
Factors leading to wrongful conviction: false confessions, government misconduct

22 Roy Brown – Cayuga County

Convicted in 1992 of a murder that happened in 1991
Sentenced to 25 years to life
Age at conviction: 31
Served 15 years; exonerated in 2007
Factors leading to wrongful conviction: unreliable/limited science, informants/snitches

23 Anthony Capozzi – Buffalo

Convicted in 1987 of rape, sodomy, sexual abuse that happened in 1985
Sentenced to 11 to 35 years
Age at conviction: 29
Served 20 years; exonerated in 2007
Factors leading to wrongful conviction: eyewitness misidentification
Decades Lost that Can Never Be Regained

TRYING TO REBUILD THEIR LIVES

All of these 23 people's lives were shattered by wrongful convictions – and the lives of their friends, families, coworkers, neighbors and communities were impacted, as well. Each wrongfully convicted New Yorker has a difficult road ahead to rebuild a life. Four Innocence Project clients who were exonerated in the last year have shared their harrowing personal experience with state legislators in order to help reform the state's criminal justice system. Knowing that they will never be able to regain the years of life they lost, they advocate for reforms that can prevent other people from enduring the same unimaginable injustice. Each one of the 23 New Yorkers exonerated through DNA was robbed of some of life's most important experiences; following are brief summaries of what four of the most recent exonerees lost, and how they are trying to rebuild their lives:

Alan Newton, exonerated in 2006

In 1984, Bronx native Alan Newton was on trial for a rape he didn't commit. He was 22 years old and working for a phone company at the World Trade Center when a rape victim picked his photo out of a lineup. He was convicted in 1985 and eventually served nearly half his life behind bars. His mother passed away shortly after his conviction, and he attended her funeral in shackles. Soon after his exoneration in July 2006, he enrolled at Medgar Evers College with support from the Thurgood Marshall Scholarship Fund and is now close to getting his degree. He credits his large and supportive family with helping him stay positive throughout his long ordeal.

Scott Fappiano, exonerated in 2006

Scott Fappiano, who is now 45, has tried to pick up where he left off when he was incarcerated at 23. He's moved back into the apartment he grew up in and has reconnected with a woman that he dated as a young man. Unavoidably, however, things have changed in the intervening years. His mother is ill with emphysema and his father died while he was on trial. He regrets not having the opportunity to raise a family. He also missed out on the oppor-

tunity to obtain a college education. Before his conviction, he was studying at St. John's University but dropped out after his arrest.

Roy Brown, exonerated in 2007

Fifteen years to the day after he was convicted of a brutal murder he did not commit, Roy Brown was released from prison. "The wheels of justice are flat," Brown told reporters. There to greet him was a sister who had fought for years to win his release, and a daughter who was raised in foster care while he was in prison. Brown suffered from advanced liver disease and was desperate to get out of prison before his health worsened. By the time he was released in 2007, the disease had progressed and was in the end stages. He received a new liver and has made a miraculous recovery, but he would not have qualified for the liver transplant had he remained in prison. He is currently living on public assistance and the support of his friends and family.

Jeffrey Deskovic, exonerated in 2006

Jeffrey Deskovic was a high school sophomore when he was convicted of murdering a classmate in 1990. While most of his peers were dating, planning for college, and spending time with friends, Deskovic was studying the law and writing frantic letters from his prison cell. He was 16 years old when he was convicted, and 32 years old when he was exonerated. Since his release, he has struggled to make up for lost time. He is working towards a bachelor's degree in behavioral sciences at Mercy College and is learning how to navigate technology in the 21st century. Still, he knows he can never make up for the lost years in his adolescence and early adulthood.

REAL PERPETRATORS COMMIT ADDITIONAL CRIMES WHILE INNOCENT PEOPLE ARE IN PRISON

The only person who benefits from a wrongful conviction is the real perpetrator, who remains at large, able to escape justice while an innocent person remains in prison. New York State has paid a heavy price for wrongful convictions – far beyond the innocent individuals whose freedom was taken.

In 10 of the 23 exoneration cases, the actual perpetrator was later identified. In nine of these 10 cases, law enforcement agencies now say that the true perpetrator had committed additional crimes while an innocent person was in prison. In each of these cases, if the correct person had been identified and brought to justice – instead of an innocent person being wrongfully convicted – serious crimes could have been prevented, and lives could have been saved.

According to law enforcement reports, five murders, seven rapes, two assaults and one robbery were committed by the actual perpetrators of crimes for which innocent people were convicted. Every one of those additional crimes was committed after the initial crime for which the wrong person was apprehended – meaning that each one of those crimes could have been prevented. Following are the details of those cases, according to law enforcement reports:

THESE 23 WRONGFUL CONVICTIONS HAVE LED DIRECTLY TO FIVE ADDITIONAL MURDERS, SEVEN RAPES, TWO ASSAULTS AND ONE ROBBERY – ALL OF WHICH COULD HAVE BEEN PREVENTED.

- Anthony Capozzi was convicted in 1987 for a 1985 incident involving rape, sodomy and sexual abuse. Capozzi remained in prison until 2007 while the actual perpetrator, Altemio Sanchez, committed three rapes and three murders, according to police. The murders were committed in 1990, 1992 and 2006.
- Jeffrey Deskovic was convicted in 1990 for a 1989 murder and rape. While Deskovic remained in prison until 2006, the actual perpetrator, Steven Cunningham, committed a murder in 1994, law enforcement officials say.
- Michael Mercer was convicted in 1992 of rape, sodomy and robbery that happened in March 1991. Police say that the actual perpetrator, Arthur Brown, committed a rob-

bery at gunpoint a month after Mercer was arrested.

- Five men, wrongfully convicted of charges in the 1989 Central Park jogger case, were exonerated in 2002. Antron McCray, Yusef Salaam and Raymond Santana were convicted of rape and assault (McCray was convicted in 1989; Salaam and Santana were convicted in 1990). Kevin Richardson was convicted in 1990 of robbery, attempted murder, rape and sodomy. Kharey Wise was also convicted in 1990 for assault, sexual abuse and riot. While all five were imprisoned, the actual perpetrator, Matias Reyes, pled guilty to four rapes and the murder of a pregnant woman.
- Douglas Warney was convicted in 1997 of a 1996 murder. In 1998, the actual perpetrator, Eldred Johnson, Jr., assaulted two men, slashing their throats and leaving them to die, according to law enforcement officials.

THE LESSONS

CAUSES OF WRONGFUL CONVICTIONS IN NEW YORK AND NATIONWIDE

New York's 23 DNA exonerations reveal the causes of wrongful convictions and mirror the pattern of failure in the criminal justice system that is clear in the nation's more than 200 DNA exonerations. Many cases involve multiple, overlapping factors that led to the wrongful convictions. An examination of each exoneration case can determine what caused the wrongful conviction in the first place – and identifying patterns across many exoneration cases can identify the systemic flaws that lead to injustice.

Nobody knows how many innocent people are in prison, but we do know that the DNA exonerations are just the tip of the iceberg. Physical evidence that can be subjected to DNA testing exists in just 5-10% of all criminal cases. Even among that small fraction of cases, many will never have the benefit of DNA testing because the evidence has been lost or destroyed. DNA exonerations don't just show a piece of the problem – they are a microcosm of the criminal justice system. In New York, the 23 DNA exonerations illustrate – through cold, hard science – how the entire system is broken, and why it must be fixed.

EYEWITNESSES MISIDENTIFICATION

Nationwide, more than 75% of wrongful convictions overturned by DNA were caused, at least in part, by eyewitness misidentification. In New York, eyewitness misidentification played a role in at least 10 of the 23 wrongful convictions later overturned with DNA testing.

For decades, strong social science research has shown that eyewitness testimony is often unreliable. Research shows that the human mind is not like a tape recorder; we neither record events exactly as we see them, nor recall them like a tape that has been rewound. Instead, witness memory is like any other evidence at a crime scene; it must be preserved carefully and retrieved methodically, or it can be contaminated. In case after case in New York and around the nation, DNA has proven what scientists already know – that eyewitness identification is frequently inaccurate. In the wrongful convictions caused by eyewitness misidentification, the circumstances varied, but judges and juries all relied on testimony that could have been more accurate if reforms proven by science had been implemented. In New York, eyewitness misidentification has ranged from honest mistakes by witnesses who genuinely believed they were identifying the right person to police procedures so flawed that they were virtually guaranteed to result in a miscarriage of justice. For example:

- Habib Wahir Abdal was wrongfully convicted partly based on the victim's identification of him in a "show-up" procedure (an identification procedure in which a suspect is presented in person to an eyewitness for possible identification). Four months after an African-American man raped a woman in Buffalo in 1982, police picked up Abdal and brought him to the victim. They told her that he was the suspect and asked her if he was the man who raped her. She said no, but police persisted and showed her a photo of Abdal taken four years before the rape. She then viewed Abdal in person again and identified him as her attacker. He served 16 years in prison before he was exonerated in 1999.
- Scott Fappiano's wrongful conviction for the 1985 rape of a New York City police officer's wife was the result of multiple identification procedures that were seriously flawed.

The victim identified Fappiano in a photo lineup and again in a live lineup, in which all of the other members (known as "fillers") were New York police officers. On the same day, the victim's husband viewed a live lineup and selected a "filler." Fappiano served 21 years in prison before DNA testing proved his innocence in 2006.

- Anthony Capozzi was wrongfully convicted in 1985 of committing two rapes in Buffalo despite striking differences between the victims' initial descriptions of their attacker and Capozzi's physical appearance. Capozzi, who weighed over 200 pounds and had a three-inch scar on his face, was identified in court by three rape victims – all of whom had described their attacker as being about 160 pounds and failed to mention the scar. He was convicted of two rapes and acquitted of the third. After serving 20 years in prison, Capozzi was exonerated in 2007 when DNA testing on evidence from his case proved that another man – now convicted of several similar crimes in the area – committed the rapes for which Capozzi was convicted.

DNA EXONERATIONS ARE JUST THE TIP OF THE ICEBERG. NOBODY KNOWS HOW MANY INNOCENT PEOPLE ARE STILL IN PRISON.

UNRELIABLE OR LIMITED FORENSIC SCIENCE

Forensic science problems were a factor in 55% of the first 200 DNA exonerations nationwide, according to an independent review by University of Virginia Professor Brandon L. Garrett. Unreliable or limited science played a role in at least 10 of the 23 wrongful convictions in New York that have been overturned with DNA evidence.

Understanding the role of forensic science problems in wrongful convictions cases is particularly complicated because it is so varied – including areas as diverse as serology and hair analysis that are limited and cannot precisely identify individuals, bite marks and dog sniffing that are not validated disciplines, and mistakes or even intentional fraud by lab analysts and other employees. The arrival of DNA evidence in American courtrooms in the late 1980s and 1990s changed the criminal justice system forever. The widely accepted strength of DNA testing has led experts to call into question the reliability of other forms of forensics. Where these older forms of forensic science could indicate that someone might have committed a crime, DNA has the potential to show whether someone is actually guilty or innocent. Most, but not all, of the people who were exonerated with DNA evidence in New York and nationwide were wrongfully convicted before DNA testing was available. Wrongful convictions based, at least in part, on limited or unreliable forensic science in New York include:

- Roy Brown was wrongfully convicted of a Cayuga County murder based partly on the testimony of a prosecution witness who said that seven bite marks left during the crime on the victim's body were "entirely consistent" with Brown's teeth. In fact, according to a defense expert, six of the marks were insufficient for analysis and the seventh excluded Brown because it showed two more upper teeth than Brown had. In 2006, DNA testing on saliva from the victim's shirt proved that Brown was not the source of the bite marks (and was not the murderer), but a judge said he found the bite mark evidence more persuasive than the DNA evidence. Finally, in 2007, Brown was fully exonerated.
- Leonard Callace was wrongfully convicted of a Suffolk

County rape in 1987 after prosecutors told the jury that forensic testing on semen from the crime scene proved that the perpetrator could have been Callace. ABO blood type testing before trial showed that the perpetrator had type A blood, the same as Callace (and 40 percent of Caucasian men in the United States). Callace was also misidentified by the victim at trial. The jury took one hour to convict him and he was sentenced to 25-50 years in prison. He was exonerated in 1992 after DNA testing proved that he was not the perpetrator.

- Based on scientific evidence that was limited – and was interpreted to only support one theory of the crime – Hector Gonzalez served more than five years in prison for a 1995 murder he didn't commit. Gonzalez was arrested after a witness told police that he was at the scene of a nightclub fight in which a man was stabbed to death. Serological testing showed that blood stains on Gonzalez's pants matched the blood type of the victim – and 54 percent of New York City's population. DNA tests on these stains later proved that the blood matched two other men in the fight, and witness testimony showed that Gonzalez had been tending to their wounds when blood was transferred to his pants.

FALSE CONFESSIONS OR ADMISSIONS

In 25% of DNA exonerations nationwide, innocent defendants made incriminating statements, confessed or pled guilty. The rate of false confession or admission is even greater in New York, where it was a factor in 10 of the 23 DNA wrongful convictions overturned by DNA.

A variety of factors can contribute to a false confession or admission during a police interrogation. Some people falsely confess under duress or because they fear violence. Sometimes, people are told that they will receive a harsher sentence if they do not confess. In many cases, people who have a diminished capacity because of mental or physical impairments falsely confess because they do not understand the situation or because their limited cognitive capabilities cause them to want to please authority figures. In many false confession cases, jurors are told that defendants knew details of a crime that only the perpetrator could know – when, in fact, defendants learned those details from police in the course of an interrogation or gave multiple guesses about the details during an interrogation before giving the "correct" answer. Wrongful convictions in New York resulting from false confessions or admissions include:

- Douglas Warney became a suspect in a 1996 Rochester murder after he called the police to tell them he had information about the killing. After police interrogated him for 12 hours and supplied him with non-public details about the crime scene, Warney confessed to his involvement in the murder. His confession, however, was full of inconsistencies, such as the location of the crime, disposal of clothing and the participation of another person who could not have been present. Warney, who has a history of mental issues and an eighth-grade education, was convicted and sentenced to 25 years to life in prison. He was released and exonerated in 2006 after DNA from the crime scene matched the profile of a New York inmate, who admitted that he killed the victim alone.
- After supposed confessions that should have raised serious questions by police and prosecutors, five New York City teenagers – Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Kharey Wise – were con-

victed of the 1989 rape of a jogger in Central Park. After prolonged police interrogation, the teens, all between 14 and 16 years old, confessed to involvement in the attacks and four of them gave videotaped statements. Twelve years later, another man, Matias Reyes, confessed to committing the crime alone. Evidence from the crime scene was compared to Reyes' profile and it matched. Reyes was convicted of the crime and is serving life in prison. The convictions of all five wrongfully convicted men were thrown out. They had served between five and 11 years in prison.

- Jeffrey Deskovic falsely confessed to a murder in his hometown of Peekskill at age 15 after police interrogated him for more than six hours and subjected him to three polygraph tests. He became a suspect when he offered to help police with the investigation into the death of his high school classmate. He was given coffee – but no food – throughout the interrogation and told by police that he had failed the polygraph tests. After his confession Deskovic was under a table in the police station, curled in the fetal position and crying. He was convicted based on the confession and sentenced to 15 years to life. He was exonerated in 2006 after DNA testing of the evidence from the crime scene matched a New York inmate, who then confessed to raping and killing the victim alone.

IN NEW YORK, THE 23 DNA EXONERATIONS ILLUSTRATE – THROUGH COLD, HARD SCIENCE – HOW THE ENTIRE SYSTEM IS BROKEN.

INFORMANTS AND SNITCHES

In more than 15% of cases of wrongful conviction overturned by DNA testing nationwide, an informant or jailhouse snitch testified against the defendant. In New York, at least four of the 23 exoneration cases involved informants or snitches.

Often, statements from people with incentives to testify – particularly incentives that are not disclosed to the jury – are the central evidence in convicting an innocent person. DNA exonerations have shown that snitches lie on the stand. To many, this news isn't a surprise. Testifying falsely in exchange for an incentive – either money or a sentence reduction – is often the last resort for a desperate inmate. For someone who is not in prison already, but who wants to avoid being charged with a crime, providing snitch testimony may be the only option. In some cases, snitches or informants come forward voluntarily, often seeking deals or special treatment. But sometimes law enforcement officials seek out snitches and give them extensive background on cases — essentially feeding them the information they need to provide false testimony. Often, juries are not told that informants are testifying with incentives. New York wrongful convictions caused, in part, by snitches or informants include:

- John Restivo, Dennis Halstead and John Kogut were wrongfully convicted of killing a 16-year-old girl in Nassau County in 1984. The testimony of several incentivized snitches, along with Kogut's false confession and erroneous forensic evidence, led to the men's convictions. Several witnesses testified against Restivo, Halstead or Kogut in exchange for reduced sentences. Others were threatened by police that they would be charged in this crime if they didn't testify against the defendants. Some of these snitches later recanted their testimony, admitting they lied on the stand. The men were convicted of murder and rape in two separate trials. After serving more than 16 years in prison, they were exonerated in 2005 after DNA testing on semen from the crime scene revealed the profile of a single unknown male and excluded the three defendants.

THE LEARNING

LEGISLATIVE REMEDIES THAT CAN REPAIR NEW YORK'S JUSTICE SYSTEM

There are those who claim that the eventual exoneration of innocent people proves the system works. If that were true, then justice is not being dispensed by police, prosecutors, defense lawyers or courts – but by law students, journalism students and a few concerned lawyers, organizations and citizens. In most of the 23 New York cases, prosecutors resisted defendants' attempts to obtain new evidence post-conviction, and courts denied appeals from people claiming they were innocent.

The DNA exonerations do not solve the problem – they prove its existence and illuminate the need for reform. Learning the lessons of DNA exonerations will increase the accuracy of our criminal justice system to protect the innocent and help identify the guilty – and ultimately, enhance the public safety.

In recent years, New York lawmakers have had opportunities to put the lessons of DNA exonerations into practice and implement critical improvements in the state's system of justice, but these reforms ultimately stalled. While dozens of other states – including California, Texas, North Carolina, Maryland, Vermont and West Virginia – have passed legislation to address wrongful convictions, New York has not. Several initiatives were introduced in the state legislature last year,

including A.8693, an omnibus reform package that would mandate the preservation of evidence, provide post-conviction case review and require the recording of custodial interrogations. Unfortunately, this legislation and similar bills did not pass.

It is imperative that the recommendations below – which address common problems that New York's DNA exonerations illustrate – be advanced by the New York Legislature to enhance public safety and restore confidence in the state's criminal justice system.

Ensure Proper Preservation, Cataloguing & Retention of Biological Evidence

Evidence that can be subjected to DNA testing to prove innocence or solve cases (both new cases and "cold" cases) is often lost, destroyed or impossible to locate in New York State. Properly identifying, preserving and cataloguing biological evidence will enable New York to most effectively capitalize on the crime-solving potential of DNA.

In the "DNA era" of criminal justice, preserved biological evidence can provide critical proof of guilt or innocence. In New York, the crime-solving potential of this
evidence is squandered because of a failure to preserve it in a manner that allows its ready retrieval. By properly identifying, preserving, and cataloguing biological evidence,
New York can help law enforcement agencies and others to find the evidence that can solve crimes and resolve credible claims of innocence.

This will require stronger laws to require the preservation of biological evidence. It will also require substantial efforts to catalogue biological evidence that currently exists in warehouses and other local or state facilities. Other cities, such as Charlotte, North Carolina, have done precisely that, using computerized inventory bar-coding to catalogue existing evidence. These systems enable officials to readily locate all biological evidence – past, present, and future – when such evidence can help resolve questions of guilt or innocence.

Allow All of the Wrongfully Convicted to Prove Innocence with DNA

Some judges have interpreted New York's post-conviction DNA statute to prevent those who pled guilty to crimes from trying to prove their innocence with post-conviction DNA testing. The legislature should enact a minor change in language that would allow such people to prove their innocence with DNA.

Eleven of the 208 people nationwide exonerated through DNA testing originally pled guilty to crimes we now know they did not commit. This counterintuitive phenomenon occurs for a number of reasons. Innocent people, faced with a choice between a guilty plea or the possibility of a guilty verdict resulting in a much higher sentence, are presented with an impossible dilemma – particularly if it's not clear at the time that DNA can set the record straight.

But the innocent should not be doomed because they didn't realize before their trial that they could have proven their innocence. When DNA testing can prove guilt or innocence, it should be allowed, regardless of whether a guilty plea led to the conviction. While New York's statute on post-conviction DNA testing does not address this explicitly, judicial interpretation in recent years makes clear that a clarification in the law is necessary.

WHILE DOZENS OF OTHER STATES HAVE PASSED LEGISLATION TO ADDRESS WRONGFUL CONVICTIONS, NEW YORK HAS NOT.

Enable Judges to Order Comparison of Crime Scene Evidence to Forensic Databases

Judges in New York State do not have the explicit authority to order that DNA or fingerprints from crime scenes be compared to the DNA or fingerprint databases that could identify the person who left them. New York's Legislature should provide judges with the explicit authority to order such comparisons.

Comparing crime scene evidence to the appropriate forensic databases can solve crimes and exonerate the innocent, yet the explicit discretion to make such comparisons is solely in the hands of law enforcement and the prosecution. That discretion is often sufficient, but where the court deems such a comparison necessary while the prosecution disagrees, the court should have the ultimate authority to order such comparisons.

Forensic databases were developed to help solve crimes and apprehend perpetrators. They have done that in cases in New York where innocent people were wrongfully convicted – and a simple clarification in state law will ensure that these databases are used to their greatest potential.

Video Record Custodial Interrogations in Their Entirety

Video equipment is commonplace, easy to operate, and inexpensive – yet New York juries must still rely on competing accounts from police and defendants about what actually happened during an interrogation. New York's Legislature should mandate the recording of custodial interrogation to reduce wrongful convictions.

For the recording of interrogations to be effective, the entire custodial interrogation must be recorded. This record will improve the credibility and reliability of authentic confessions, while protecting the rights of innocent suspects. Recorded interrogations provide judges and jurors with the best evidence of what was said during an interrogation. For law enforcement agencies, recording interrogations can prevent disputes about how a suspect was treated, create a clear record of a suspect's statements and increase public confidence in the criminal justice system.

As former U.S. Attorney Tom Sullivan detailed in a 2005 Journal of Criminal Law and Criminology article, "Electronic Recording of Custodial Interrogations: Everybody Wins," over 350 jurisdictions nationwide have embraced the practice of recording custodial interrogations, and the number continues to rapidly climb. (According to Sullivan, that number is now over 500.) The report finds that "virtually every officer with whom we spoke, having given custodial recordings a try, was enthusiastically in favor of the practice."

New York's Division of Criminal Justice Services recently provided $1.2 million to jurisdictions statewide for video recording equipment. In addition, a grant has been awarded to the Criminal Justice Section of the New York State Bar Association to help conduct pilot programs in two counties, Broome and Schenectady, for the recording of custodial interrogations. These developments show that preventing false confessions is a priority for New York. However, to truly be suc-

cessful, New York should also join Illinois, Maine, New Mexico and Wisconsin, all of which have passed statewide legislation mandating the recording of custodial interrogations.

Enact No New Limits on Court Consideration of Claims of Innocence

It takes years for the wrongfully convicted to prove their innocence since they can only locate the evidence and access the courts from their prison cells. Enacting time limits on innocence claims slams shut the door to justice.

Recent proposals in the New York Legislature to limit "innocence claims" to one year after conviction patently ignore the fact that each exoneration requires years of work. The cause of justice will suffer a terrible setback if the innocent are capriciously prevented from accessing the courts to prove their innocence. Successfully proving innocence post-conviction is an arduous task, but on those rare occasions it is possible, it would be wrong to deny a wrongfully convicted person the ability to prove his innocence and regain his freedom.

Implement Eyewitness Identification Reforms

Eyewitness misidentification is the leading cause of wrongful convictions, but it has not been addressed by New York's Legislature. The Legislature should require that law enforcement agencies implement simple reforms that are proven to increase the accuracy of eyewitness identifications.

The prevalence of eyewitness misidentification has spurred tremendous research on reforming traditional eyewitness procedures. Social science research has proven that procedural reforms can greatly increase the accuracy of eyewitness identifications, while also protecting the innocent. This is particularly important, as in many cases the eyewitness identification is the only evidence available to indicate innocence or guilt.

In light of recommendations from the National Institute of Justice and the American Bar Association, states such as New Jersey, North Carolina and Wisconsin, as well as individual cities and towns throughout the country, have implemented these reforms. Other

states, including California, West Virginia, Georgia and Vermont, are seriously considering the same. New York cannot afford to ignore this critical element of the criminal justice system.

Establish an Expert, Independent Commission to Prevent Wrongful Convictions

There is no statewide, independent entity charged with reviewing New York State's DNA exonerations to identify their causes and the remedies that can prevent future wrongful convictions. New York would benefit from the establishment of an Innocence Commission, which would engage a cross-section of experts from the criminal justice community to study wrongful convictions and develop statewide policy recommendations.

Many other states have learned from wrongful convictions in this manner. The California Commission on the Fair Administration of Justice has researched, heard testimony and issued reports and recommendations on eyewitness identifications, false confessions, the use of incentivized informants and forensic laboratory oversight. Composed of individuals representing a cross section of the criminal justice system, the Commission's recommendations have resulted in criminal justice community consensus on needed reforms – which has in turn led to successful legislative efforts on the causes of wrongful convictions.

States with far fewer wrongful convictions than New York have formed such Commissions to review cases, and their recommendations have already begun to improve the accuracy and effectiveness of law enforcement agencies in those states. North Carolina's Chief Justice created the 30-member North Carolina Actual Innocence Commission in 2002, which ultimately provided ground-breaking leadership on eyewitness identification reform in North Carolina. Wisconsin's Republican House Judiciary Chair, Steve Gundrum, established that state's Commission on Wrongful Conviction, which not only issued numerous innocence protection recommendations that became law, but also ultimately spurred the establishment of a permanent criminal justice reform commission in that state. In Pennsylvania, former prosecutor and Republican Senate Judiciary Committee Chairman Stewart Greenleaf authored a Senate Resolution creating the Pennsylvania Advisory Committee to Study Wrongful

Convictions, composed of a broad cross-section of the Pennsylvania Criminal Justice community and supported by the professional staff of the Pennsylvania Joint State Government Commission.

The Innocence Project has reviewed the state's 23 DNA exonerations to identify the broad causes of those wrongful convictions, yet a Commission to Prevent Wrongful Convictions in New York could more closely examine each case, with a specific eye toward what court processes – and perhaps even more importantly, what prosecutorial and defense failures – contributed to those wrongful convictions. It is axiomatic that ethical prosecutorial practices and properly supported defense representation can prevent wrongful convictions, and clear that the Kaye Commission recommendations regarding public defense should be enacted into law. Yet New York State still has much to learn by identifying the specific shortcomings of the prosecutors and public and private defenders that may have led to these wrongful convictions, as well as the remedies that can minimize the likelihood that such problems continue to threaten justice.

AN EXPERT COMMISSION'S POWERFUL CALL FOR REFORM

A New York State Innocence Commission would review exoneration cases in order determine the causes of the wrongful conviction, identify patterns across multiple cases, and make recommendations to improve the criminal justice system.

The closest such review of a wrongful conviction in New York was conducted by a commission that was assembled to look at just one case – the wrongful conviction of Jeffrey Deskovic in Westchester County. Westchester County District Attorney Janet DiFiore created the commission in late 2006 to identify the underlying causes of Deskovic's wrongful conviction and to make recommendations that can prevent future injustice. DiFiore appointed respected leaders in the criminal justice system – including judges, a former prosecutor and a defense attorney – to the commission. The members included retired state judges Leslie Crocker Snyder and Peter J. McQuillan, former Richmond County District Attorney William L. Murphy, and Richard Joselon, Supervising Attorney for the Legal Aid Society's Criminal Appeals Bureau. The commission's report was released in July 2007.

FINDINGS OF THE COMMISSION

The commission's 35-page report outlines every aspect of Deskovic's case – the police investigation, prosecution, defense, appeals and ultimate exoneration. The commission found that New York's criminal justice system failed at every stage, and that the problems in Deskovic's case result from systemic flaws that need to be remedied statewide.

"We have reviewed the voluminous public record of the proceedings below, and we are persuaded that, from the outset and continuing at every stage thereafter, errors were made that propelled the case towards it unjust outcome," the commission report said. "We do not catalogue these mistakes to assign fault or apportion blame. Rather, we attempt to analyze what went wrong for Jeffrey Deskovic in the hope that a broader understanding of his tragedy will help those who work in the criminal justice system take the steps necessary to protect others from his fate."

The commission identified specific problems that led to Deskovic's wrongful conviction, including:

- **Tunnel vision on the part of police and prosecutors**
  "Jeffery Deskovic's case provides a textbook illustration of tunnel vision in action," the commission concluded. Police focused too early on Deskovic as the prime suspect and interrogated him "improperly." Prosecutors failed to reassess the case when physical evidence emerged that appeared to exculpate Deskovic. Once Deskovic "confessed" during the improper interrogation, police stopped investigating other leads in the case and prosecutors failed to look critically at the evidence. Police also relied too heavily on a New York Police Department profile of the perpetrator, which ultimately proved inaccurate but steered police away from other leads.
- **Selective recording of Deskovic's statements during interrogations**
  In one four-hour interview with Deskovic, police recorded only 35 minutes of conversation because the tape recorder

THE COMMISSION FOUND THAT NEW YORK'S CRIMINAL JUSTICE SYSTEM FAILED AT EVERY STAGE, AND THAT THE PROBLEMS IN DESKOVIC'S CASE RESULT FROM SYSTEMIC FLAWS THAT NEED TO BE REMEDIED STATEWIDE.

was turned off three times. A second interrogation was not recorded at all, despite the availability of a tape recorder. The commission concluded that the failure to record the entire interrogation appears "possibly deliberate and certainly tactical."

- **Troubling police tactics and carelessness or misconduct in the police investigation**
  Police tactics in dealing with Deskovic did not take into account his youth or vulnerabilities. Deskovic's mother clearly did not want him involved in the police investigation, and the family sought to retain an attorney, but he was interviewed by police without his family or an attorney present. Police also "deliberately or inadvertently" provided information to Deskovic that only the perpetrator would know, and the prosecution then cited Deskovic's knowledge of such information as proof of his guilt.

- **Prosecution's questionable treatment of scientific evidence**
  Had the prosecution waited to present the case to a grand jury until after the DNA results were received, it would have been easier to reexamine the case in light of scientific evidence. Instead, DNA results were received after a murder indictment obtained. Later, during the trial, the prosecution developed "strained and shifting" theories to explain the scientific evidence away because it did not support the prosecution's case, the commission said.

- **Defense failure to use evidence of Deskovic's psychological vulnerabilities and maximize exculpatory scientific evidence**
  Although ample evidence existed to demonstrate why Deskovic might confess to a crime he did not commit, the defense did not use it. The defense also did not sufficiently use DNA results that excluded Deskovic as the source of semen recovered from the victim.

- **Court's mid-trial loss of evidence**
  During the trial, evidence that had been presented – including the clothing the victim was wearing when she died – was left in a black plastic bag in the courtroom, and a cleaning crew discarded it. During its deliberations, the jury asked to see some of the evidence, but it had been discarded accidentally.

RECOMMENDATIONS OF THE COMMISSION

After concluding, "It is obvious that an enormous and horrific injustice was imposed on Jeffery Mark Deskovic by the State of New York," the commission recommended several areas of "corrective action" that the state must take in order to prevent future injustice. The recommendations include:

Legislation allowing courts to order comparisons of crime scene evidence to DNA databases or DNA profiles

"[T]o avoid another Deskovic case in the future, there is a need for legislation according a court the authority to direct a CODIS search when the defendant's petition is non-frivolous," the commission said. "A defendant – either pre-trial or post-conviction – should have a right to have an unidentified DNA profile, whether extracted from crime scene evidence or otherwise, run through the DNA Databases to see if the real perpetrator or an accomplice can be identified."

Videotaping of interrogations statewide

"Videotaping custodial interrogations is not only feasible, it is being used in an increasing number of jurisdictions as a way to protect the innocent and ensure the conviction of the guilty," the commission said.

Legislation creating a "Commission of Inquiry" to identify causes of wrongful convictions and systemic remedies

"The purpose of the inquiry, of course, is to learn what went wrong," the Commission said. "Was it a systemic error or an individual's mistake or misconduct? The inquiry group should then recommend changed procedures or practices – or legislation – to prevent a repetition of the injustice."

Legislation to standard procedures for evidence collection and storage

"In too many cases where a defendant is seeking post-conviction DNA testing to prove his innocence, the crime scene evidence is simply, lost, misplaced or discarded," the commission said. "In New York, each law enforcement agency has its own practices. A statute formalizing and making uniform the way DNA evidence is collected, stored and retrieved would further the cause of justice."

CONCLUSION

Several New Yorkers who were exonerated through DNA testing have shared their experience with the State Legislature in an effort to pass the reforms outlined in this report. As Innocence Project Co-Director Peter Neufeld told an Assembly Committee earlier this year, "I'd like each of these gentlemen to speak. Because what you'll see is that we didn't just select these exonerees at random, but each of them – their stories, their cases – raise issues that are part of your legislative package. And so it makes it much more significant, I think, when you realize how human beings are affected by what you want to do here today."

Following are excerpts of legislative testimony over the last year by several of the 23 people in New York State who have been exonerated through DNA testing.

"I don't want to undermine anything that is going on here or anything, but we are almost in the year 2007. It is ludicrous that this stuff cannot be inventoried. How can they not inventory evidence?"

— Scott Fappiano of Brooklyn, testifying before the New York State Assembly Standing Committee on Codes and Correction in October 2006 – less than a week after he was exonerated.

"Now they want to come up and say, okay, we have one year [to seek DNA testing after a conviction]. It takes one year just to get into a courtroom and sometimes longer for a judge to hear a case. It takes, as you people know, as the attorneys know, it takes effort and a long

time to research for evidence, statements, witnesses. And another thing I would like to raise up… I feel strongly in support of having cameras and audiotapes during interrogation on all crimes… Because there are prosecutors, and there are judges, that do make mistakes, and [the case] does not go according to the law… There's guilty people right now walking the street… and you've got innocent people like us four gentleman and the 201 other exonerees sitting behind bars waiting to get out of jail for a crime we did not do. I think that's terrible for the justice system to wake up in the morning knowing that they put innocent people in hail for a crime we didn't do."

— Doug Warney of Rochester, testifying before the New York State Assembly Standing Committee on Codes and Correction in May 2007

"I knew the evidence would exonerate me once it was found. At least I was one of the lucky ones. There are other men like me who are still living in cages who claim that they are innocent and their DNA will prove they are innocent. Unfortunately, the state, the city, and the police departments across the state cannot produce this evidence. Legislation is needed to require the preservation of criminal evidence. No such legislation exists. Legislation is needed to improve the registration and storing of evidence."

— Alan Newton of the Bronx, testifying before the New York State Assembly Standing Committee on Codes and Correction in May 2007

"We need to have videotaping of all interrogations from beginning to end. This would enable there to be an objective record of who said what, when, and in what context. It would prevent police fro omitting those dirty little details that they would rather the rest of the world no know that they engage in. Similarly, it would protect them from unfounded accusations of coercion… I think that one of the key factors in preserving my conviction, and the convictions of many other people, is that the finality of the conviction, you know, the upholding the validity of the result is often given greater precedence than that of the basic premise [of] the court system, which is guilt or innocence. Procedural and technical issues become a barrier towards establishing innocence."

— Jeffrey Deskovic of Westchester County, testifying before the New York State Assembly Standing Committee on Codes and Correction in May 2007

"I feel very strongly about this because it's not just me… Because there's more at the door. There's more people behind that wall… And I've seen other cases where they just turned them down, the

same thing that they've done to me. And these are people just like me that have no money, have no education, no means at all… I'm here today in hopes and prayers that you will consider that there's more at the door. And the only way to prove that is to expand the time limit for those who are pursuing DNA testing or other means that happened in my case and these other gentlemen's cases. Because it's got to stop somewhere, and you're the people that can help."

— Roy Brown of Syracuse, testifying before the New York State Assembly Standing Committee on Codes and Correction in May 2007

At the close of one of the legislative hearings, Assemblyman Joseph Lentol told the exonerees who spoke, "Thank you for your incredible courage and for taking the time to come here today to share your story with us. I promise you, your words will no longer fall on deaf ears."

APPENDIX A

FULL PROFILES (IN CHRONOLOGICAL ORDER) OF THE 23 DNA EXONERATIONS IN NEW YORK STATE

1. Charles Dabbs – Westchester

Convicted in 1984 of rape that happened in 1982
Sentenced to 12.5 to 20 years
Age at conviction: 29
Served 7 years; exonerated in 1991
Factors leading to wrongful conviction: eyewitness misidentification

Charles Dabbs was convicted in 1984 of first degree rape. The victim had been assaulted from behind, dragged into an alley, and forced down a flight of stairs. She lost consciousness, awaking to find two other men with her assailant. One man held her arms, the other her legs, and a third raped her. She identified only one person - the rapist. Based on this identification, Dabbs was convicted and sentenced to twelve and a half to twenty years in prison.

At trial, the victim's testimony was bolstered by the fact that she and Dabbs are distant cousins and that the assailant had distinctive clothes that were similar to Dabbs's. He could not be ruled out as a contributor of the semen stain on the victim's pants by methods of conventional serology.

In 1990, Dabbs gained access to the evidence for DNA testing. Though testing on the victim's pants was inconclusive, DNA was successfully extracted from a cutting of the victim's underwear. Dabbs was excluded and his conviction was vacated. Based on this exclusion,

the prosecution dismissed the indictment, seven years after Dabbs was convicted.

2. Leonard Callace – Suffolk County

Convicted in 1987 of sodomy, sexual abuse, wrongful imprisonment and criminal possession of a weapon that happened in 1985
Sentenced to 25 to 50 yrs
Age at conviction: 33
Served 5.5 years; exonerated in 1992
Factors leading to wrongful conviction: eyewitness misidentification, unreliable/ limited science

Leonard Callace was a cab driver, construction worker, and petty thief. In July 1986, he was charged with the January 1985 sexual assault of an eighteen-year-old nursing home aide at knifepoint in the parking lot of a shopping center. She had been accosted by two men and forced into a nearby car. The second man was never identified.

The victim picked Callace out of a lineup as her assailant. Eighteen months earlier, she had described her assailant as 5' 10" or taller, with reddish-blond afro style hair, a full beard, and a cross tattoo on his left hand. Callace is 5' 8", had straight blond hair, a tightly trimmed goatee, and a tiny cross on his right hand. Prosecutors offered a deal to Callace: that he plead guilty and serve just four more months. Callace refused. The jury took one hour to convict him of four counts of sodomy, three counts of sexual abuse, wrongful imprisonment, and criminal possession of a weapon. On March 24, 1987, he was sentenced to twenty-five to fifty years in prison.

At trial, the prosecution presented a sketch by police artists resembling Callace, the victim's identification of Callace from a photo array and the victim's in-court identification of Callace. The prosecution also showed that the blood group (ABO type) of the semen collected from the scene was the same as Callace's. Callace presented an alibi, but it was uncorroborated.

Callace's conviction was confirmed on appeal. After learning about DNA testing, he asked his attorney about the original trial evidence. The attorney remembered that the victim had just picked up her jeans from the cleaners and that she had spit out semen onto the jeans after one of the assaults. The jeans were secured from the pros-

ecution for DNA testing at Lifecodes, Inc. On June 27, 1991, a judge granted Callace's motion to consider DNA tests as new evidence. He also ruled that if the samples did not match, he would hold a hearing to consider post-conviction relief for Callace.

RFLP analysis on the victim's jeans showed that the DNA in the semen stains did not match Callace.

On October 5, 1992, Callace was released from prison. The prosecution dismissed all charges and did not pursue a new trial because of the DNA evidence and the reluctance of the victim to have another trial. Callace had served almost six years of his sentence.

3. Kerry Kotler – Suffolk County

Convicted in 1982 of rape, burglary and robbery that happened in 1978
Sentenced to 25 to 50 years
Age at conviction: 23
Served 10.5 years; exonerated in 1992
Factors leading to wrongful conviction: eyewitness misidentification, unreliable/ limited science, government misconduct

Kerry Kotler was convicted for the rape, burglary, and robbery of the same victim on separate occasions in 1978 and 1981. A man in a ski mask and armed with a knife had raped and robbed her in her home. She could not identify him and reported only the burglary to the police. In 1981, she returned home to find a man who claimed to be returning for another visit, this time without a mask, who again raped and robbed her at knife point.

The victim identified Kotler from a photo book, as well as by voice and at a live lineup. Testing by conventional serology could not exclude Kotler as the depositor of the semen on the victim's underwear. Kotler appealed based on many issues, but his conviction was affirmed.

In 1989, Kotler succeeded in having the evidence sent to a laboratory for DNA testing. The amount of DNA, however, was insufficient and the evidence was returned. The evidence was then sent to Forensic Science Associates in 1990. PCR testing revealed that Kotler could not have been the depositor of the semen on the victim's underwear.

The prosecution contended that the profile found could have been a mixture of a consensual partner and Kotler. The evidence was then sent to the Center for Blood Research, whose findings were the same as FSA's. The victim's husband was then tested and also excluded.

Based on these results, the defense filed to vacate the judgment. Besides the DNA results, the defense brought up the withholding of evidence including police reports that showed the victim's description of the assailant to be quite different from Kotler and that the identification itself was not positive. The court held a hearing regarding the DNA evidence, resulting in the prosecution joining the defense to vacate the conviction. Two weeks later, the indictments were officially dismissed. Kotler had served eleven years in prison. He would later be convicted of different charges on the basis of DNA evidence.

4. Terry Chalmers – Westchester County

Convicted in 1987 of rape, sodomy, robbery and grand larceny that happened in 1986
Sentenced to 12 to 24 years
Age at conviction: 19
Served 7.5 years; exonerated in 1995
Factors leading to wrongful conviction: eyewitness misidentification

On August 18, 1986, a woman was approached and pushed into her car, which was parked at the train station in Mount Vernon, New York. While the assailant drove, the victim was forced to remove her clothes and perform sexual acts with the man. They arrived at Wilson Woods Park, where the assailant threw her on the ground and raped her. He then left, taking her jewelry, handbag, and car.

The victim was unable to positively identify the perpetrator from six photographs the next day. She finally made a positive identification of Terry Chalmers after viewing a second lineup forty-six days after the crime, and Chalmers's picture was the only one that was used in previous photo lineups. No other evidence was introduced other than the victim's in-court identification, and on June 9, 1987, Chalmers was convicted of rape, sodomy, robbery, and two counts of grand larceny. He was sentenced to twelve to twenty-four years in prison.

Chalmers filed an appeal, claiming that the police did not properly conduct the photo lineups and were suggestive in the identification

process. On July 18, 1990, the New York Supreme Court affirmed the conviction, ruling that even if the lineup was not properly conducted, the in-court identification was enough to convict Chalmers. He later discovered that the Westchester Department of Laboratories and Research had retained the rape kit and items of clothing which were used as evidence at trial and he petitioned for DNA testing with the help of the Innocence Project.

Forensic Science Associates performed PCR based DNA testing on the vaginal and cervical swabs from the rape kit. In a report dated July 8, 1994, it was determined that the victim could not be the source of DNA in the sperm fraction from the swabs. A second report on July 26, 1994, determined that Chalmers could be eliminated as the source of the spermatozoa from the vaginal and cervical swabs.

The conviction was subsequently vacated and charges were dismissed on January 31, 1995. Chalmers had spent seven and a half years in prison.

5. Victor Ortiz – Orange County

Convicted in 1984 of rape and sodomy that happened in 1983
Sentenced to 25 years
Age at conviction: 28
Served 11.5 years; exonerated in 1996
Factors leading to wrongful conviction: eyewitness misidentification

Victor Ortiz was charged with and convicted of rape in the first degree, sodomy in the first degree for engaging in deviate sexual intercourse in the form of anal intercourse, and sodomy in the first degree for engaging in deviate sexual intercourse in the form of oral intercourse. He was tried by a jury and convicted on January 17, 1984, of the 1983 rape and related charges. On February 15, 1984, Ortiz was sentenced to concurrent terms of twelve and one half to twenty-five years imprisonment on each of the three counts.

On January 8, 1983, the seventeen year old victim was abducted at gun point from a street corner outside of her boyfriend's house in Newburgh, New York. Her attacker then took her to the woods, where he walked with her for a lengthy period of time before raping her. Her clothes were taken off, including her underwear, and the perpetrator raped her vaginally, anally, and orally. Afterward, she put

her clothes back on, including her underwear.

The victim ran to her boyfriend's home, where she spent the night. She went to the hospital later that day and did not shower, change clothes, or go to the bathroom before she was examined by the doctor. Her clothing was collected as evidence.

The examining physician collected a milky white substance from the victim's vagina. Wet slides revealed the presence of non-motile sperm. He took rectal smears but did not detect sperm, although an examination of fixed rectal slides later showed several sperm heads.

The victim's boyfriend testified that he did not have sex with the victim on the night of the incident or at any other time. He remembers the victim came into his house, woke him up, said she had been raped. He confirmed that she stayed in his room until the incident was reported the next day.

Ortiz contacted the Innocence Project in 1994, claiming innocence. The case was accepted and assigned to a student. The Project confirmed in 1995 that the rape kit and other evidence from the case still existed. The Orange County District Attorney's stipulated to the release of the physical evidence used at trial. The evidence was sent to Forensic Science Associates along with a sample of Ortiz's blood.

DNA testing excluded Victor Ortiz as the source of spermatozoa on the evidence. He was exonerated and released in October 1996, having served ten years in prison.

6. Habib Wahir Abdal – Buffalo

Convicted in 1983 of a rape that happened in 1982
Sentenced to 20 years to life
Age at conviction: 44
Served 16 years; exonerated in 1999
Factors leading to wrongful conviction: eyewitness misidentification, government misconduct

Habib Wahir Abdal, then known as Vincent Jenkins, was convicted of rape in 1983. The conviction stemmed from a crime that occurred in Buffalo, New York, in May 1982. A young white woman was raped in a nature preserve after she had been separated from her husband.

The initial description of the assailant was a black man with a hooded jacket. The assailant had blindfolded her.

Abdal was picked up over four months later and identified by the victim in a show up procedure. Though she had been informed by police that Abdal was the suspect, she failed initially to identify him as her assailant. The victim then viewed a photo of Abdal that was four years old. She returned to the show up and eventually identified him as the perpetrator.

Forensic comparison of the hairs that were collected pointed to a black man other than Abdal. He also did not match the initial description of the attacker. Still, the jury convicted him and he was sentenced to twenty years. Abdal's attorney, Eleanor Jackson Piel, continued to work on his case. She eventually contacted the Innocence Project. Piel's postconviction efforts to secure the physical evidence for DNA testing were successful in 1993, but the tests were deemed inconclusive.

Years later, as DNA testing became more sophisticated and discerning, Abdal's evidence was again submitted for testing. This time, the results revealed that there were two contributors of spermatozoa, in keeping with the victim's claim of prior consensual sex with her husband. Neither of the profiles belonged to Abdal, and neither belonged to the victim's husband.

Though the results exculpated Abdal, prosecutors fought his exoneration, claiming there may have been more rapists or that Abdal participated in the rape without ejaculating. These theories contradict the victim's statements to police that there was a singular rapist who ejaculated inside of her, as well as the prosecution's own theory of the crime at trial.

Abdal, after spending sixteen years in prison for a crime he did not commit, was finally released in September 1999. He died in 2005, just six years after his exoneration.

7. James O'Donnell - Staten Island

Convicted in 1998 of attempted sodomy and assault that happened in 1997
Sentenced to 3.5 to 7 years

Age at conviction: 34
Served 2 years; exonerated in 2000
Factors leading to wrongful conviction: eyewitness misidentification

James O'Donnell was convicted in 1998 of attempted sodomy and second degree assault. The victim had entered a park in Staten Island in May 1997 for her daily walk. She noticed that she was being followed by a man. She turned to walk the other direction but he continued to follow her. He then accosted and assaulted her, throwing her down, choking her, and demanding that she come with him. The victim fought back with her hands, leading to the assailant biting her left hand. The assailant then took out his penis, at which point the victim passed out.

The victim was found by a passerby, who contacted the police. She was then taken to a medical center, where she gave the police an initial description and helped them compose a sketch. The description of the assailant and his clothing were published in a local paper. A local resident contacted the police, informing them that he knew a man who fit the description, including a fringed leather jacket, and who had been seen in and near the park where the crime occurred. The investigating detective then obtained a photo of O'Donnell, placed it in a photo lineup, and showed it to a witness who had been in the park that day. She stated that the man she saw "looked like" the man in the photo of O'Donnell. A friend she had been with in the park was not available to view the array. The witness later identified O'Donnell in a live lineup. Her friend, when viewing the same live lineup, failed to pick O'Donnell. The victim also identified O'Donnell in the photo array and again in a live lineup.

O'Donnell presented an alibi, which was corroborated by his girlfriend (now wife) and her son. They both testified that O'Donnell was at home with them the morning the crime occurred. Based on the eyewitness identification, however, the jury convicted O'Donnell and he was sentenced to three and a half to seven years in prison.

A year after the crime, O'Donnell's Legal Aid attorney on appeal, Lori Schellenberger, uncovered a police report indicating that a sexual assault evidence collection kit had been prepared by a nurse at the medical center. Included in that kit was a paper towel used to swab the bite wound on the victim's hand and fingernail scrapings. Schellenberger asked prosecutors if the evidence had been tested

and if it was still available for testing. The kit was unearthed and, with the cooperation of the Richmond County District Attorney's Office, sent to the Office of the Medical Examiner of the City of New York. The Medical Examiner's Office inspected and inventoried the evidence before shipping it to Forensic Science Associates.

FSA found male DNA in the swabs taken from the bite mark as well as in the fingernail scrapings. Significantly, the male DNA profiles from both samples matched each other. James O'Donnell was excluded as the contributor of this male DNA, thus proving that he did not bite the victim nor was scratched by her. He could not have been her assailant.

Based on the results of DNA testing, the District Attorney's Office agreed to release O'Donnell in April 2000. Replicate testing was conducted by the Medical Examiner's Office later that year with the same results. In December 2000, O'Donnell's conviction was formally vacated.

8. Hector Gonzalez – Brooklyn

Convicted in 1996 of a murder that happened in 1995
Sentenced to 15 years to life
Age at conviction: 18
Served 5.5 years; exonerated in 2002
Factors leading to wrongful conviction: eyewitness misidentification

Hector Gonzalez was arrested in December of 1995 and charged with murder. More than five years later, DNA testing proved crucial in establishing his innocence and securing his release.

The victim was killed during a fight outside of a night club. At trial, prosecutors presented one eyewitness that placed Gonzalez at the scene of the fight but the witness did not identify him as the killer. Serological testing revealed six blood stains on Gonzalez's pants. Five of those stains revealed a blood group marker that is shared by more than half of the population of New York City. On this evidence, Gonzalez was convicted and sentenced to fifteen years to life in prison.

A subsequent investigation by the United States Attorney's Office of the Eastern District into the activities of the Latin Kings, including this murder, produced testimony that Gonzalez was not involved in

the murder. In corroborating this testimony, the blood evidence was submitted for DNA testing. Results revealed that the blood on Gonzalez's pants came from two other men who were wounded in the fight. Gonzalez had been tending to their wounds when their blood was transferred to his pants.

Gonzalez was released on April 24, 2002, after having served over five years of his sentence.

9. Antron McCray – Manhattan

Convicted in 1990 of rape and assault that happened in 1989
Sentenced to 5 to 10 years
Age at conviction: 15
Served 6 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/ limited science, false confession

On the night of April 19, 1989, a 28-year-old jogger was brutally attacked and raped in Central Park. She was found unconscious with her skull fractured, her body temperature at 84 degrees, and 75 percent of her blood drained from her body. When she recovered, she had no memory of the assault. Initial police investigations quickly focused on a group of African American and Latino youths who were in police custody for a series of other attacks perpetrated in the park that night.

After prolonged periods of police interrogation, five teenagers - Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Kharey Wise - confessed to being involved in the attacks. At the time, the defendants were between 14 and 16 years of age. Richardson, McCray, Sanatana, and Wise all gave videotaped confessions.

The confessions were presented as evidence though they differed in the time, location, and participants of the rape. At trial, the prosecutors also presented forensic evidence, including hair found on one of the defendants that "matched and resembled" that of the victim and a hair found on the victim's clothing that was believed to have originated from one of the defendants. Also presented as evidence was a rock found near the scene of the crime that had blood and hair on it; evidence that was believed to have come from the victim.

The following year, all five teenagers were convicted, in two separate trials, of charges stemming from the attack. Antron McCray was tried as a juvenile and convicted of rape and assault. He was sentenced to five to ten years.

In early 2002, Matias Reyes, a convicted murderer and rapist, admitted that he alone was responsible for the attack on the Central Park jogger. Reyes had already committed another rape near Central Park days earlier in 1989, using the same modus operandi. The victim of that rape had described the rapist as having fresh stitches in his chin and an investigator quickly linked Reyes to this description. Although the police had Reyes's name on file, they failed to connect Reyes to the rape and assault of the Central Park jogger.

Eventually, the evidence from the crime was subjected to DNA testing. The DNA profile obtained from the spermatozoa found in the rape kit matched the profile of Reyes. Mitochondrial DNA testing on the hairs found on one of the defendants revealed that the hairs were not related to the victim or the crime. Further testing on hairs found on the victim also matched Reyes. Neither blood nor the hair found on the rock matched the victim. The evidence corroborates Reyes's confession to the crime and is consistent with the other crimes committed by Reyes. He is currently serving a life sentence for those crimes.

The investigation of the convictions of these five teenagers has raised questions regarding police coercion and false confessions, as well as, the vulnerability of juveniles during police interrogations. In retrospect, it is clear, these young men did not know where, how, or when the attack took place.

On December 19, 2002, on the recommendation of the Manhattan District Attorney, the convictions of the five men were overturned. Antron McCray served six years in a New York State prison.

10. Kevin Richardson – Manhattan

Convicted in 1990 of attempted murder, rape, sodomy and robbery that happened in 1989
Sentenced to 5 to 10 years
Age at conviction: 14
Served 5.5 years; exonerated in 2002

Factors leading to wrongful conviction: unreliable/ limited science, false confession, government misconduct

On the night of April 19, 1989, a 28-year-old jogger was brutally attacked and raped in Central Park. She was found unconscious with her skull fractured, her body temperature at 84 degrees, and 75 percent of her blood drained from her body. When she recovered, she had no memory of the assault. Initial police investigations quickly focused on a group of African American and Latino youths who were in police custody for a series of other attacks perpetrated in the park that night.

After prolonged periods of police interrogation, five teenagers - Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Kharey Wise - confessed to being involved in the attacks. At the time, the defendants were between 14 and 16 years of age. Richardson, McCray, Sanatana, and Wise all gave videotaped confessions.

The confessions were presented as evidence though they differed in the time, location, and participants of the rape. At trial, the prosecutors also presented forensic evidence, including hair found on one of the defendants that "matched and resembled" that of the victim and a hair found on the victim's clothing that was believed to have originated from one of the defendants. Also presented as evidence was a rock found near the scene of the crime that had blood and hair on it; evidence that was believed to have come from the victim.

The following year, all five teenagers were convicted, in two separate trials, of charges stemming from the attack. Then fourteen years old, Kevin Richardson was tried as a juvenile and convicted of attempted murder, rape, sodomy, and robbery. He was sentenced to five to ten years.

In early 2002, Matias Reyes, a convicted murderer and rapist, admitted that he alone was responsible for the attack on the Central Park jogger. Reyes had already committed another rape near Central Park days earlier in 1989, using the same modus operandi. The victim of that rape had described the rapist as having fresh stitches in his chin and an investigator quickly linked Reyes to this description. Although the police had Reyes's name on file, they failed to connect Reyes to the rape and assault of the Central Park jogger.

Eventually, the evidence from the crime was subjected to DNA testing. The DNA profile obtained from the spermatozoa found in the rape kit matched the profile of Reyes. Mitochondrial DNA testing on the hairs found on one of the defendants revealed that the hairs were not related to the victim or the crime. Further testing on hairs found on the victim also matched Reyes. Neither blood nor the hair found on the rock matched the victim. The evidence corroborates Reyes's confession to the crime and is consistent with the other crimes committed by Reyes. He is currently serving a life sentence for those crimes.

The investigation of the convictions of these five teenagers has raised questions regarding police coercion and false confessions, as well as, the vulnerability of juveniles during police interrogations. In retrospect, it is clear, these young men did not know where, how, or when the attack took place.

On December 19, 2002, on the recommendation of the Manhattan District Attorney, the convictions of the five men were overturned. Kevin Richardson served five and a half years of his sentence.

11. Yusef Salaam – Manhattan

Convicted in 1990 of rape and assault that happened in 1989
Sentenced to 5 to 10 years
Age at conviction: 15
Served 5.5 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/ limited science, false confession

On the night of April 19, 1989, a 28-year-old jogger was brutally attacked and raped in Central Park. She was found unconscious with her skull fractured, her body temperature at 84 degrees, and 75 percent of her blood drained from her body. When she recovered, she had no memory of the assault. Initial police investigations quickly focused on a group of African American and Latino youths who were in police custody for a series of other attacks perpetrated in the park that night.

After prolonged periods of police interrogation, five teenagers - Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Kharey Wise - confessed to being involved in the attacks. At the time,

the defendants were between 14 and 16 years of age. Richardson, McCray, Sanatana, and Wise all gave videotaped confessions.

The confessions were presented as evidence though they differed in the time, location, and participants of the rape. At trial, the prosecutors also presented forensic evidence, including hair found on one of the defendants that "matched and resembled" that of the victim and a hair found on the victim's clothing that was believed to have originated from one of the defendants. Also presented as evidence was a rock found near the scene of the crime that had blood and hair on it; evidence that was believed to have come from the victim.

The following year, all five teenagers were convicted, in two separate trials, of charges stemming from the attack. Yusef Salaam was tried as a juvenile and convicted of rape and assault. He was sentenced to five to ten years.

In early 2002, Matias Reyes, a convicted murderer and rapist, admitted that he alone was responsible for the attack on the Central Park jogger. Reyes had already committed another rape near Central Park days earlier in 1989, using the same modus operandi. The victim of that rape had described the rapist as having fresh stitches in his chin and an investigator quickly linked Reyes to this description. Although the police had Reyes's name on file, they failed to connect Reyes to the rape and assault of the Central Park jogger.

Eventually, the evidence from the crime was subjected to DNA testing. The DNA profile obtained from the spermatozoa found in the rape kit matched the profile of Reyes. Mitochondrial DNA testing on the hairs found on one of the defendants revealed that the hairs were not related to the victim or the crime. Further testing on hairs found on the victim also matched Reyes. Neither blood nor the hair found on the rock matched the victim. The evidence corroborates Reyes's confession to the crime and is consistent with the other crimes committed by Reyes. He is currently serving a life sentence for those crimes.

The investigation of the convictions of these five teenagers has raised questions regarding police coercion and false confessions, as well as, the vulnerability of juveniles during police interrogations. In retrospect, it is clear, these young men did not know where, how, or when the attack took place.

On December 19, 2002, on the recommendation of the Manhattan District Attorney, the convictions of the five men were overturned. Yusef Salaam served five and a half years for a crime he did not commit.

12. Raymond Santana – Manhattan

Convicted in 1990 of rape and assault that happened in 1989
Sentenced to 5 to 10 years
Age at conviction: 14
Served 5 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/ limited science, false confession

On the night of April 19, 1989, a 28-year-old jogger was brutally attacked and raped in Central Park. She was found unconscious with her skull fractured, her body temperature at 84 degrees, and 75 percent of her blood drained from her body. When she recovered, she had no memory of the assault. Initial police investigations quickly focused on a group of African American and Latino youths who were in police custody for a series of other attacks perpetrated in the park that night.

After prolonged periods of police interrogation, five teenagers - Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Kharey Wise - confessed to being involved in the attacks. At the time, the defendants were between 14 and 16 years of age. Richardson, McCray, Sanatana, and Wise all gave videotaped confessions.

The confessions were presented as evidence though they differed in the time, location, and participants of the rape. At trial, the prosecutors also presented forensic evidence, including hair found on one of the defendants that "matched and resembled" that of the victim and a hair found on the victim's clothing that was believed to have originated from one of the defendants. Also presented as evidence was a rock found near the scene of the crime that had blood and hair on it; evidence that was believed to have come from the victim.

The following year, all five teenagers were convicted, in two separate trials, of charges stemming from the attack. Raymond Santana was tried as a juvenile and convicted of rape and assault. He was sen-

tenced to five to ten years.

In early 2002, Matias Reyes, a convicted murderer and rapist, admitted that he alone was responsible for the attack on the Central Park jogger. Reyes had already committed another rape near Central Park days earlier in 1989, using the same modus operandi. The victim of that rape had described the rapist as having fresh stitches in his chin and an investigator quickly linked Reyes to this description. Although the police had Reyes's name on file, they failed to connect Reyes to the rape and assault of the Central Park jogger.

Eventually, the evidence from the crime was subjected to DNA testing. The DNA profile obtained from the spermatozoa found in the rape kit matched the profile of Reyes. Mitochondrial DNA testing on the hairs found on one of the defendants revealed that the hairs were not related to the victim or the crime. Further testing on hairs found on the victim also matched Reyes. Neither blood nor the hair found on the rock matched the victim. The evidence corroborates Reyes's confession to the crime and is consistent with the other crimes committed by Reyes. He is currently serving a life sentence for those crimes.

The investigation of the convictions of these five teenagers has raised questions regarding police coercion and false confessions, as well as, the vulnerability of juveniles during police interrogations. In retrospect, it is clear, these young men did not know where, how, or when the attack took place.

On December 19, 2002, on the recommendation of the Manhattan District Attorney, the convictions of the five men were overturned. Raymond Santana spent five years in prison for a crime he did not commit.

13. Kharey Wise – Manhattan

Convicted in 1990 of assault, sexual abuse and rioting that happened in 1989
Sentenced to 5 to 15 years
Age at conviction: 16
Served 11.5 years; exonerated in 2002
Factors leading to wrongful conviction: unreliable/ limited science, false confession

On the night of April 19, 1989, a 28-year-old jogger was brutally attacked and raped in Central Park. She was found unconscious with her skull fractured, her body temperature at 84 degrees, and 75 percent of her blood drained from her body. When she recovered, she had no memory of the assault. Initial police investigations quickly focused on a group of African American and Latino youths who were in police custody for a series of other attacks perpetrated in the park that night.

After prolonged periods of police interrogation, five teenagers - Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Kharey Wise - confessed to being involved in the attacks. At the time, the defendants were between 14 and 16 years of age. Richardson, McCray, Sanatana, and Wise all gave videotaped confessions.

The confessions were presented as evidence though they differed in the time, location, and participants of the rape. At trial, the prosecutors also presented forensic evidence, including hair found on one of the defendants that "matched and resembled" that of the victim and a hair found on the victim's clothing that was believed to have originated from one of the defendants. Also presented as evidence was a rock found near the scene of the crime that had blood and hair on it; evidence that was believed to have come from the victim.

The following year, all five teenagers were convicted, in two separate trials, of charges stemming from the attack. Then sixteen years old, Kharey Wise, was tried as an adult and convicted of assault, sexual abuse, and riot. He was sentenced to five to fifteen years.

In early 2002, Matias Reyes, a convicted murderer and rapist, admitted that he alone was responsible for the attack on the Central Park jogger. Reyes had already committed another rape near Central Park days earlier in 1989, using the same modus operandi. The victim of that rape had described the rapist as having fresh stitches in his chin and an investigator quickly linked Reyes to this description. Although the police had Reyes's name on file, they failed to connect Reyes to the rape and assault of the Central Park jogger.

Eventually, the evidence from the crime was subjected to DNA testing. The DNA profile obtained from the spermatozoa found in the rape kit matched the profile of Reyes. Mitochondrial DNA testing on

the hairs found on one of the defendants revealed that the hairs were not related to the victim or the crime. Further testing on hairs found on the victim also matched Reyes. Neither blood nor the hair found on the rock matched the victim. The evidence corroborates Reyes's confession to the crime and is consistent with the other crimes committed by Reyes. He is currently serving a life sentence for those crimes.

The investigation of the convictions of these five teenagers has raised questions regarding police coercion and false confessions, as well as, the vulnerability of juveniles during police interrogations. In retrospect, it is clear, these young men did not know where, how, or when the attack took place.

On December 19, 2002, on the recommendation of the Manhattan District Attorney, the convictions of the five men were overturned. Wise served 11.5 years in prison for crimes he did not commit.

14. Michael Mercer – Manhattan

Convicted in 1992 of rape, sodomy and robbery that happened in 1991
Sentenced to 20.5 to 41 years
Age at conviction: 41
Served 10.5 years; exonerated in 2003
Factors leading to wrongful conviction: eyewitness misidentification

In January 2003, Michael Mercer regained his freedom after DNA testing excluded him as the perpetrator of the May 1991 rape of a 17-year-old girl in New York City. Mercer had been sentenced to 20-41 years in prison.

The victim was accosted in an elevator, forced to the roof, robbed, and raped. Two months later, she spotted Mercer in the building as he was going to visit a friend and she screamed for his capture. He was arrested and charged based exclusively on the victim's identification. In his first trial, the jury could not reach a verdict. In the retrial, where the victim was resolute about her identification, Mercer was convicted.

Mercer's conviction was upheld when he appealed in 1995. In 1996, his request for DNA testing was denied based on lack of merit.

His chance to test the evidence was not realized until March of 2000, when the city started retesting rape kits and comparing results with the State DNA database. Finally, in January 2003, DNA testing of biological material from the victim not only excluded Mercer from the rape, but matched Arthur Brown, a man serving a life sentence for gunpoint robberies and rapes. The victim, then in her late 20s, was shown a photo lineup containing photos of both Mercer and Brown. She identified Brown as the attacker. Brown could not be charged, however, because the stature of limitations had expired.

15. John Kogut – Nassau County

Convicted in 1986 of rape and murder that happened in 1984
Sentenced to 31.5 years
Age at conviction: 24
Served 17 years; exonerated in 2005
Factors leading to wrongful conviction: unreliable/ limited science, false confessions, forensic science misconduct, informants/ snitches

On December 21, 2005, Nassau County Judge Victor M. Ort found John Kogut not guilty of the 1984 rape and murder of a 16 year old girl. Kogut was charged with the crime in 1985 and convicted in 1986. He was sentenced to 31.5 years to life in prison. Kogut's 1986 trial was separate from that of Dennis Halstead and John Restivo, who were also tried and convicted of rape and murder, on the theory that the three men had acted together in abducting, raping, and killing the victim. It took almost two decades for Kogut to win a retrial after a series of postconviction DNA tests excluded all three men as the rapists and proved that semen from the victim's body had come from unknown assailant.

The Crime
On November 10, 1984, the victim, a 16-year-old girl disappeared after leaving her job at a roller rink at 9:45 p.m. On December 5, 1984, her body was found, naked, in a wooded area of Lynbrook, New York. The body had been covered by leaves and debris and was located a short distance from the roller rink.

The autopsy revealed that the victim had died as a result of ligature strangulation. Vaginal swabs taken during the autopsy revealed the presence of semen and spermatozoa - evidence that she had been

sexually assaulted. However, serology tests to determine the semen donor's blood type were never performed.

The Nassau County Police Department was under enormous pressure to solve this crime, particularly since there had been several other disappearances of young girls in the area in recent years. Kogut, Halstead, and Restivo were all initially interrogated as part of an investigation into the disappearance of another girl, before the police changed their focus to this rape and murder.

The Confession

After 3 polygraph examinations, detectives began to focus on Kogut as a suspect in the rape and murder. Kogut, though he was told that he failed the polygraph, continued to maintain his innocence. After nearly 18 hours of interrogation, however, the police produced a confession from Kogut. The confession was hand written by the interrogating officer for Kogut's signature, allegedly after five other versions of the confession that were never transcribed. Kogut was then taken to the crime scene. He could not point the police to any evidence from the crime that was missing, such as the victim's clothes, jewelry, or murder weapon. The next day, the confession was recorded on video tape. It contained no details that were not previously known by law enforcement.

According to the confession, Restivo, Halstead, and Kogut were all in Restivo's van. They approached the victim, who was on foot, and she entered the van voluntarily. When the victim demanded to be let out of the van, she was stopped, stripped, and raped by Halstead and Restivo. They drove to a cemetery, where the victim was taken out of the van and Kogut strangled her with a piece of rope. The victim's body was then rolled into a blanket and dumped in another location.

Based on the confession, investigators procured a warrant to search Restivo's van. They claimed they found two hairs in the van that were microscopically similar to the victim's, including indications of chemical treatment.

The Trials

At trial, prosecutors argued that the hairs found in Restivo's van provided corroboration of the confession, and all three men were tried for rape and murder. All three men denied having anything to do with the abduction, rape, or murder and offered separate alibi

defenses. Prosecutors also relied on snitch testimony against all three men. Kogut was convicted in May 1986 and was sentenced to 31.5 years to life. Restivo and Halstead were convicted in November 1986 and were then sentenced to 33 1/3 years to life.

Biological Evidence and Post-Conviction
Centurion Ministries began working on behalf of all three defendants in 1994. The Innocence Project began working on Restivo's case in 1997. In the postconviction proceedings that secured the defendants' release, Kogut was represented by Wilmer, Cutler & Pickering and Halstead was represented by Pace Law School's Postconviction Clinic.

DNA testing in this case went through many rounds over a period of ten years, despite repeated exclusions of all three men. The prosecution initially argued that the samples tested (vaginal slides) were not the "best" samples available and could have failed to detect semen from the defendants present on the original swabs. In 2003, however, the defense team obtained property records from the Police Department which led to the discovery of an intact vaginal swab that had never been tested. STR testing on the spermatozoa on the vaginal swab matched the single unknown male profile from the prior testing and again excluded all three men.

In addition, defense attorneys also secured a new affidavit from former Det. Nicholas Petraco, who had testified for the state in 1986 regarding the hairs allegedly found in Restivo's van. Det. Petraco concluded, based on 20 years of research and expertise, that the hairs displayed "post-mortem root banding," a hallmark of decomposition that only occurs while hairs are attached to a corpse that has been dead for at least 8 hours, if not days or weeks. The banding on these hairs was suspiciously similar to those found on dozens of hairs taken from the autopsy that had been in unsealed envelopes in a Police Department laboratory for months. Because the victim was only alleged to have been in the van for a few minutes after death, he concluded, the hairs could not have been shed during that time, and were instead autopsy hairs that were commingled with others from the van – whether through police negligence or misconduct.

Based on these results, all three convictions were vacated in June 2003 and all three defendants were released. John Kogut, however, faced re-trial, based largely on his confession. At trial, the prosecution sought to rebut the DNA evidence by arguing that the victim, who

was said by her mother and best friend to be a virgin, had consensual sex with an unknown male prior to her rape and murder. Kogut's lawyer argued that the confession was false, and won a motion to have expert testimony on false confessions admitted for the first time in New York State.

After a three month bench trial, Judge Ort found Kogut not guilty on all counts. His verdict included specific findings that numerous aspects of the confession were contradicted by DNA and other forensic evidence, and that that the decomposed hairs from the victim were not shed by her in Restivo's van.

16. Dennis Halstead – Nassau County

Convicted in 1987 of murder and rape that happened in 1984
Sentenced to 33.3 years to life
Age at conviction: 29
Served 16 years; exonerated in 2005
Factors leading to wrongful conviction: unreliable/ limited science, false confessions, forensic science misconduct, informants/ snitches

In June 2003, the convictions of Dennis Halstead, John Restivo, and John Kogut were all vacated, and the three defendants were released. In 1986, Halstead and Restivo were tried separately from Kogut, who was also tried and convicted of rape and murder on the theory that the three men had acted together in abducting, raping, and killing the victim. A series of postconviction DNA tests excluded all three men as the rapists and proved that semen from the victim's body had come from unknown assailant.

In December 2005, the Nassau County District Attorney's office announced that it would drop all charges against Dennis Halstead and John Restivo after John Kogut was found not guilty by Nassau County Judge Victor M. Ort on December 21, 2005.

The Crime
On December 5, 1984, the body of the 16-year-old victim was discovered, naked, in a wooded area of Lynnbrook, New York. She was last seen leaving her job at the local roller rink almost a month before.

The medical examiner determined the cause of death was ligature strangulation; semen and sperm found on the victim's vaginal swabs

suggested she had been raped.

The Investigation
The local police department believed the victim's death to be connected to similar crimes involving the disappearances of other young women.

By March 1985, investigators had focused their investigation in part on Dennis Halstead, who was believed to have been associated with another young woman who had disappeared. Early that month, John Restivo had been interviewed as part of the investigation and allegedly implicated Halstead. Restivo also mentioned that he was acquainted with John Kogut, a sometime employee of Restivo's and his brother's moving business.

In late March 1985, Kogut was brought to police headquarters for a polygraph examination. After three polygraphs, a detective analyzed Kogut's "polygraph charts" and determined that Kogut was lying when he denied involvement in the victim's murder. Multiple officers proceeded to interrogate Kogut for more than 18 hours, repeatedly telling him that he had failed the lie detector tests. Kogut was bombarded with allegations that he, John Restivo, and Dennis Halstead had abducted, raped, and murdered the victim. Eventually Kogut signed a confession that had been handwritten by a detective; this confession was the sixth version of facts allegedly given by Kogut.

According to the final version of the confession, Restivo, Kogut, and Halstead were driving in Restivo's van. They encountered the victim, who got in the van voluntarily. Halstead and Kogut stripped the victim and Halstead raped her. They arrived at a cemetery, where Restivo stopped the van and also raped the victim. During the attack, the victim drifted in and out of consciousness. When she began to regain consciousness after the rape, she grew frantic and Kogut strangled her with a hard nylon rope.

Kogut's confession did not include any details about the crime not previously known by law enforcement. Kogut was taken to the site where the victim's body had been discovered, but again was unable to offer any new details about the crime.

Based on Kogut's confession, Restivo's van was searched. Two hairs that were microscopically similar to those of the victim were found

in the front passenger seat. The two hairs appeared identical to the victim's from "root to tip, including artificial treatment."

The Trials

John Restivo and Dennis Halstead were tried together for rape and murder in November 1986; John Kogut had already been tried separately and convicted of rape and murder in March 1986. The prosecution argued that the two hairs found in Restivo's van were corroborative of Kogut's confession.

The defense presented the testimony of hair comparison expert Dr. Peter DeForest. Dr. DeForest testified that the hairs found in Restivo's van displayed "advanced banding," a condition caused by bacteria eating away at the interior of the hair shaft. Advanced banding occurs only after death and only when the hair is still attached to the decomposing body, meaning that the victim could not have deposited the hairs while she was alive and supposedly in Restivo's van.

At the time of trial, research on advanced banding was relatively new and no studies had been published about it. The state called its own expert, who testified to the limits of contemporary research, and argued in closing that "for all anyone knows, banding occurs right after death, as when the heart stops and the lungs stop working and the blood settles."

In addition to Kogut's confession and the two hairs, the state presented the testimony of multiple witnesses who alleged that they had heard Restivo and Halstead make incriminating statements. Both men were ultimately convicted.

Post-Conviction

Centurion Ministries began working on behalf of all three defendants in 1994. The Innocence Project began working on Restivo's case in 1997. In the postconviction proceedings that secured the defendants' release, Kogut was represented by Wilmer, Cutler & Pickering and Centurion Ministries and Halstead was represented by Pace Law School's Postconviction Clinic.

DNA testing in this case went through many rounds over a period of ten years, despite repeated exclusions of all three men. The prosecution initially argued that the samples tested (vaginal slides) were not the "best" samples available and could have failed to detect semen

from the defendants present on the original swabs. In 2003, however, the defense team obtained property records from the police department which led to the discovery of an intact vaginal swab that had never been tested. STR testing on the spermatozoa on the vaginal swab matched the single unknown male profile from the prior testing and again excluded all three men.

In addition, defense attorneys also secured an affidavit from the state's expert witness, who had testified in 1986 regarding the hairs found in Restivo's van. The expert concluded, based on 20 years of research and expertise, that the hairs displayed "post-mortem root banding," a hallmark of decomposition that only occurs while hairs are attached to a corpse that has been dead for at least 8 hours, if not days or weeks. The banding on these hairs was similar to those found on dozens of hairs taken from the autopsy that had been in unsealed envelopes in a police department laboratory for months. Because the victim was only alleged to have been in the van for a few minutes after death, he concluded, the hairs could not have been shed during that time, and were instead autopsy hairs that were commingled with others from the van – whether through negligence or misconduct.

Based on these results, all three convictions were vacated in June 2003 and all three defendants were released. John Kogut, however, faced retrial, based largely on his confession. At trial, the prosecution sought to rebut the DNA evidence by arguing that the victim, who was said by her mother and best friend to be a virgin, had consensual sex with an unknown male prior to her rape and murder. Kogut's lawyer argued that the confession was false, and won a motion to have expert testimony on false confessions admitted for the first time in New York State.

After a three-month bench trial, Judge Ort found Kogut not guilty on all counts in December 2005. His verdict included specific findings that numerous aspects of the confession were contradicted by DNA and other forensic evidence, and that that the decomposed hairs from the victim were not shed by her in Restivo's van. Before the end of the month, Assistant Nassau District Attorney Fred Klein said in court that the case against Halstead and Restivo should be dismissed because he could not prove guilt beyond a reasonable doubt.

17. John Restivo – Nassau County

Convicted in 1987 of rape and murder that happened in 1984
Sentenced to 33.3 years to life
Age at conviction: 25
Served 16 years; exonerated in 2005
Factors leading to wrongful conviction: false confessions, forensic science misconduct, informants/ snitches

In June 2003, the convictions of Dennis Halstead, John Restivo, and John Kogut were all vacated, and the three defendants were released. In 1986, Halstead and Restivo were tried separately from Kogut, who was also tried and convicted of rape and murder on the theory that the three men had acted together in abducting, raping, and killing the victim. A series of postconviction DNA tests excluded all three men as the rapists and proved that semen from the victim's body had come from unknown assailant.

In December 2005, the Nassau County District Attorney's office announced that it would drop all charges against Dennis Halstead and John Restivo after John Kogut was found not guilty by Nassau County Judge Victor M. Ort on December 21, 2005.

The Crime
On December 5, 1984, the body of the 16-year-old victim was discovered, naked, in a wooded area of Lynnbrook, New York. She was last seen leaving her job at the local roller rink almost a month before.

The medical examiner determined the cause of death was ligature strangulation; semen and sperm found on the victim's vaginal swabs suggested she had been raped.

The Investigation
The local police department believed the victim's death to be connected to similar crimes involving the disappearances of other young women.

By March 1985, investigators had focused their investigation in part on Dennis Halstead, who was believed to have been associated with another young woman who had disappeared. Early that month, John Restivo had been interviewed as part of the investigation and allegedly implicated Halstead. Restivo also mentioned that he was acquainted with John Kogut, a sometime employee of Restivo's and his

brother's moving business.

In late March 1985, Kogut was brought to police headquarters for a polygraph examination. After three polygraphs, a detective analyzed Kogut's "polygraph charts" and determined that Kogut was lying when he denied involvement in the victim's murder. Multiple officers proceeded to interrogate Kogut for 12 hours, repeatedly telling him that he had failed the lie detector tests. Kogut was bombarded with allegations that he, John Restivo, and Dennis Halstead had abducted, raped, and murdered the victim. Eventually Kogut signed a confession that had been handwritten by a detective; this confession was the sixth version of facts allegedly given by Kogut.

According to the final version of the confession, Restivo, Kogut, and Halstead were driving in Restivo's van. They encountered the victim, who got in the van voluntarily. Halstead and Kogut stripped the victim and Halstead raped her. They arrived at a cemetery, where Restivo stopped the van and also raped the victim. During the attack, the victim drifted in and out of consciousness. When she began to regain consciousness after the rape, she grew frantic and Kogut strangled her with a hard nylon rope.

Kogut's confession did not include any details about the crime not previously known by law enforcement. Kogut was taken to the site where the victim's body had been discovered, but again was unable to offer any new details about the crime.

Based on Kogut's confession, Restivo's van was searched. Two hairs that were microscopically similar to those of the victim were found in the front passenger seat. The two hairs appeared identical to the victim's from "root to tip, including artificial treatment."

The Trials

John Restivo and Dennis Halstead were tried together for rape and murder in November 1986; John Kogut had already been tried separately and convicted of rape and murder in March 1986. The prosecution argued that the two hairs allegedly found in Restivo's van were corroborative of Kogut's confession.

The defense presented the testimony of hair comparison expert Dr. Peter DeForest. Dr. DeForest testified that the hairs found in Restivo's van displayed "advanced banding," a condition caused by bacteria

eating away at the interior of the hair shaft. Advanced banding occurs only after death and only when the hair is still attached to the decomposing body, meaning that the victim could not have deposited the hairs while she was alive and supposedly in Restivo's van.

At the time of trial, research on advanced banding was relatively new and no studies had been published about it. The state called its own expert, who testified to the limits of contemporary research, and argued in closing that "for all anyone knows, banding occurs right after death, as when the heart stops and the lungs stop working and the blood settles."

In addition to Kogut's confession and the two hairs, the state presented the testimony of multiple witnesses who alleged that they had heard Restivo and Halstead make incriminating statements. Both men were ultimately convicted.

Post-Conviction
Centurion Ministries began working on behalf of all three defendants in 1994. The Innocence Project began working on Restivo's case in 1997. In the postconviction proceedings that secured the defendants' release, Kogut was represented by Wilmer, Cutler & Pickering and Centurion Ministries and Halstead was represented by Pace Law School's Postconviction Clinic.

DNA testing in this case went through many rounds over a period of ten years, despite repeated exclusions of all three men. The prosecution initially argued that the samples tested (vaginal slides) were not the "best" samples available and could have failed to detect semen from the defendants present on the original swabs. In 2003, however, the defense team obtained property records from the police department which led to the discovery of an intact vaginal swab that had never been tested. STR testing on the spermatozoa on the vaginal swab matched the single unknown male profile from the prior testing and again excluded all three men.

In addition, defense attorneys also secured an affidavit from the state's expert witness, who had testified in 1986 regarding the hairs found in Restivo's van. The expert concluded, based on 20 years of research and expertise, that the hairs displayed "post-mortem root banding," a hallmark of decomposition that only occurs while hairs are attached to a corpse that has been dead for at least 8 hours, if not

days or weeks. The banding on these hairs was similar to those found on dozens of hairs taken from the autopsy that had been in unsealed envelopes in a police department laboratory for months. Because the victim was only alleged to have been in the van for a few minutes after death, he concluded, the hairs could not have been shed during that time, and were instead autopsy hairs that were commingled with others from the van – whether through negligence or misconduct.

Based on these results, all three convictions were vacated in June 2003 and all three defendants were released. John Kogut, however, faced retrial, based largely on his confession. At trial, the prosecution sought to rebut the DNA evidence by arguing that the victim, who was said by her mother and best friend to be a virgin, had consensual sex with an unknown male prior to her rape and murder. Kogut's lawyer argued that the confession was false, and won a motion to have expert testimony on false confessions admitted for the first time in New York State.

After a three-month bench trial, Judge Ort found Kogut not guilty on all counts in December 2005. His verdict included specific findings that numerous aspects of the confession were contradicted by DNA and other forensic evidence, and that that the decomposed hairs from the victim were not shed by her in Restivo's van. Before the end of the month, Assistant Nassau District Attorney Fred Klein said in court that the case against Restivo and Halstead should be dismissed because he could not prove guilt beyond a reasonable doubt.

18. Doug Warney – Rochester

Convicted in 1997 of second degree murder that happened in 1996
Sentenced to 25 years to life
Age at conviction: 35
Served 9 years; exonerated in 2006
Factor leading to wrongful conviction: false confession

On May 16, 2006, Douglas Warney was released from prison after serving more than nine years for a murder he did not commit. Post-conviction DNA testing on fingernail clippings from the victim and blood at the crime scene excluded Warney and matched Eldred Johnson, Jr.. Johnson, a New York inmate already serving a life sentence, subsequently confessed to the murder, telling investigators that he acted alone.

The Crime
On January 3, 1996, in Rochester, New York, police found the victim lying on his back with puncture wounds to his neck and chest. He had been stabbed 19 times and exhibited defensive wounds on his left hand. A bloodstained knife, a bloodstained towel, and several bloody tissues were in the clothing hamper in his bathroom.

The Confession
Douglas Warney, a man with a history of mental health issues, an eighth-grade education, and advanced AIDS, called the police stating that he had information about a homicide. He knew the victim: he had cleaned the victim's house and shoveled snow from his driveway just two years before the murder. Warney was interrogated for 12 hours by police, he confessed and provided details that only the killer could know - that the victim was wearing a nightgown, that he had been cooking chicken, and that the killer cut himself with a knife and wiped it with a tissue in the bathroom. He also mentioned a second man, who was later found to have been confined to a clinic at the time of the murder. Warney's confession contained other inconsistencies, such as the location of the murder and the disposal of clothing after the crime.

The Biological Evidence
The Monroe County Public Safety Laboratory conducted blood and enzyme testing on the crime scene evidence. The victim was type O, and Warney was found to be type A. The blood on the knife was consistent with the victim's blood and enzyme types. Bloodstains on the towel and bloody tissues could not have come from either the victim or Warney. Blood was also found under the victim's fingernail scrapings, but there was an insufficient amount of material for testing.

Post-Conviction
Warney was initially charged with capital murder, though he was ultimately convicted of second degree murder and sentenced to 25 years to life in prison.

The Innocence Project and Donald M. Thompson began working on Warney's case in 2004 and sought DNA testing of blood from the fingernail clippings, knife, towel, and tissues. The prosecution opposed testing, and Warney lost his motion for DNA testing in 2004.

While the case was being appealed, Rochester prosecutors, without notifying Warney, Thompson, or the Innocence Project, arranged for DNA testing on the blood splatter and fingernail scrapings. The Monroe County Public Safety Laboratory conducted STR based DNA testing on the victim's left fingernail scrapings, blood flecks from around the crime scene, bloodstains on the towel, and bloodstains on tissues in the bathroom. Warney was excluded from this evidence and the profile was compared against the national DNA profile database. The DNA profile matched Eldred Johnson, Jr., a New York state inmate already serving a life sentence for other crimes. When he was interviewed by prosecutors, Johnson stated that he had killed the victim, had committed the crime alone, and he did not know Douglas Warney.

On May 16, 2006, Douglas Warney's conviction was vacated and he was released from prison.

19. Alan Newton – Bronx

Convicted in 1985 of rape, robbery and assault that happened in 1984
Sentenced to 13.5 to 40 years
Age at conviction: 22
Served 21 years; exonerated in 2006
Factors leading to wrongful conviction: eyewitness misidentification

On July 6, 2006, Alan Newton was exonerated of rape, robbery, and assault charges. He had asked for DNA testing in 1994, and his request was denied because evidence had been presumed to be lost. In 2005, at the Innocence Project's request, the district attorney's office found the rape kit after an exhaustive search. Postconviction DNA testing then proved that Newton was not the perpetrator of this crime.

The Crime
At about 4:00 AM on June 23, 1984, the 25-year-old victim stopped at a convenience store in the Bronx, New York. As the victim was leaving the store, she was grabbed from behind by another customer, who put a box cutter to her throat and pushed her from behind into a blue and white Grand Prix and drove away. After a few minutes, the car stalled as they were going up a hill and the assailant got out and lifted the hood. The victim could not get out of the car because the

passenger side door handle was broken off. The assailant dragged her into a nearby park, orally sodomized her, raped her, and attempted to take her money and cigarettes. She then went to find a cab, and the assailant returned, grabbed her again and took her to a nearby abandoned building. There, they struggled and he raped her again. In order to prevent her from identifying him, the perpetrator then cut the victim's face with the razor, blinding her in the left eye. He took her money and cigarettes, telling her that if she called the police he would come back and kill her. She saw the back of the assailant as he ran away and then passed out. When the victim regained consciousness, she went to a call box and summoned the police.

The Identification
The victim described the assailant as "a black male, approximately twenty seven years, wearing a beige shirt, pants." She later described the assailant as five seven or five eight, 160 pounds, short afro, mustache. She could not tell if the person was dark or light skinned because it was so dark out. She told a detective at the hospital that he was "physically large" and that his name was "Willie."

While still in the hospital recovering from surgery, the victim viewed nearly two hundred photographs on June 24 and 25, 1984, and selected Alan Newton's photo. On June 28, 1984, police picked up the victim from the hospital and brought her in to view a lineup. She identified Newton in the lineup and again at trial.

On June 27, 1984, the convenience store clerk from which the victim was abducted identified Newton in a photo lineup, and in a live lineup the next day.

The Biological Evidence
The victim testified at trial that the assailant ejaculated and that she felt the semen running down her leg. The doctor who collected the rape kit from the victim at the hospital and a serologist testifying for the state both testified they observed spermatozoa on the victim's vaginal specimens.

The Defense
At trial, Newton maintained his innocence and presented an alibi defense. According to Newton, after going to see the movie Ghostbusters in Brooklyn with his fiancé, her daughter, and other relatives, he went back to his fiancé's home in Queens. They stayed up late

watching television, he spent the night, and had breakfast there in the morning. Newton's fiancé and her daughter corroborated his alibi.

In May 1985, Newton was acquitted of all charges stemming from the incident in the park, but was convicted of the charges related to the victim's attack in the abandoned building.

Post-Conviction
Newton first requested postconviction DNA testing on August 16, 1994. The Court denied his request on November 3, 1994, because the kit could not be located. In 2005, at the request of the Innocence Project, the Bronx County District Attorney's Office asked the Property Clerk Division to conduct a search for the victim's rape kit, despite claims made by officials at the Property Clerk's Office over the course of eleven years that the kit could not be located and was presumed destroyed. In November 2005, the kit was found after a physical search of the evidence barrels at the Pearson Place, Queens warehouse. The rape kit was found in the same barrel that was indicated on the evidence voucher.

The victim's rape kit was submitted to the New York City Office of the Chief Medical Examiner, Department of Forensic Biology ("OCME"), and the evidence was split to enable replicate testing by an independent laboratory. In April 2006, Forensic Science Associates ("FSA") obtained a full male STR DNA profile from testing of the vaginal and cervical swabs. The OCME's testing of the cervical swab, completed in March 2006, yielded a partial profile, consistent with FSA's result. New reference samples were collected from Newton and both FSA and the OCME generated Newton's DNA profile from them to compare to the crime scene evidence. The Bronx County District Attorney's Office confirmed the profile that the OCME and FSA obtained for Newton by comparing it against his profile on record in the State DNA databank. The DNA testing conclusively excluded Newton as the source of the spermatozoa recovered from the victim immediately after the rape.

On July 6, 2006, Alan Newton was freed and walked out of a Bronx courthouse after the Innocence Project and the Bronx County District Attorney's Office filed a joint motion to vacate Newton's conviction.

20. Scott Fappiano – Brooklyn

Convicted in 1985 of rape, sodomy, burglary and sexual abuse that happened in 1983
Sentenced to 20 to 50 years
Age at conviction: 23
Served 21 years; exonerated in 2006
Factors leading to wrongful conviction: eyewitness misidentification

On October 6, 2006, Scott Fappiano walked out of the Kings County Supreme Court as a free man. After serving 21 years for rape, sodomy, burglary, and sexual abuse, postconviction DNA testing proved his innocence.

The Crime
On December 1, 1983, in Brooklyn, New York, a white male intruder with a gun woke the victim and her husband, a New York Police Department officer. The perpetrator instructed the victim to tie up her husband in the bed with a length of telephone wire. He then ordered the victim to remove her clothing. The perpetrator vaginally raped her throughout the house and forced her to perform oral sex on him. The perpetrator then smoked a cigarette and drank a beer, leaving both in the living room. The victim was able to flee into the hallway and bang on a neighbor's door for assistance. The perpetrator then fled the scene.

The Identification
The victim described the perpetrator as a white male of Italian descent. She was brought to the police station to view photographs of individuals who fit her general description. She selected a photograph of Scott Fappiano. She chose him again in a live lineup containing Fappiano and police officers serving as "fillers." On the same day, her husband viewed a live lineup and selected one of the "fillers."

The Biological Evidence
The victim was taken to the hospital and a rape kit was collected. The vaginal smears and swabs tested positive for the presence of semen. The victim's white jogging pants that she had put on after the assault also tested positive for semen in the crotch area. Police also collected a towel containing semen stains, cigarette butts, and a beer bottle from the victim's apartment.

The Office of the Chief Medical Examiner (OCME) performed serology on the semen-stained towel and cigarettes. Fappiano was type O, and the victim's husband was type A. These items had type A antigens on them. The jogging pants and rape kit could not be tested at the time of trial due to technological limitations.

The Trial

Fappiano was tried twice for this crime. The jury could not reach a verdict in his 1984 trial. He was tried again in 1985 and convicted of rape, sodomy, burglary, and sexual abuse. The court sentenced him to 20 - 50 years in prison.

Post-Conviction

In 1989, Fappiano was granted postconviction DNA testing of the semen-stained sweatpants. The District Attorney sent the evidence to LifeCodes, a private DNA laboratory. Lifecodes detected spermatozoa on the sweatpants, but no results were obtained. The sweatpants and rape kit were sent back to the District Attorney's Office.

In 2003, The Innocence Project began representing Fappiano. A two-year search at the Office of the District Attorney and NYPD storage facilities did not turn up any evidence. In August 2005, however, Orchid Cellmark notified the Innocence Project that they had inherited materials from LifeCodes. Cellmark had two tubes of DNA extract from the sweatpants that corresponded to Fappiano's case number. This evidence was transferred to the Office of the Chief Medical Examiner in New York. In 2006, the OCME performed multiple rounds of DNA testing over the course of the summer. They first determined that there was DNA from one male and one female in the sample. They then excluded Fappiano and the victim's husband from the male portion. Lastly, the OCME confirmed that the victim was the contributor of the female portion of the extract from the sweatpants, establishing that the evidence had indeed come from the same crime and proving that Fappiano could not have been the perpetrator.

On October 6, 2006, Scott Fappiano's convictions were vacated and he was released after serving 21 years in prison. He was greeted in the courthouse by his family.

21. Jeffrey Deskovic – Westchester County

Convicted in 1990 of murder, rape and possession of a weapon that happened in 1989
Sentenced to 15 years to life
Age at conviction: 17
Served 15.5 years; exonerated in 2006
Factors leading to wrongful conviction: false confessions, government misconduct

On November 2, 2006, Jeff Deskovic's indictment charging him with murder, rape, and possession of a weapon was dismissed on the grounds of actual innocence. Postconviction DNA testing both proved Deskovic's innocence and identified the real perpetrator of a 1989 murder and rape.

The Crime
On the afternoon of November 15, 1989, the 15-year-old victim went out after school to take pictures for a photography class. She never returned home. Her naked body was found by police dogs the morning of November 17, 1989. Her clothes and cassette player were recovered from the vicinity. She appeared to have been raped, beaten, and strangled.

The Confession
Jeff Deskovic, then 16 years old, was a classmate of the victim's. He became a suspect because he was late to school the day after the victim disappeared. Police also believed he seemed overly distraught at the victim's death, visiting her wake three times.

Police spoke with Deskovic eight times in December 1989 and January 1990. Deskovic had begun his own "investigation" of the case, giving officers notes about possible suspects. Police asked Deskovic to submit to a polygraph examination and he agreed in late January 1990. He believed that, if cleared, he could continue to help police with their investigation.

Deskovic was taken to a private polygraph business run by an officer with the local Sheriff's Department, who, according to trial testimony, had been hired to "get the confession." Deskovic was held in a small room there with no lawyer or parent present. He was provided with coffee throughout the day but no food. In between polygraph sessions, detectives interrogated Deskovic.

Deskovic's alleged confession occurred after six hours, three polygraph sessions, and extensive questioning by detectives between sessions. One of the detectives accused Deskovic of having failed the test and said he had been convinced of Deskovic's guilt for several weeks. According to the detective, Deskovic then stated he "realized" three weeks ago he might be the responsible party. Deskovic was asked to describe the crime and began speaking in the third person, switching to first person part way through the narrative. Deskovic said, "I lost my temper" and admitted he had hit the victim in the head with a Gatorade bottle, put his hand over her mouth and kept it there too long. During the confession, Deskovic sobbed. By the end of the interrogation, he was under the table, curled up in the fetal position, crying.

The Biological Evidence
The victim was found naked and her autopsy revealed genital trauma. Semen was identified on the vaginal swabs from her rape kit but no semen was observed on her clothes.

DNA testing was conducted before trial. The results showed that Deskovic was not the source of semen in the rape kit. Deskovic had been told before the alleged confession that if his DNA did not match the semen in the rape kit, he would be cleared as a suspect. Instead, prosecution continued on the strength of his alleged confession.

The Trial
In January 1991, Deskovic was convicted by jury of 1st degree rape and 2nd degree murder, despite DNA results showing that he was not the source of semen in the victim's rape kit. The state argued that the semen had come from a consensual sex partner and that Deskovic killed the victim in a jealous rage.

Post-Conviction
In January 2006, the Innocence Project took on Deskovic's case. The semen from the rape kit was tested with newer technology for entry into the New York State DNA databank of convicted felons. In September 2006, the semen was matched to convicted murderer Steven Cunningham, who was in prison for strangling the sister of his live-in girlfriend.

On September 20, 2006, Jeff Deskovic was released from prison when his conviction was overturned. Following an apology from the assistant district attorney, the court dismissed Deskovic's indictment on the grounds of actual innocence on November 2, 2006.

Steven Cunningham subsequently confessed to the crime for which Jeff Deskovic served nearly 16 years.

22. Roy Brown – Cayuga County

Convicted in 1992 of a murder that happened in 1991
Sentenced to 25 years to life
Age at conviction: 31
Served 15 years; exonerated in 2007
Factors leading to wrongful conviction: unreliable/ limited science

By using Freedom of Information laws to request copies of his own court documents, Roy Brown solved his own case. DNA testing compared the suspected true perpetrator to DNA from a bite mark found on the victim and confirmed the truth of his suspicion.

The Crime
On May 23, 1991, the victim, a social service worker, was found beaten, strangled and stabbed to death near the upstate New York farmhouse where she lived. The victim had been bitten numerous times all over her body. At the scene, police collected a bloody nightshirt and swabbed the bite marks for saliva. The victim's farmhouse had also been set on fire.

The Identification
Roy Brown became a suspect because he had recently been released from a short jail term resulting from a series of threatening phone calls to the director of the social services agency where the victim worked. A year earlier, the agency had placed Brown's daughter into a residential care facility. The victim was not involved in the case.

A man that Brown was incarcerated with testified that, after his release, Brown called him and confessed to the crime over the phone.

The Biological Evidence
The prosecution relied on the testimony of a bite mark analyst who stated that the seven bite marks on the victim's body were "entirely

consistent" with Brown. A defense expert stated that six of the bite marks were insufficient for analysis and the seventh excluded Brown because it had two more upper teeth than he had.

Saliva from the nightshirt and bite mark swabs were analyzed with inconclusive results.

Post-Conviction
In 1995, Brown sought testing on the bite mark swabs, but they had been consumed during previous testing. Brown was also told that the saliva from the nightshirt had been consumed.

Brown then took it upon himself to try and find the victim's true killer. After a fire destroyed all of his court documents at his step-father's house, he asked for copies of his documents under the Freedom of Information Act. He found documents that had not been disclosed to the defense implicating another man, Barry Bench. Bench had acted oddly around the time of the murder and was upset at the victim because the farmhouse that she lived in belonged to the Bench family (she had dated Bench's brother up until two months before the murder). In 2003, Brown wrote to Bench, telling him that DNA would implicate him when Brown finally got testing. Bench committed suicide by stepping in front of an Amtrak train five days after the letter was mailed.

In 2005, the Innocence Project took on Brown's case and discovered that there were six more saliva stains on the nightshirt that could be tested. In 2006, DNA testing proved that the saliva on the shirt did not match Brown. After this exclusion, the Innocence Project located Barry Bench's daughter, who gave a sample of her DNA. Half of her DNA matched the saliva on the shirt: exactly what you would expect from a daughter.

Roy Brown was released from prison on January 23, 2007. The prosecution formally dropped all charges on March 5, 2007.

23. Anthony Capozzi – Buffalo

Convicted in 1987 of rape, sodomy, sexual abuse that happened in 1985
Sentenced to 11 to 35 years
Age at conviction: 29

Served 20 years; exonerated in 2007
Factors leading to wrongful conviction: eyewitness misidentification

Biological evidence stored for two decades in a hospital drawer was the key to the 2007 exoneration of Anthony Capozzi, a Buffalo, New York, man who spent 20 years in prison for two rapes he didn't commit.

DNA tests in March 2007 showed that another man, currently awaiting trial on three murders, actually committed the 1985 attacks, know as the Delaware Park rapes.

Capozzi was charged with three similar rapes and went to trial in 1987. The rape victims told police their attacker was about 160 pounds – Capozzi weighed 200 to 220 pounds. None of the victims mentioned a prominent three-inch scar on Capozzi's face. All three victims identified Capozzi in court as the attacker. He was convicted by a jury of two rapes and acquitted of the third. He was sentenced to 35 years.

Biological evidence was collected from two victims in 1985 and stored in a hospital drawer. When the evidence was tested in 2007 at the request of Capozzi and his attorney, sperm collected during the rape examinations of both victims matched the profile of a man currently in state custody – and proved that Capozzi could not be the rapist.

Capozzi was exonerated and released from state custody in April 2007.

APPENDIX B

REPORT ON THE CONVICTION OF JEFFREY DESKOVIC, BY AN EXPERT PANEL COMMISSIONED BY WESTCHESTER DISTRICT ATTORNEY JANET DIFIORE (RELEASED JULY 2007)

Report on the Conviction of Jeffrey Deskovic

Prepared at the Request of
Janet DiFiore
Westchester County District Attorney

Judge (ret.) Leslie Crocker Snyder,
Member, Kasowitz, Benson, Torres & Friedman

Judge (ret.) Peter J. McQuillan

Hon. William L. Murphy,
Former Richmond County District Attorney

Richard Joselson, Esq.,
Supervising Attorney, Criminal Appeals Bureau
The Legal Aid Society of New York City

June 2007

TABLE OF CONTENTS

SUMMARY OF THE FACTS…….....83

WHAT WENT WRONG…..... 85

Introduction…….85

What Went Wrong - - An Overview……...87

Police and Prosecutorial Failures……87

Defense Failures Before and During Trial…… 88

Other Errors……89

Errors by Police and Prosecution…….. 89

Police & Prosecutorial Tunnel Vision……89

Police Over-Reliance on NYPD Profile……... .92

Selective Reading of Deskovic's Statements…….....94

Troubling Police Tactics in Dealing with Deskovic……...98

Carelessness or Misconduct in Police Investigation……. .. .99

Prosecution Decision to Proceed with Grand Jury
Prosecution Before Receiving DNA Results…….102

Prosecution's Questionable Presentation of Scientific Evidence…….103

Defense Failures……...106

Defense Failure to Use Evidence of Deskovic's
Psychological Vulnerabilities……. . 106

Defense Failure to Maximize the Exculpatory Value of the
Scientific Evidence ……. 107

Defense Conflict of Interest in Representing Freddy Claxton…….. . 108

Other Errors…… 111

Court's Midtrial Loss of Evidence…… 111

CORRECTIVE ACTION…….. .112

Introduction……112

The Unidentified DNA Profile…….. 113

Videotaping the Interrogation……114

Commission of Inquiry……. 115

Evidence Collection and Storage……. 116

SUMMARY OF THE FACTS

Jeffrey Deskovic was a 16 year-old sophomore at Peekskill High School in Peekskill, New York in November 1989.

On the morning of November 17, 1989, Peekskill police found the raped, strangled and beaten body of 15 year-old Angela Correa, a classmate of Deskovic's, in a wooded area in Hillcrest Park known as "the Pit"; it was covered with leaves. Her body was mostly naked, with items of clothing nearby.

Correa had last been seen on November 15, 1989.

She had left school at about 2:45pm, gone home and changed into casual clothes. When she left home, she carried a camera and telephoto lens in a plastic bag and wore a walkman-type cassette player with a "New Kids on the Block" cassette inside and headphones.

She was reported missing by her family on November 16th and considered a missing person by the Peekskill Police Department by November 17th.

A witness, William Harrison, had been taking his daily walk through Hillcrest Park the afternoon of November 15th at approximately 3:30pm and saw Angela. He heard voices which sounded like people arguing, but could not hear what was said.

After Angela's body was discovered on November 17th, numerous police officers and Detectives responded to the scene and sealed off the entire area of the park. For 6 hours, no one was permitted to enter the area, after which the police ended their crime scene investigation and the area was open to the public.

In addition to learning that Angela had been raped, the police found a piece of torn, wet white paper under her body which appeared to be part of a note written by Angela to "Freddy" and dated 11/15/89. Also found at the crime scene were Angela's torn bra (a one piece pull-over), among other items, including 3 different type of head hairs, none ever matched to Deskovic Ultimately, 3 separate crime scenes were denoted by the police.

Detectives Thomas McIntyre and David Levine headed the subsequent investigation into Correa's murder. Dr. Louis Roh performed the autopsy on Correa's body. The cause of her death was a fractured skull, internal hemorrhage and asphyxiation due to ligature strangulation. There were various internal and external injuries. Among them were indicia that the body had been dragged, face down, over a dirt surface. Abrasions and contusions in the vaginal area led to an examination of the underlying tissue which showed fresh hemorrhage indicating recent force was applied to the vaginal surface consistent with forcible sexual intercourse. In addition, multiple tearing on her hymen indicated to Roh prior sexual activity. Roh opined that the date and time of Correa's death were consistent with occurring between 3:30 p.m. and 4:30 p.m. on November 15, 1989.

During the course of the two month-long police investigation, the police interviewed numerous classmates of Deskovic's and Angela's at Peekskill High School and learned that Deskovic was allegedly absent from school at the Medical Examiner's estimated time of her death (3:30-4:30pm on Nov. 15), had attended all 3 wakes for Angela and had been observed distraught and crying over her death. Freddy Claxton, a classmate presumed to be "Freddy", had an alibi.

From December 12 until Deskovic's arrest on January 25, 1990, numerous encounters occurred between various Detectives and Deskovic, especially Detective Thomas McIntyre and David Levine, the lead detectives in the case. Some were initiated by the police, some by Deskovic. Deskovic was Mirandized on most occasions. Deskovic asked the police not to tell his mother and, despite his age, 16, they never contacted her at any point in the investigation. They continued their contact with Deskovic, even after Deskovic's mother made clear she did not want Deskovic talking to the police and, had attempted unsuccessfully to hire an attorney to represent him.

Ultimately Detective McIntyre asked Deskovic to take a polygraph examination. Deskovic said he would think about it and continued to conduct his own "investigation," eager to share his notes with the police, including various "revelations" about the crime and crime scenes which included drawing an accurate diagram of the crime scene. He also gave a blood sample to the police (January 10, 1990), after being told by Det. Levine that this would resolve whether he had been involved in the crime or not.

During the various times the police questioned Deskovic, most importantly on January 10 and January 25, a tape recorder was available. On January 10, 35 minutes of a four hour session with Detective Levine and Lieutenant Tumulo were recorded, Levine having turned the tape on and off 3 times. The January 25 session, summarized below, was not recorded at all.

On January 25, Deskovic voluntarily submitted to a polygraph, as requested by the police. He arrived at police headquarters alone at about 9:30am, without either a lawyer, his mother, a friend or family member. He was driven to Brewster, N.Y. by Detectives McIntyre and Levine. The polygraph was administered by police investigator Stephens. Deskovic was questioned sporadically until 5pm, at which time Deskovic asked for Det. McIntyre, after being informed he had failed the exam. Deskovic "confessed" to McIntyre that he killed Angela, fell on the floor in a fetal position, where McIntyre physically comforted him by holding Deskovic's head on his lap and rubbing his back. During the course of eliciting "background" information, Stephens learned that Deskovic "sometimes hears voices and they make me to things I shouldn't." The entire day's session was not tape recorded.

During the course of the investigation, swabbings of Correa's vaginal cavity had revealed seminal fluid and intact spermatozoa. In January, 1990, the fluid was sent to the FBI laboratory for DNA analysis and compared with the sample of Deskovic's blood. On March 2, the police were informed that Deskovic had been conclusively excluded as the source of the seminal fluid found inside Angela. No action was taken by the police as a result. No physical evidence or eyewitness testimony was found to connect Deskovic to Angela's rape and murder. The

scientific evidence exonerated him.

It should be noted that Deskovic was described as "suicidal" or having "suicidal ideation" as of January 26, 1990, the day after his arrest, and was hospitalized from early March 1990 until August 13, 1990 when he was released from Rockland Children's Psychiatric Hospital. A competency examination had been ordered and completed in June, 1990.

WHAT WENT WRONG

Introduction

On January 18, 1991, Deskovic, then seventeen, faced the court for sentencing after being convicted of murdering and raping Correa. Granted an opportunity to speak, Deskovic thanked his attorney and family for standing by him, and implored the court to overturn the guilty verdict:

> I didn't do anything. I've already had a year of my life taken from me for something I didn't do, and I'm about to lose more time and I didn't do anything.[1]

Deskovic's proclamation of innocence carried more weight than many similar pleas. The whole case against him had been built upon a series of his own statements, most of them unrecorded, culminating in an allegedly incriminating statement, which was entirely unrecorded and which was elicited only after a lengthy, confrontational polygraph examination. No eyewitness had identified him as the perpetrator or placed him near the scene of the homicide. No physical evidence connected him to the crime. Indeed, seminal fluid and live sperm found in the victim's body following the rape/murder definitively excluded Deskovic as it source. So did several hairs removed from the victim during the autopsy. Deskovic was sixteen years old with no prior record at the time of the crime. Nevertheless, his plea left the Assistant District Attorney not only persuaded of his guilt, but "convinced that he might very well do this again."[2]

The court called the case a "classic tragedy" in which "two young people's lives [were] destroyed."[3] It said that it had observed Deskovic more closely than it had observed any other defendant, recognized his family and community support and acknowledged that "maybe [he was] innocent."[4] Still, the "jury ha[d] spoken and the court could neither "quarrel" nor "disagree" with the verdict.[5] It imposed the minimum lawful sentence of imprisonment of 15

---

1 See Sentencing Tr. at 10.

2 See Sentencing Tr. at 6.

3 See Sentencing Tr. at 11.

4 See Sentencing Tr. at 10-11.

5 See Sentencing Tr. at 11.

years to life.[6] As the proceeding ended, Deskovic spoke once again:

> I will be back on appeal. Justice will yet be served. I will be set free.[7]

Deskovic was right. Tragically, however, his vindication would not come for sixteen years.

Following his conviction and sentence, Deskovic received all of the traditional elements of post-judgment due process, but he obtained no relief. The Appellate Division, Second Department unanimously affirmed his conviction, opining that there was no "indication in the record" that police elicited the inculpatory statement in a manner that "could [have] induce[d] a false confession" and that the evidence against Deskovic was "overwhelming." People v. Deskovic, 210 A.D.2d 579 (2d Dept. 1994). That same court then summarily denied a motion to reargue. Thereafter, a judge of the Court of Appeals denied Deskovic's application to bring his case before New York's highest court. People v. Deskovic, 83 N.Y.2d 1003 (1994).

His state appeals exhausted, Deskovic tried to obtain federal habeas corpus review, but, owing to an error by his attorney, he missed the statute of limitations. Deskovic v. Mann, 1997 WL 811524 (S.D.N.Y. 1997). That determination was affirmed by the United States Court of Appeals for the Second Circuit. Deskovic v. Mann, 210 F.3d 354 (2d Cir. 2001). Finally, the United States Supreme Court ended Deskovic's collateral attack on his conviction by denying his petition for certiorari. Deskovic v. Mann, 531 U.S. 1088 (2001).

In the ensuing years, Deskovic repeatedly asked the then-Westchester District Attorney to run the DNA samples from the case against the State and federal DNA databases. His requests were unavailing. Only after Deskovic had obtained counsel from the Innocence Project and a new Westchester District Attorney, Janet DiFiore, had taken office did his luck change. DiFiore, to her great credit, promptly agreed to the necessary testing and consented to Deskovic's release when the sample matched that of a man serving a life sentence for an unrelated murder. That man subsequently confessed to raping and killing Angela Correa. He recently pled guilty to the charge.

On November 2, 2006, the First Deputy District Attorney sought dismissal of the indictment on the ground that "Deskovic [was] actually innocent." The prosecutor offered apologies on behalf of her office and the Peekskill Police Department. The court expressed regret as well. When the case against him was finally dismissed, Deskovic was 33 years old. He had been incarcerated half his life for a crime he did not commit.

---

6 See Sentencing Tr. at 13.

7 See Sentencing Tr. at 14.

It is, of course, theoretically possible that, even as this terrible tragedy unfolded, the criminal justice system functioned exactly as it should. One can imagine a situation in which police, prosecutors, defense counsel and the courts each discharged their functions in a perfectly appropriate way, yet the result achieved was calamitously wrong. One can imagine such a case, but Jeffrey Deskovic's case is not such a case. We have reviewed the voluminous public record of the proceedings below, and we are persuaded that, from the outset and continuing at every stage thereafter, errors were made that propelled the case towards its unjust outcome. We do not catalogue these mistakes to assign fault or to apportion blame. There may be a place for that, but that place is not here. Rather, we attempt to analyze what went wrong for Jeffrey Deskovic in the hope that a broader understanding of his tragedy will help those who work in the criminal justice system take the steps necessary to protect others from his fate.

What Went Wrong – An Overview

Before embarking on a step-by-step review of what we believe went wrong in Deskovic's case, we provide a summary of the problems that we have detected:

POLICE AND PROSECUTORIAL FAILURES

- Police & Prosecutorial Tunnel Vision – The police focused too early on Deskovic as their prime suspect due, in part, to an inaccurate NYPD profile of the offender. Because they believed he was guilty, detectives interrogated Deskovic in a manner that improperly exploited his youth, naiveté and psychological vulnerability, thereby eliciting a false inculpatory statement. The prosecution, which, like the police, believed it had its man, failed to undertake a necessary reassessment of its case when scientific facts emerged (e.g., DNA and hair evidence) that appeared to exculpate Deskovic. Specifically, the record indicates that all investigation ceased after police obtained Deskovic's purported confession. The prosecution apparently did little or nothing to corroborate the theories it employed to square the scientific evidence with Deskovic's guilt. There is no evidence, for example, that much was done to locate the "boyfriend" who was the supposed source of semen or even to document Correa's movements in the 24 hours before her death when, according to the prosecution theory, she must have had consensual sex. The prosecution also affirmatively decided not to seek hair samples from the ME and ME's assistant, who, in the prosecution's view, were the sources of hair found on Correa's body.

- Police Over-Reliance on NYPD Profile – Shortly after they discovered Correa's body, Peekskill police sought an offender "profile" from the NYPD. The profile ultimately proved inaccurate in almost every respect, but it appeared to fit Deskovic, prompting a premature focus on him as a prime suspect.

- Selective Recording of Deskovic's Statements – The two most inculpatory statements in the case were the 1/10 statement during which Deskovic supposedly drew an accurate diagram of the crime scene and the 1/25 polygraph exam, which culminated in Deskovic's confession. Although on 1/10, Deskovic spent approximately four hours with Detective Levine and Lieutenant Tumulo, only about 35 minutes of that session was

recorded because Levine turned the tape on and off three times. The 1/25 session was not recorded at all. As to both, the opportunity for complete taping undeniably existed. Had those statements been recorded, jurors would have been in a far better position to evaluate them at trial. In the absence of recordings, however, jurors were forced to rely exclusively on accounts by the police. That other, less consequential statements were recorded, in whole or in part, makes the failure to record the key statements appear possibly deliberate and certainly tactical.

- Troubling Police Tactics In Dealing with Deskovic – Though legal, the police tactics in dealing with Deskovic did not take adequate account of his youth, naiveté, inexperience with the justice system and psychological vulnerabilities, particularly in light of their knowledge that Deskovic's mother did not want him involved in the police "investigation" and that, at least at one point, the family had sought to retain counsel on Deskovic's behalf.

- Carelessness or Misconduct in the Police Investigation – Much of the prosecution's effort to persuade the jury that Deskovic's statements established his guilt hinged on the argument that Deskovic knew things about the crime that only the killer could know (e.g., crime scene details, the existence of a note, found with Correa's body, to Freddy Claxton, another high school classmate). Given Deskovic's innocence, two scenarios are possible: either the police (deliberately or inadvertently) communicated this information directly to Deskovic or their questioning at the high school and elsewhere caused this supposedly secret information to be widely known throughout the community.

- Prosecution's Decision to Proceed with the Grand Jury Presentation Before Receiving the DNA Results – Though the prosecution acted lawfully in proceeding as it did, it would have been wiser to seek delay of the grand jury presentation until after the DNA results arrived. The case certainly looked different at that point and a thorough re-examination might have been easier to pursue had a murder indictment not yet been obtained.

- Prosecution's Questionable Presentation of the Scientific Evidence – Confronted with scientific evidence that did not support its case, the prosecutor developed strained and shifting theories to explain that evidence away. The prosecutor refused, until the end of the trial, to commit to a theory of the DNA evidence. Specifically, the prosecution waffled about whether the source of the semen found in Correa was an unidentified boyfriend who had had consensual sex with her at some unspecified time before her death or an unapprehended accomplice, who had deposited the sperm during the rape. It is also difficult to justify the prosecutor's decision not to test hair samples from the Medical Examiner or his assistant when the prosecution argued to the jury that they were the likely source of hair found on Correa's body.

DEFENSE FAILURES BEFORE AND DURING THE TRIAL

- Defense Failure to Use Evidence of Deskovic's Psychological Vulnerabilities – The defense faced the difficult task of explaining to jurors why someone might confess to

a murder that he did not commit. Ample evidence existed in the record demonstrating Deskovic's psychological vulnerabilities. Nevertheless, the defense did not attempt to introduce psychiatric evidence that might have persuaded jurors that Deskovic was particularly vulnerable to the police tactics employed against him and that those tactics induced a false confession. In the absence of such evidence, the defense attack on the statements seemed scattershot and unfocused.

- Defense Failure to Maximize the Exculpatory Value of the Scientific Evidence – There is no question that, from the defense perspective, the most favorable evidence in the case was the scientific proof that excluded Deskovic as the source of the semen present on the vaginal swabs taken from the victim. Despite this, the defense made no effort to meaningfully question the forensic biologist or the FBI DNA expert, who were the sources of this evidence. As a consequence, the defense failed to make the most of the evidence that should have served as the centerpiece of its case.

- Defense Conflict of Interest in the Representation of Freddy Claxton – Before Deskovic's arrest, the Legal Aid Society of Westchester began representing Freddy Claxton, who had been questioned by police following Correa's death. Eventually, Claxton became an important, yet unseen, player in the case against Deskovic: the prosecutor suggested that Claxton may have had consensual sex with Correa before the crime and Deskovic's knowledge of Correa's note to Claxton was cited as an incriminating fact. The defense should have had every incentive to establish that Claxton did not have consensual sex with Correa and that Claxton may have spoken to others at school about the note (police had questioned him about it). The defense representation of Claxton necessarily hampered these efforts. Further, the court should have considered appointing independent counsel to explain the potential conflict to Deskovic, but it did not do so.

OTHER ERRORS

- Court's Mid-trial Loss of Evidence – As the end of the trial neared, a courthouse cleaning crew inadvertently discarded many of the exhibits that had been introduced in evidence, including the clothing worn by Correa when she died. The evidence had inexcusably been left unsecured in a black plastic garbage bag in the courtroom. There was controversy between the parties about the condition of some of these items and, because the evidence had been lost, the jury's deliberation request to examine some of it could not be accommodated. Even in the absence of bad faith, given the stakes, this cavalier treatment of the evidence was unacceptable.

ERRORS BY THE POLICE AND PROSECUTION CONTRIBUTED TO DESKOVIC'S CONVICTION

Police & Prosecutorial Tunnel Vision

Time and again, academics, advocates and independent investigators alike have identified

tunnel vision as a primary cause of wrongful convictions[8]. Jeffrey Deskovic's wrongful conviction is no exception.

Tunnel vision by law enforcement authorities does not imply a malicious intent to frame the innocent. Nor does it suggest that authorities fixate on particular suspects arbitrarily. Rather, tunnel vision is a "natural human tendency" that causes "lead actors in the criminal justice system to focus on a suspect, [and then] select and filter evidence that will build a case for conviction while ignoring or suppressing evidence that points away from guilt."[9] When tunnel vision operates in criminal investigations, a conclusion by police or prosecutors, however tentative, becomes the lens through which all subsequently uncovered information is assessed. And there is the inevitable institutional pressures on police to "clear cases," especially serious or high profile ones, and on prosecutors to obtain convictions following arrests.

Jeffrey Deskovic's case provides a textbook illustration of tunnel vision in action. Deskovic's behavior following Correa's death was certainly odd and it was perfectly appropriate for police to take a closer look at him. Early in the investigation, however, Peekskill authorities obtained a so-called offender profile from the NYPD.[10] This profile ultimately proved wildly inaccurate, but it appeared to match Deskovic in many respects. Through the filter of this inaccurate profile, detectives regarded Deskovic's unusual behavior with rapidly increasing suspicion.

The tunnel vision that led police to hone in exclusively on Deskovic caused them to overlook or undervalue exculpatory aspects of Deskovic's unusual behavior. By one interpretation – the one favored by police – Deskovic was a disturbed killer who was inserting himself farther and farther into the police investigation until he could finally take responsibility for what he had done. By another light, however, Deskovic was a lonely and immature young man, who was genuinely conducting his own "investigation" in a juvenile attempt to gain acceptance from the police. Supporting the latter theory was the fact that much of what Deskovic provided was silly or dead wrong. For example, he urged the authorities to investigate one of his classmates, with whom he had previously quarreled.[11] He offered them the surmise,

---

8 See Keith A. Findley & Michael S. Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases," 2006 Wisc. L.Rev. 291, 293-94 (2006) (hereinafter "Findley & Scott")(citing, as examples, the findings of former Illinois Governor George Ryan's Commission on Capital Punishment, numerous Canadian government inquiries on the causes of wrongful convictions and the report of the Innocence Commission for Virginia). According to the website of the Innocence Project of the Benjamin N. Cardozo School of Law, "One commonality in almost all of the [160-plus post-conviction DNA exonerations] is that they feature some form of tunnel vision." Innocence Project, Benjamin N. Cardozo School of Law, "The Problem of Tunnel Vision in Criminal Justice," posted at www.innocenceproject.org (last visited February, 2007)

9 Findley & Scott at 292, 305.

10 See Complaint Follow-up Report of Det. McIntyre re: profile (undated).

11 See Testimony of Det. Levine, Trial Tr. at 829; Testimony of Inv. Stephens, Trial

wholly unsupported by anything police had unearthed, that the victim's sister was covering for someone.[12] Finally, he searched the crime scene and located a key, which he thought might belong to Correa, but which, in truth had absolutely nothing to do with the crime.[13] These actions and ones like them might well have prompted open-minded investigators to conclude that Deskovic merely was an inept (but innocent) amateur detective, but the Peekskill detectives had already become convinced of his guilt.

Tunnel vision continued to operate. As the police became increasingly convinced of Deskovic's culpability, the tactics they employed against him made him appear more guilty in their eyes. At times, they were highly confrontational, accusing him of the crime and sharply rejecting his professions of innocence.[14] On other occasions, they were collegial, seemingly inviting this teenager to play a critical role in their investigation.[15] These tactics, themselves the product of the narrowing police focus on Deskovic, laid the groundwork for a false confession.[16] Ultimately, detectives drove Deskovic to another town and interrogated him in a 10x 10 room for hours against the pressure-filled backdrop of a polygraph test. They proceeded as they did because, by then, they were fully convinced of Deskovic's guilt. That their target was a psychologically vulnerable sixteen-year-old boy, who had no previous experience with the justice system, was of no moment under these circumstances. On the day of the polygraph, they acted for the avowed purpose of getting a confession.[17] The tactics they employed were designed for this purpose and, although those tactics were left largely unexamined by the finders of fact because the interrogation was unrecorded, they succeeded.

Once Deskovic was arrested, tunnel vision also distorted the prosecution's behavior.

Tr. at 1014.

12 See Testimony of Det. Levine, Trial Tr. at 834.

13 See Testimony of Det. McIntyre, Trial Tr. at 1175, 11247.

14 See Complaint Follow-up Report of Det. McIntyre (acknowledging that he questioned Deskovic's account during their first conversation and requested he take polygraph); Testimony of Det. McIntyre, Trial Tr. at 1159-60 (same); Testimony of Det. David Levine, Trial Tr. at 710, 815, 849, 852 (told Deskovic that he was a suspect during questioning on January 9th and accused him of committing the crime during interrogation on January 10th).

15 See Testimony of Inv. Stephens, Trial Tr. at 163 (Deskovic told Stephens that he was taking the polygraph on January 25th because police would permit him to participate in their investigation if he passed).

16 Findley & Scott at 333-40 Saul M. Kassin, "On the Psychology of Confessions: Does Innocence Put Innocents at Risk?," 2005 American Psychologist 215, 219-22 (April 2005) (hereinafter cited as "Kassin")

17 See Testimony of Inv. Stephens, Trial Tr. at 1034 (acknowledging that goal of polygraph procedure was to elicit confession).

Convinced that its man was in custody, the District Attorney's office successfully pressed for an indictment, rather than await the results of potentially exculpatory scientific testing. When DNA and hair analysis seemed to exclude Deskovic as the perpetrator, the prosecution did nothing. Still firmly committed to its belief in Deskovic's guilt, it eschewed the opportunity to re-open the investigation. Rather, it seemed determined to square the exculpatory scientific proof with the case against Deskovic. As for the DNA, the prosecution veered between contending that the sperm had been deposited by an unapprehended accomplice of Deskovic (even though their profile described a crime committed by a loner) and urging that sperm had nothing at all to do with the rape, but rather was the product of consensual sex at an unspecified time and an unknown place with a boyfriend who never could quite be identified. Not until summation was it clear that the prosecution would press the latter DNA theory and jettison the former.

As for the hair evidence, the prosecution insisted that the hairs found on the body – hairs that could not have belonged to Deskovic – must have come from the Westchester County Medical Examiner or his assistant. Even as they made this argument, the prosecution steered scrupulously clear of asking these men for hair samples, although their own expert suggested that this would be a good idea.[18] The tactical desire to win thus prevented the prosecution from taking an easy and obvious step that could have contributed to discovering the truth.

From start to finish, tunnel vision propelled the police investigation and then the District Attorney's prosecution. No one would suggest that the intended result was to convict the innocent, but that is exactly what occurred.

Police Over-Reliance on NYPD Profile

On November 24, 1989, only a week after the discovery of Correa's body, Detectives McIntyre and Levine met Detective Pierce of the NYPD Criminal Assessment and Profiling Unit. After reviewing the facts of the investigation and examining crime scene photos and a map of the location, Pierce offered a detailed profile of the offender. He predicted that Correa's killer would be a white or Hispanic man, less than 25 years old and probably less than 19 years old, who was shorter than 5'10". According to Pierce's profile, the offender knew his victim. The murderer was a loner who was unsure around women. He had little involvement in school activities. He likely had a physical handicap or was mentally slow. He could well have been a "trouble maker" with an assaultive history and involvement with drugs or alcohol.[19]

The first and most obvious effect of the profile was that it focused police attention on the students of Peekskill High School, which Correa had attended. While it surely was not unreasonable to investigate Correa's classmates as possible suspects, the profile may well have served prematurely to foreclose other potentially fruitful areas.

The profile also directed police to a particular kind of Peekskill student. Early police

---

18 See Testimony of Peter DeForest, Trial Tr. at 385.

19 See Complaint Follow-up Report of Det. McIntyre re: profile (undated).

investigative reports strongly suggest that the detectives' initial suspicions of Deskovic were validated and then elevated precisely because Deskovic appeared to fit Pierce's description of the offender. Deskovic was, after all, a 5'10" white man who was under 19 at the time. As Detective McIntyre noted in a complaint follow-up report that was apparently authored before Deskovic's first encounter with police, Deskovic knew the victim and was described as a "loner." Unnamed sources told McIntyre that Deskovic was "emotionally handicapped," "emotionally distraught" and delusional, and suggested that he had previously "assaulted" his mother.[20] This seemed to gibe perfectly with the profile, which described an offender who was a "trouble maker" with an "assaultive history."

Subsequent police reports regarding Deskovic continued to hew closely to the terms of the profile: Deskovic was deemed "hostile and agitated,"[21] "a very troubled youngster," who was "schizo," "very secretive," "very nasty," "prone to violence," and "extremely violent towards his mother, hitting and pushing her and screaming obscenities at her."[22] We cannot now know, but it would take no great leap to infer that police actually used the profile in framing their questions to others about Deskovic. Because questions often suggest answers, as the investigation continued along this route, Deskovic appeared to match the profile even more. If the police reports are any indication, before long, Deskovic became the exclusive focus of the investigation. The profile marked the first step – actually, the first misstep – down that path. Throughout the early stages of the investigation, the profile reinforced the police perception that Deskovic was guilty.

As it turned out, of course, the initial profile of the killer was wrong in almost all critical respects. The man presently charged with Correa's murder – the man whose DNA was found in her body and who has confessed to the crime – is African-American, not white or Hispanic. He was nearly 30 years old, not less than 19. He was a total stranger, not an acquaintance of the victim. As the profile predicted, he had no involvement in school activities, but that was because he had absolutely no association with the high school.[23]

---

20 See Complaint Follow-up Report of Det. McIntyre re: Deskovic's conduct at Correa's wake and funeral (undated).

21 See Complaint Follow-up Report of Det McIntyre re: 12/12 interview with Deskovic (undated). Notably, Deskovic became hostile and agitated only after McIntyre had suggested that his reactions to Correa's death made no sense, expressed disbelief for his story and asked him to take a polygraph.

22 See Complaint Follow-up Report of Det. Brovarski re: interview with mother of John Larino (undated).

23 See Jonathan Bandler, "Killer, I Strangled Her," The Journal News (Westchester County, NY, October 6, 2006, p. 1A.

Selective Recording of Deskovic's Statements

The police had no problem getting Jeffrey Deskovic to talk to them about Angela Correa. On seven separate occasions between December 12, 1989, and January 25, 1990, Deskovic spoke with the authorities about the case.[24] The Peekskill detectives also had the wherewithal to record their interrogations of Deskovic.[25] By recording those sessions only selectively, and by failing to record those portions of the interrogations in which Deskovic allegedly made his most incriminating remarks, the police denied the jury an essential tool for evaluating the setting in which the statements were made. The police failure to create a complete taped record of their interrogations of Deskovic was likely a major cause of this erroneous conviction.

Legal academics as well as many who have scrutinized the causes of wrongful convictions have long advocated the videotaping of police interrogations, at least those involving serious crimes[26]. Significantly, even when it is not mandatory, law enforcement in many jurisdictions has embraced electronic recording, believing that it both provides a complete record of an interrogation and that it protects police from unwarranted claims of misconduct[27].

In 1989 and 1990, when Deskovic's case arose, the Peekskill police had the capacity to record interrogations and, indeed, they did some of the time or selectively. Both Detective Levine and Detective McIntyre had ready access to micro cassette recorders and standard recorders for this purpose.[28] Levine and McIntyre taped portions of their police station

---

24 See Notice to Defendant of Intention to Offer Evidence Pursuant to Section 710.30 CPL (describing Deskovic's statements to police on December 12, 1989, and January 9,10, 22, 23, 24, 25, 1990).

25 See id. (indicating that at least portions of the January 10, 1990 statement and the January 22, 1990 statement were recorded).

26 Findley & Scott at 391-93; Kassin at 225; Canadian Commissions of Inquiry, "Report of the Working Group on the Prevention of Miscarriages of Justice," October 20, 2005. Currently, Great Britain and four U.S. states – Minnesota, Alaska, Illinois and Maine – all require that interrogations be recorded in some form. Kassin at 225. In Massachusetts, the Supreme Judicial Court stopped just short of mandating videotaping, holding instead that, if an interrogation resulting in a confession is unrecorded, then the defendant will be entitled to a jury instruction urging caution in the use of that confession. Commonwealth v. DiGiambattista, 442 Mass. 423, 813 N.E.2d 516 (Mass. 2004)

27 See Thomas P. Sullivan, "Electronic Recording of Custodial Interrogations: Everybody Wins," Crim. L. & Criminology, 1127 (2005) (cataloguing jurisdictions where recording occurs).

28 See Testimony of Det. Levine, Trial Tr. at 637-43; Testimony of Det. McIntyre, Trial Tr. at 1094-99, 1144, 1199.

interrogations of Deskovic on January 10th.[29] In addition, Levine recorded his entire telephone conversation with Deskovic on January 22nd as well as a brief conversation he had with Deskovic outside a friend's home later that evening.[30] The Westchester District Attorney's office also recognized the potential evidentiary value of taped statements. The prosecution introduced the tapes of those portions of the interrogations that had been recorded during its direct case at Deskovic's trial.[31]

That the detectives chose to record some of their interrogations with Deskovic renders their failure to record others particularly questionable. For example, Levine acknowledged that he and Lieutenant Tumulo spoke with Deskovic for approximately four hours at the police station on January 10th, but had the recorder running for only about 35 minutes.[32] Specifically, Levine turned on the tape at 3:55 p.m. that afternoon, but turned it off around 4:15 p.m. He did not reactivate the recorder until 5:20 p.m. and he shut it off again, for good this time, at 5:40 p.m.[33] Levine offered a series of explanations for his conduct, all of them unpersuasive. On one occasion, he contended that he turned the tape off when he went to get coffee and forgot to turn it back on.[34] Later in the interrogation, he claimed that he turned off the machine because he believed Deskovic was uncomfortable with it on. He did not explain, however, why, only a moment before, he had decided to remove the recorder from his pocket and place it on the table, where Deskovic could see it, thereby triggering his supposed discomfort.[35]

These explanations notwithstanding, the record strongly suggests that the decision about when to press play and when to press stop was governed, at least in part, by a tactical desire to choreograph which parts of the interrogation a fact-finder would ultimately hear. The recorder was fully operational, for example, when Levine professionally read Deskovic Miranda warnings and Deskovic calmly waived his rights.[36] When Deskovic drew his supposedly incriminating crime scene diagram, in contrast, Levine had switched off the recorder.[37] Similarly, by the time

---

29 See Testimony of Det. Levine, Trial Tr. at 637-43; Testimony of Det. McIntyre, Trial Tr. at 1094-99.

30 See Testimony of Det. Levine, Trial Tr. at 723-39.

31 See Trial Tr. at 637, 725, 739, 1169.

32 See Testimony of Det. Levine, Trial Tr. at 780.

33 See Testimony of Det. Levine, Trial Tr. at 821-23.

34 See Testimony of Det. Levine, Trial Tr. at 668, 671.

35 See Testimony of Det. Levine, Trial Tr. at 708-09.

36 See Testimony of Det. Levine, Trial Tr. at 663.

37 See Prosecutor's Summation, Trial Tr. at 1508.

the interrogation turned angry and confrontational, the tape had stopped running.[38] Jurors thus never got to hear the exchange that occurred when Levine branded Deskovic a liar and accused him of murdering Correa, and Deskovic responded by professing his innocence.[39] As to these crucial aspects of the interrogation, jurors could rely only on the detective's after-the-fact in-court recapitulation.

That only snippets of the January 10th interrogation were recorded is particularly disturbing because of that statement's importance to the police investigation and, eventually, to the prosecution's case as whole. During an unrecorded segment of this interrogation, Deskovic, supposedly without prompting, drew a map of the area behind the Hillcrest elementary school that portrayed three discrete crime scenes – 1) the place where he believed the assailant had accosted Correa; 2) the spot on the path where the rape had occurred; and 3) the location where Correa's body had been found.[40] The prosecution placed great weight on the diagram at Deskovic's trial, contending both that it was forensically accurate[41] and that the information it contained had not been released to the public and, thus, could only have been known by the real killer.[42] Because there was no recorded account of the creation of this pivotal evidence, Deskovic's jurors were denied an essential tool for evaluating the prosecution's case.

Deskovic's January 25th statement was far and away the most important evidence at the trial. Without it, the State had no case against him. He would never have been prosecuted for killing Correa. He would never have been convicted. He would never have spent a day – let alone 16 years – in prison. Reasonable minds can differ about the credibility of the police explanations for sporadically recording Deskovic's January 10th statement. No similar controversy exists about the police rationale for failure to record any of the January 25th polygraph examination. The police simply offered none.

Deskovic arrived at police headquarters in Peekskill at 9:30 a.m. on January 25, 1990. About half an hour later, he left the station with detective McIntyre to make the one hour drive to Brewster, where the polygraph examination would be administered. They arrived at the testing site around 11:00 a.m. There, Deskovic met Investigator Stephens, the polygraph examiner, and was placed in a 10 x10 room, where he would remain for the next eight hours.[43] Stephens then put Deskovic through an arduous series of interviews, the avowed purpose of which was to elicit

---

38 See Testimony of Det. Levine, Trial Tr. at 710.

39 See Complaint Follow-up Report of Det. Levine, dated 1/27/90.

40 See Complaint Follow-up Report of Det. Levine, dated 1/27/90.

41 See Testimony of Det. Paul Astrologo, Trial Tr. 192, 264.

42 See Testimony of Det. McIntyre, Trial Tr. at 1267; Prosecution Summation, Trial Tr. at 1504, 1526.

43 See Complaint Follow-up Report of Det. McIntyre re: 1/25 interrogation (undated); Testimony of Inv. Stephens, Trial Tr. at 1042.

a confession.[44] During part of this period, Deskovic was connected to the polygraph machine. After the examination was complete, Stephens told Deskovic that he had failed it.[45] Thereafter, Stephens left and was replaced by McIntyre.[46] The interrogation continued. By its end, Deskovic was lying under a desk in a fetal position, sobbing uncontrollably.[47] He had confessed to murdering Correa.[48]

Nothing whatsoever prevented the Peekskill detectives from recording the January 25th session in its entirety. The polygraph room was equipped with a monitoring device, which allowed others to listen in an adjoining room.[49] Detectives Levine and McIntyre and Lieutenant Tumulo were present in that room and heard everything through the intercom.[50] There is no indication that the acoustics were anything less than acceptable. The setting thus seems uniquely suited to tape recording. Such a recording would have allowed jurors to hear for themselves precisely what Deskovic said and to comprehend fully the circumstances surrounding his saying it. No recording was made, however, because, as Levine and McIntyre testified at trial, they simply left their recorders behind when they left for Brewster.[51] No additional explanation was offered, either by the police or the prosecution.

It is, of course, impossible to say whether jurors would have acquitted Deskovic had they heard, first hand, what occurred during those eight hours in Brewster. What is certain, however, is that in the absence of a taped record, they were treated only to an incomplete, self-serving account of events. The unexcused and inexcusable failure to provide jurors with this essential tool looms large in explaining Deskovic's wrongful conviction.

---

44 See Testimony of Inv. Stephens, Trial Tr. at 955, 1031,1034.

45 See Testimony of Inv. Stephens, Huntley Hearing Tr. at 271; Trial Tr. at 1028.

46 See Testimony of Inv. Stephens, Trial Tr. at 1092.

47 See Testimony of Det. Levine, Trial Tr. at 766; Testimony of Det. McIntyre, Trial Tr. at 1188, 1262; Testimony of Inv. Stephens, Huntley Hearing Tr. at 291.

48 See Testimony of Det. McIntyre, Trial Tr. at 1184-88; Complaint Follow-up Report of Det. McIntyre re: 1/25 interrogation (undated).

49 See Testimony of Inv. Stephens, Trial Tr. at 950.

50 See Testimony of Det. Levine, Trial Tr. at 762; Testimony of Det. McIntyre, Trial Tr. at 1178.

51 See Testimony of Det. Levine, Trial Tr. at 760; Testimony of Det. McIntyre, Trial Tr. at 1255.

Troubling Police Tactics In Dealing with Deskovic

It is not difficult to understand why the police were interested in talking to Deskovic in the wake of Correa's murder. He had behaved oddly at Correa's wake and his conduct in embarking on an independent investigation, complete with proposed lines of inquiries and unnamed sources, was suspicious. As the police theorized, Deskovic's actions could have been those of a killer inserting himself into the investigation and working up the gumption to confess. By the same token, Deskovic's actions could have been – and, indeed, apparently were – those of a troubled sixteen year old, who having experienced the death of a peer for the first time, became obsessed with it and naively believed that the detectives, who fed him pizza and spent time with him discussing the case, would invite him into their investigation if he could prove himself worthy. Had the detective's initial theory been correct, then their tactics would likely have been credited with snaring a killer. Because their gut reaction proved tragically wrong, however, those same tactics produced a false confession and procured a wrongful conviction.

It is important to acknowledge that, as the court found following the Huntley hearing, the police tactics in dealing with Deskovic were lawful.[52] Investigator Stephens described the passive/active techniques that police employ when interrogating a suspect they believe to be guilty. Passive interrogation involves low-key non-stressful questioning. If such inquiry bears no fruit – if it does not elicit the desired admission – then the questioning shifts to active interrogation, which is more aggressive, confrontational and accusatory. The shift from passive to active interrogation sometimes involves a change in the questioner.[53]

The police employed these methods in their interrogations of Deskovic from December 12, 1989, until January 25, 1990. McIntyre acknowledged that he considered Deskovic a suspect on December 12th and it is evident from the record that police thereafter did little to search for other would-be killers.[54] When Deskovic refused to implicate himself on December 12th, McIntyre shifted to active interrogation, becoming more forceful, expressing his disbelief in Deskovic's account and opining that Deskovic had something to do with Correa's death.[55] On that date, however, Deskovic held firm. The pattern repeated itself during Levine's January 10th interrogation. Again the conversation began in a low-key way with Levine even going to fetch coffee.[56] Deskovic maintained his innocence, however, and, at some point, Levine became confrontational, accusing Deskovic of being responsible for Correa's death.[57] Again, Deskovic

---

52 See Decision on Motion to Suppress Statements (Colabella, J.).

53 See Testimony of Inv. Stephens, Huntley Hearing Tr. at 288-91, Trial Tr. at 1046-50.

54 See Testimony of Det. McIntyre, Trial Tr. at 1231.

55 See Testimony of Det. McIntyre, Trial Tr. at 1159-60, 1209.

56 See Testimony of Det. Levine, Trial Tr. at 668.

57 See Testimony of Det. Levine, Trial Tr. at 710, 849.

remained steadfast. Finally, on January 25th, after Stephens's low-key questioning failed to elicit the desired confession, McIntyre took over the interrogation and, following one final confrontation, Deskovic confessed.[58]

There were warning signs. Deskovic was a sixteen-year-old boy, who had no prior experience with the criminal justice system. Through their early conversations with him and their interviews of others, the police learned further that Deskovic might well have serious psychological difficulties, making him even less capable of fending for himself.[59] Moreover, the detectives knew that Deskovic was speaking to them without the permission and against the wishes of his mother, but they proceeded anyway.[60] Indeed, they scheduled the polygraph for a school day, making it unlikely that Deskovic's family would realize that he was missing. In addition, police were aware that, following their first conversation with Deskovic, the family had attempted unsuccessfully to retain counsel to represent him.[61]

Further, in their dealings with him, the police encouraged Deskovic's naive belief that they would accept him as a partner in their investigation. They reviewed his proposed investigative questions with him. They urged him to sketch his impressions of the crime scene and of Correa's route on the day she disappeared. They allowed him to accompany them to the area behind Hillcrest elementary school. They ate pizza with him.[62] Even as he sat strapped to the polygraph, Deskovic explained that he was taking the test because, if he passed, he believed he would be permitted to participate fully in the police investigation of Correa's death.[63]

Carelessness or Misconduct in the Police Investigation

Lacking any physical evidence or eyewitness testimony connecting Deskovic to the crime

---

58 See Testimony of Inv. Stephens, Huntley Hearing Tr. at 291-92; Trial Tr. at 1044, 1092; Testimony of Det. McIntyre, Huntley Hearing Tr. at 446-47; Trial Tr. at 1178-84.

59 See Complaint Follow-up Report of Det. McIntyre re: Deskovic's conduct at Correa's wake and funeral (undated); Complaint Follow-up Report of Det. Brovarski re: interview with mother of John Larino (undated).

60 See Testimony of Det. McIntyre, Huntley Hearing Tr. at 481, 482; Trial Tr. at 1176-77.

61 See Complaint Follow-up Report of Det. McIntyre re: Lt. Tumulo's conversation with Atty. Louis Echer (undated). Plainly, had Deskovic's family been able to retain counsel or had they been referred to an agency that could provide them legal services at no cost, then this entire tragedy could have been averted.

62 Complaint Follow-up Report of Det. Levine, dated ½7/90; Complaint Follow-up Report of Det. McIntyre re: 1/10 crime scene visit (undated); Testimony of Det. Levine, Trial Tr. at 721; Testimony of Det. McIntyre, Trial Tr. at 1161-69.

63 See Testimony of Inv. Stephens, Huntley Hearing Tr. at 279, Trial Tr. at 1063.

and forced to contend with scientific evidence that appeared to exonerate him, the prosecution needed something to corroborate the January 25th confession. It found what it was seeking in information gleaned from Deskovic's statements that the prosecution insisted could only have been known to the real perpetrator. Deskovic must be the killer, the prosecution urged, because he had information about the crime available to no one else.

We now know that Deskovic had nothing to do with Correa's death. Therefore, two scenarios are possible. First, the police, perhaps inadvertently, may have fed information directly to Deskovic. This is a possibility, but it is one for which no supporting evidence presently exists. Second, the information that the prosecution claimed only the killer could know may, despite the investigator's efforts, have found its way into the community at large. Either way, Deskovic's jurors were misled.

At trial, the prosecution took great pains to suggest that the confidentiality of the police investigation had been strictly maintained. Sergeant O'Buck and Detective Astrologo, who were involved in the search of crime scene, both testified that they had disclosed nothing about their observations to members of the media.[64] Detective Levine made the same point.[65] Detective McIntyre insisted that he provided no information to any of the people that he interviewed during the course of the investigation.[66] He added that the information about the three discrete crime scenes had appeared in no media accounts of the case.[67] The prosecution even introduced the crime scene diagram that had appeared in the local paper following Correa's death to show that it lacked the detail of Deskovic's sketch.[68]

The prosecutor employed this testimony in making powerful arguments against Deskovic at trial. When Deskovic met with Levine on January 10th to discuss his proposed areas of investigation, he made reference to a note that Angela had written to Freddy Claxton shortly before her death.[69] Indeed, remnants of this note were recovered from the area beneath Correa's body.[70] In both his opening and closing arguments, the prosecutor suggested that

---

64 See Testimony of Sgt. O'Buck, Trial Tr. at 132; Testimony of Det. Astrologo, Trial Tr. at 301.

65 See Testimony of Det. Levine, Trial Tr. at 598.

66 See Testimony of Det. McIntyre, Trial Tr. at 1265.

67 See Testimony of Det. McIntyre, Trial Tr. at 1267.

68 See Testimony of Det. Levine, Trial Tr. at 777; Testimony of Det. McIntyre, Trial Tr. at 1267-70.

69 See Testimony of Det. Levine, Trial Tr. at 653, 902.

70 See Testimony of Officer Ubben, Trial Tr. at 174-76; Testimony of Det. McIntyre, Trial Tr. at 1116, 1137.

Deskovic's knowledge of Correa's note to Claxton evidenced Deskovic's guilt.[71] Similarly, regarding Deskovic's crime scene sketch, the prosecutor urged jurors to conclude that Deskovic's knowledge of the three discrete sites proved he was the killer.[72]

We cannot now answer the question of how Deskovic acquired this knowledge. We know only that his knowledge was not the knowledge of a killer. Perhaps, the police conveyed the information to him directly, although the defense did not appear to allege this at trial and, as far as we know, this charge has not been made elsewhere, nor is there any proof of it. More likely, Deskovic learned what he learned because information about the crime had been disseminated widely throughout the Peekskill community. This was, after all, a terrible, high-profile crime and the public must have been keenly interested in seeing it solved. Officials acknowledged that the crime scene had not been entirely cordoned off from public view at the time it was processed.[73] It was reopened entirely after only six hours.[74] Deskovic had read media accounts of the case and acknowledged visiting the scene the day after police found Correa as he commenced his own "investigation." He returned to it several times after that.[75] In all likelihood, Deskovic learned of the "three crime scenes" from people who watched the crime scene technicians at work on November 17th or from his own observations the next day. Despite their protestations to the contrary,[76] investigators may simply have left evidence of their work behind.

Similar carelessness also could well explain how Deskovic learned of the Claxton note. From the start, Peekskill High School was a focus of police attention in this case. In the course of their investigation, officers spoke with many students, including, of course, Claxton.[77] Anyone who has ever attended high school knows full well how quickly information, both accurate and not, spreads there. It takes no great speculative leap to conclude that rumors abounded about Angela and Freddy and a possible note before the police had left the building.

The bottom line is this. If, as the prosecution contended, Deskovic had information about Correa's death that was not widely known, flaws in the investigation, in some measure, must be to blame.

---

71 See Prosecutor's Opening Statement, Trial Tr. at 27; Prosecutor's Summation, Trial Tr. at 1517.

72 See Prosecutor's Summation, Trial Tr. at 1526.

73 See Testimony of Det. Astrologo, Trial Tr. at 289; Testimony of Det. Levine, Trial Tr. at 798.

74 See Testimony of Det. Astrologo, Trial Tr. at 286.

75 See Testimony of Det. McIntyre, Trial Tr. at 1204.

76 See Testimony of Det. Levine, Trial Tr. at 598.

77 See Complaint Follow-up Report of Det. McIntyre re: 11/20/89 interview of Freddy Clacton (undated). According to the report, police specifically asked Claxton about Correa's note.

Prosecution's Decision to Proceed with the Grand Jury Presentation Before Receiving the DNA Results

Chief Judge Judith Kaye has written that, "[i]n our State justice system, the critical functions of investigating criminal activity and protecting citizens from unfounded accusations are performed by the Grand Jury, whose proceedings are conducted by the prosecutor, beyond public scrutiny." People v. Huston, 88 N.Y.2d 400, 401 (1996). It is the historical function of the Grand Jury "to determine whether sufficient evidence exists to accuse a citizen of a crime." Id. at 406.

Following Deskovic's arrest on January 25, 1990, prosecutors moved quickly to present the case to the grand jury. Samples from the vaginal swabs taken from Correa's body and from Deskovic's blood had already been forwarded to the FBI laboratory for DNA comparison, but the test results had not yet been received.[78] The Grand Jury voted an indictment without hearing the DNA results and that indictment was filed on February 27, 1990.[79] Only three days later, on March 2, 1990, the District Attorney's office received word that the semen found in Correa's body had not come from Deskovic.[80] Deskovic was arraigned on the indictment two weeks later, on March 15, 1990.[81] Thereafter, the defense moved unsuccessfully to dismiss the indictment, urging that the exculpatory DNA evidence should have been presented to the Grand Jury.[82]

As the trial court found, the District Attorney's Office acted in accordance with the law in obtaining the indictment as it did. The DNA test results had yet to be received at the time of the Grand Jury presentation or the filing of the indictment. Even if it had been, it is far from clear that the failure to present this evidence would, as a legal matter, have required dismissal of the indictment.

Minimum legal requirements aside, the District Attorney's Office exercised questionable judgment in proceeding as it did. By the time of the Grand Jury presentation, the DNA samples had already been forwarded to the FBI. There is no indication in the record that the prosecution took any steps to ascertain whether the testing could be expedited under the circumstances. Nor does it appear that the District Attorney explored the possibility of briefly delaying the Grand Jury presentation until after the test results had been received. Given the stakes, it is highly unlikely that the defense would have opposed such a request had one been made.

---

78 See Testimony of FBI Special Agent Deadman, Trial Tr. at 415.

79 See People's Affidavit in Opposition to Defense Omnibus Motion at 3.

80 See People's Affidavit in Opposition to Defense Omnibus Motion at 3; Testimony of Special Agent Deadman, Trial Tr. at 418-19.

81 See People's Affidavit in Opposition to Defense Omnibus Motion at 3.

82 See Defense Omnibus Motion at 3-4.

As it was, the Grand Jury was denied the opportunity to consider critical evidence in the case. The District Attorney was not legally required to defer the presentation until the receipt of this evidence. A brief delay, however, would have provided the grand jurors with a far more complete picture. Had the Deskovic's DNA matched the DNA on the vaginal swab, the prosecution would have been strengthened immeasurably. If, as turned out to be the case, there was no match, then grand jurors could have determined "whether sufficient evidence exist[ed] to accuse a citizen of a crime." Huston, 88 N.Y.2d at 406. By declining to wait, the prosecution deprived the Grand Jury of the opportunity to fulfill this historic function.

Prosecution's Questionable Presentation of the Scientific Evidence

Towards the end of his opening statement, the prosecutor confessed to jurors that his case had some "twists" and "wrinkles."[83] Specifically, the prosecutor acknowledged that seminal fluid found in Angela Correa's body after her death did not come from Deskovic.[84] Neither was Deskovic the source of hairs found on Correa during the autopsy.[85] These "wrinkles" posed considerable difficulties. To accommodate them, the prosecution advanced shifting and inconsistent hypotheses, which either contradicted its core theory of the case, were unsupported by any record evidence or both. The resulting confusion undoubtedly contributed to Deskovic's conviction.

In late August of 1990 as the trial date neared, the prosecution, in an effort to explain the DNA evidence, first advanced the theory that Deskovic might not have acted alone.[86] Indeed, in his opening statement, the prosecutor urged jurors to consider whether the proof would establish "more than one person's involvement in committing one or more of these various crimes."[87] The accomplice hypothesis flew in the face of the prosecution's core theory of the case: that Deskovic was a maladjusted loner who harbored a burgeoning private obsession with Correa. That obsession, the theory went, had prompted Deskovic to follow Correa to the area behind Hillcrest Elementary School, where he confronted her, fought with her, raped her and killed her. This tale of lonely and ultimately violent fixation did not easily accommodate a partner in crime. The purported evidence supporting the accomplice theory[88] – Deskovic's use of the third person at some points in his January 25th statement – was woefully deficient, as evidenced by the fact that the prosecution simultaneously contended that these third person pronouns represented Deskovic's inability or unwillingness to take responsibility for what he had done.

---

83 See Prosecutor's Opening Statement, Trial Tr. at 46.

84 See Prosecutor's Opening Statement, Trial Tr. at 47.

85 See Prosecutor's Opening Statement, Trial Tr. at 47-48.

86 See Huntley Hearing Tr. at 11.

87 See Prosecutor's Opening Statement, Trial Tr. at 49.

88 See Prosecutor's Opening Statement at 48-49.

By the close of the evidence, the court opined that there was no record support for the existence of an accomplice[89] and the prosecutor withdrew his request to argue the accomplice theory in summation.[90] Nevertheless, this argument had already been placed before the jury. Although it was bereft of evidentiary support, it may have contributed unfairly to Deskovic's conviction.

The prosecution's alternative explanation for the presence of another man's semen was equally strained. In his opening, the prosecutor pointed out that seminal fluid could persist in the vagina for "upwards of seventy-two hours and longer."[91] Indeed, the prosecution serologist testified at trial that this was a possible, if not a particularly likely scenario.[92] Because sperm was detected on the vaginal swab taken from Correa approximately 48 hours after her death,[93] the prosecution hypothesized that its source might not be the rapist at all, but a consensual partner who had deposited it at some earlier time.[94] In his summation, the prosecutor speculated that Correa's partner was "in all probability" Freddy Claxton, to whom Correa had addressed her final note.[95]

The problem with this prosecution theory was that it, too, was utterly unproven. The prosecution had traced Correa's movements from the time she left school on November 15th to the time she arrived at the scene of the crime. Based on that time line, there appeared to be no opportunity for Correa to have engaged in sexual relations that afternoon. In the preceding hours, Correa had attended school, again making sexual activity unlikely. While, under the prosecution's scenario, it was still possible for Correa to have had consensual sex that morning or the night before, the scientific plausibility of the theory diminished as the clock was moved backwards. And, the viability of the prosecution's consensual partner theory hinged on the dubious proposition that Correa had not bathed or washed between the time she had sexual relations and her death.

More fundamentally, however, there was simply no evidence that, at the time of her death, Correa was involved in a consensual sexual relationship with anyone. While to the jury's less-than-fully-informed ears, the summation speculation that Freddy Claxton could have been her sexual partner may have sounded reasonable, the prosecutor should have known better. For

---

89 See Trial Tr. at 1134.

90 See Trial Tr. at 1391.

91 See Prosecutor's Opening Statement, Trial Tr. at 48.

92 See Testimony of Linda Duffy, Trial Tr. at 326, 350 (noting that sperm usually survived approximately 24 hours in the vagina, but could survive longer after the woman's death).

93 See Testimony of Linda Duffy, Trial Tr. at 332.

94 See Prosecutor's Summation, Trial Tr. at 1492-93.

95 See Prosecutor's Summation, Trial Tr. at 1492-93.

he was aware, as the jury was not, that Claxton had a verified alibi for the entire afternoon of November 15th, from the time of school dismissal until well after Correa's death. During that time, Claxton was playing basketball with four friends, not having sex with Correa.[96] More, the police had interviewed Claxton, scores of other Peekskill students as well as members of Correa's family and had received no indication that Correa was sexually involved with Claxton or anyone else.

In the final analysis, the prosecution's "consensual partner" theory was both scientifically dubious and unsupported by the evidence. Like the "unapprehended accomplice" scenario, it could only have served to confuse the jury.

The prosecution's tactics in dealing with the apparently exculpatory hair evidence were also unacceptable. As the prosecution's own expert testified, none of the hairs recovered from Correa's body could be matched to Deskovic.[97] In addition, hairs were found that matched neither Deskovic nor Correa. One of these hairs was a "negroid hair" – the source of which was an African-American – found on Correa's right foot.[98] To accommodate this piece of evidence, the prosecutor elicited testimony that the Medical Examiner's assistant was an African-American man[99] and urged jurors to presume that the hair found on Correa's body must have belonged to him.[100] This may or may not have been true, but the prosecution should not have left the matter to speculation. Rather, it should have sought, and doubtlessly could have obtained, a sample from the assistant for comparison. Indeed, the prosecution's own expert testified that he had made this precise suggestion, but that his request had gone unheeded.[101]

There is no excuse for the prosecution's failure to follow the advice of its expert. Had a sample been tested and been strongly associated with the hair of the Medical Examiner's assistant, then the exculpatory value of the hair evidence would have been largely neutralized. Had the sample been inconsistent the assistant hair, however, then the outcome of the trial could well have been different. Since, as we now know, Correa's assailant was indeed African-American, this possibility cannot be gainsaid.

---

96 See Complaint Follow-up Report of Det. McIntyre re: 11/20/89 interview of Freddy Claxton (undated).

97 See Testimony of Peter DeForest, Trial Tr. at 359-83.

98 See Testimony of Peter DeForest, Trial Tr. at 375.

99 See Testimony of Det. McIntyre, Trial Tr. at 1114.

100 See Prosecutor's Summation, Trial Tr. at 1487-88.

101 See Testimony of Peter DeForest, Trial Tr. at 385.

DEFENSE FAILURES CONTRIBUTED TO DESKOVIC'S CONVICTION

Defense Failure to Use Evidence of Deskovic's Psychological Vulnerabilities

Why would a man confess to a crime he did not commit? That was the question that the defense at Deskovic's trial had to answer. The scientific evidence strongly supported Deskovic's innocence, but his January 25th statement created a significant barrier to vindication. Lay jurors and, indeed, criminal justice professionals, are simply loath to accept the possibility that someone would falsely confess to a serious crime, particularly to a brutal rape and homicide such as this one. If the defense could not credibly address this issue, then Deskovic would remain at grave risk.

On the record before us, there is no indication that the defense explored the possibility of presenting expert testimony to assist the jury in understanding how someone like Deskovic could have been induced to confess falsely.[102] We believe this was a mistake. Under New York law, expert testimony is admissible when its subject matter is "beyond the ken of the typical juror." People v. Taylor, 75 N.Y.2d 277, 288 (1990). Such testimony is most frequently offered to explain matters that otherwise seem counterintuitive or to dispel common misconceptions. Id. The phenomenon of false confessions seems to fall comfortably within this definition.

In concluding that the defense should have explored the use of such an expert in this case, we are mindful that existing decisional law may have complicated such efforts. In People v. Lea, 144 A.D.2d 863 (1988), the Appellate Division, Third Department had upheld the exclusion of a proposed defense expert's testimony that the "defendant's personality was such that he was deferential to the wishes and attitudes of others, making it more likely that the defendant was intimidated by the atmosphere in the interrogation room." Id. at 864. No issue had been raised in Lea as to the defendant's mental state or psychological condition. The issue of competency also had not arisen. Id.

The defense here could have distinguished Lea from Deskovic's case. Unlike in Lea, the record is replete with evidence that Deskovic suffered from psychological problems. A friend's mother described him as "emotionally handicapped" and, by his own account, he was "distraught" about what had happened to Correa, so distraught that he had attended three out of four sessions of her wake.[103] During the polygraph itself, Deskovic told Stephens that he periodically heard voices.[104] Finally, and again in contrast to Lea, the court in Deskovic's case had ordered a 730 examination and Deskovic spent some time during the pretrial period committed to the Rockland County Children's Psychiatric Hospital.[105]

---

102 See Colloquy, Trial Tr. at 30, 42.

103 See Complaint Follow-up Report of Det. McIntyre re: Deskovic's conduct at Correa's wake and funeral (undated); Testimony of Det. McIntyre, Trial Tr. at 1155-56.

104 See Testimony of Inv. Stephens, Trial Tr. at 1016.

105 See Case Endorsements, People v. Deskovic.

On this record, the trial judge may well have exercised his discretion to admit such testimony had the defense made the appropriate application. Such testimony could have provided jurors with the explanation they desperately needed to follow the DNA evidence to its logical exculpatory conclusion. At the very least, by moving to introduce expert testimony, the defense would have preserved a viable claim in the event an appeal became necessary.

The Defense was Scattered, Unfocused and Confusing:

Without the guidance an expert could have provided, the defense efforts to attack the confession were rendered largely ineffectual. At times, the defense seemed to acknowledge that Deskovic had made the January 25th inculpatory statements, but urged jurors to find that those statements were false.[106] At other points, the defense flatly questioned whether Deskovic had made the statements at all, suggesting instead that the police may have fabricated them.[107] On still other occasions, the defense urged the jury to exclude the statements as involuntary, whether or not the statements were true.[108] In one breath, counsel suggested that Deskovic's statements were product of his access to rampant high school "rumors" or his own "fertile imagination," but, in the next, he speculated that Deskovic might actually have witnessed the crime and gained his knowledge that way.[109] This scattershot approach was reflected in the court's lengthy and confusing charge on voluntariness.[110] While the defense in a criminal case is, of course, free to advance alternative or inconsistent theories, we believe that Deskovic would have been served better by a more focused attack on the only damning evidence against him.

Defense Failure to Maximize the Exculpatory Value of the Scientific Evidence

From the defense perspective, the most important evidence in this case was the DNA profile that scientifically excluded Deskovic as a source of the semen present on the vaginal swabs taken from the victim. Nevertheless, when Dr. Harold Deadman, a DNA expert from the Federal Bureau of Investigation and Linda Duffy, a forensic biologist from the Westchester County Department of Laboratories and Research, took the stand to testify on this pivotal matter,

---

106 See Defense Summation, Trial Tr. at 1429 (if Deskovic had been "questioned for another hour" he would have confessed to assassinating JFK)

107 See Defense Summation, Trial Tr. at 1429 ("the day after this statement was allegedly made, and I say allegedly was made."); Trial Tr. at 1433-34 (referring to "statements made in the case by Jeffrey. Again, I use the word statements. I don't use the word confessions.")

108 See Defense Summation, Trial Tr. at 1428 ("isn't it interesting that [the January 25th] statement was obtained under those circumstances."); Trial Tr. at 1434-35 (if jurors determine that the "statements were not voluntarily given, then you must completely disregard them" even if that "may be offensive to some of you")

109 See Defense Summation, Trial Tr. at 1430-31.

110 See Court's Jury Instructions, Trial Tr. at 1580-1601.

defense counsel did virtually nothing to ensure that the jury understood the centrality of this evidence. His questioning of Deadman was brief and perfunctory and he did not examine Duffy at all. As a consequence, much of the potential value of this evidence to the defense may well have been lost.

On the prosecutor's direct examination, Dr. Deadman testified that the semen recovered from Correa did not originate from Deskovic. While defense counsel had Deadman reiterate this conclusion during his brief cross, he otherwise focused on seemingly irrelevant issues such as the "actual chemical substance" of DNA and the ability to distinguish DNA samples drawn from identical twins. Counsel failed meaningfully to examine Deadman about procedures existing in his laboratory to ensure the accuracy of his testing procedures. Such testimony would have served to enhance the reliability of the favorable results. Nor did counsel have Deadman stress the uniqueness of human DNA or the absolute nature of Deskovic's exclusion. Finally, counsel never elicited from Deadman that the sample he tested contained genetic material from only one male donor. Particularly back in 1990, when this case was tried, jurors undoubtedly needed assistance in assessing the probative value of DNA evidence. Through his superficial examination of Deadman, defense counsel squandered this opportunity.

Counsel also failed to derive full benefit from the testimony of forensic biologist Duffy. Duffy testified on direct that the presence of intact sperm on a vaginal swab generally means that intercourse has occurred within 24 hours of the swabbing. While this time may be extended somewhat in a dead body, the 24 hour limitation still held true in the majority of cases. Duffy also noted that no semen at all was found on the victim's underwear.

Duffy's testimony in this regard could have been used to undermine significantly the prosecution claim that Correa had engaged in consensual sexual intercourse at some point prior to the murder. Yet counsel did nothing to emphasize this evidence when his turn came to examine Duffy. Indeed, he asked her no questions at all. In this way as well, counsel forfeited a potentially valuable opportunity to undermine the prosecution case, thereby contributing to Deskovic's wrongful conviction.

Defense Conflict of Interest in the Representation of Freddy Claxton

Early in their investigation, the police questioned Freddy Claxton, who like Deskovic was a student at Peekskill High School. Detectives asked Claxton about his relationship with Correa and about his whereabouts at the time of the crime.[111] Two days later, the Legal Aid Society of Westchester advised police that it represented Claxton and that he should not be questioned again

111 See Complaint Follow-up Report of Det Mcintyre re: 11/20/89 interview with Freddy Claxton (undated).

without his attorney.[112] There is no record indication of any further communication between the police and Claxton.

After Deskovic's arrest, Legal Aid was assigned to represent him as well. Around six weeks later, on March 8, 1990, and on numerous occasions thereafter, the prosecution raised concerns about Legal Aid's representation of both Deskovic and Claxton. At the prosecution's urging, the court raised the issue of a potential conflict with Deskovic and defense counsel several times during this early part of the case. Deskovic consistently maintained that he wished to continue with Legal Aid counsel. Deskovic's mother also acknowledged that she understood the court's explanation of the issue and agreed to Legal Aid's retention on the case.

At the start of the Huntley hearing, the court, referencing these earlier conversations, told Deskovic that, based on Legal Aid's representation of Claxton, "maybe there was a conflict of interest and maybe there wasn't."[113] The court wanted to ensure that Deskovic was aware of this and that he remained "comfortable with [his] lawyer."[114] Both Deskovic and his mother reaffirmed their desire to continue with Legal Aid as counsel.[115]

In fact, the dual representation of Claxton and Deskovic presented a troubling issue for Legal Aid, which, we believe, required further exploration. An attorney's (or law firm's) previous representation of someone who had been suspect or might be a witness in the defendant's case always raises a potential conflict of interest. People v. Brown, 235 A.D.2d 563, 564-65 (3d Dept. 1997). Here, the risk was particularly acute because Legal Aid not only had represented Claxton, but they represented him in connection with this very case. Further, it was by no means clear that this representation had terminated by the time of Deskovic's trial. On this basis alone, all of the principals – the defense, the prosecution and the court – should have been particularly cautious.

To make matters worse, although Claxton did not testify, he was still a significant player in the prosecution's case. First, according to the prosecution's theory, Claxton was the intended recipient of the note found under Correa's body at the time of her death. In both his opening and closing statements, the prosecutor urged jurors to infer that Deskovic's apparent knowledge of the note's existence necessarily constituted guilty knowledge.[116] Claxton, whom police had questioned about the note, thus possessed information material to the case: if he had told Deskovic or others at Peekskill High about the note's existence, then that fact would have tended

---

112 See Complaint Follow-up Report of Det. McIntyre re:11/22/89 communication with the Legal Aid Society.

113 See Huntley Hearing Tr. at 26-27.

114 See Huntley Hearing Tr. at 27.

115 See Huntley Hearing Tr. at 27-28.

116 See Prosecutor's Opening Statement, Trial Tr. at 27; Prosecutor's Summation, Trial Tr. at 1517.

to exculpate Deskovic by providing an innocent explanation for his knowledge of the note. Counsel's relationship to Claxton may well have hampered the defense investigation of this issue and at the very least supports the conclusion that the defense also failed Deskovic.

In addition, the prosecutor expressly argued in his summation that Claxton had been sexually involved with Correa at the time of her death and was the probable source of the semen found in her body.[117] Unbeknownst to the jury, however, Claxton's statements to the police during their investigation strongly suggested that, had he been called to testify, Claxton would have denied this.[118] This denial would have lent significant support to Deskovic's defense. If the prosecution failed to come up with a consensual source for the semen, then the defense argument that Correa's rapist and killer was the source would have been strengthened considerably. Once again, counsel's attorney-client relationship to Claxton may well have prevented full exploration of this issue in Deskovic's behalf.

In fairness, we should note that Claxton's centrality to the case may not have been clear to either the defense or the court at the outset. At the start of the trial, the defense did not know how the prosecution would deal with the DNA evidence and the prosecution steadfastly refused to illuminate the issue. Only in summation did the prosecution finally settle on Claxton as the likely source of the DNA.

Under New York law, it is incumbent upon each of the parties to bring to light what it knows about potential conflicts of interest as early as possible. People v. Smart, 96 N.Y.2d 793, 796 (2001). On the record presented, it appears that both parties may have fallen short on this issue. Although the prosecution laudably and repeatedly brought the conflict issue to the fore, it could have been more forthcoming about Claxton's anticipated role in the State's case. In addition, it is a court's obligation to undertake an inquiry sufficient to dispose of the conflict problem. Id. at 795-96. Here, the trial court, in its effort to tread lightly, may also have fallen short. Indeed, it would have been more prudent for the court to assign Deskovic independent counsel for the purpose of resolving the potential conflict.

As it was, the problem of the defense representation of Freddy Claxton never received the careful treatment it warranted. Consequently, we believe that it impeded the fairness of Deskovic's trial and was a significant failure by the defense.

---

117 See Prosecutor's Summation, Trial Tr. at 1492-93.

118 See Complaint Follow-up Report of Det. McIntyre re: 11/20/89 interview of Freddy Claxton.

OTHER ERRORS

Court's Mid-trial Loss of Evidence

Shortly before summations, the parties realized that four prosecution exhibits, Ex. 37, Correa's shoes; Ex. 35, her jeans, Ex. 36, a paper bag containing her underwear and Ex. 31, her white bra, had been lost.[119] The prosecutor, who made the relevant record, explained that, during the trial, the exhibits were stored in the courtroom in a black plastic garbage bag either near the bench, the stenographer's chair or the witness box.[120] At some point during the Thanksgiving recess, the garbage bag, as well as the exhibits it contained, was inadvertently discarded by a substitute cleaning crew.[121] Counsel moved for a mistrial, for preclusion of all evidence relating to the lost exhibits or for an adverse inference charge.[122] The court denied those applications.[123]

At the outset, it is important to emphasize that there is no evidence of bad faith on anyone's part in connection with the loss of these exhibits. For that reason, the court appeared on solid legal ground when it denied counsel's motion for a mistrial and other relief. That said, there was absolutely no excuse for the negligent failure to safeguard the evidence in this case. Surely, court personnel should have anticipated the risk that the cleaning crew would throw out a black garbage bag left unsecured in the courtroom. That the courtroom doors were themselves locked to the public and other intruders is thus simply beside the point. If trial evidence is to be stored in the courtroom, it must be stored in a secure place – either in a locked drawer or cabinet. That plainly was not done here. Lax procedures such as these would have been unacceptable in a misdemeanor trial. In a case of this magnitude, they were beyond the pale.

Thankfully, the lost evidence did not include the DNA samples taken from Correa's body. Had that evidence disappeared, the tragedy of this case would have been made incalculably worse. Even as it was, however, Deskovic was potentially prejudiced. In his January 25th statement, Deskovic had purportedly asserted that he ripped off Correa's bra during the attack.[124] Before the loss of the evidence, defense counsel had planned to argue that the nature of the bra – a pullover, with no snaps or clips – made this claim unlikely, thus casting doubt on the veracity of the entire confession.[125] Without the physical exhibit available to illustrate his claim, counsel

---

119 See Colloquy, Trial Tr. at 1341-61.

120 See Colloquy, Trial Tr. at 1342, 1344.

121 See Colloquy, Trial Tr. at 1407-08.

122 See Colloquy, Trial Tr. at 1359-61, 1393-94.

123 See Colloquy, Trial Tr. at 1393-94.

124 See Testimony of Det. McIntyre, Trial Tr. at 1185.

125 See Colloquy, Trial Tr. at 1398-1403.

evidently elected to forgo the argument. In his summation, however, the prosecutor went on the offensive, arguing from a photograph that the physical condition of the bra corroborated the claim regarding it in Deskovic's statement.[126] Undoubtedly in an effort to assess the validity of this assertion, the jury, during deliberations, asked not for the photograph, but for the physical exhibit itself.[127] Only then did the court explain what had happened.[128] It told jurors that it could not comply with their request.

As counsel pointed out in renewing his mistrial bid,[129] the bra had become important evidence in the case because the jury asked to see it during their deliberations. Jurors asked for it, presumably, because it was relevant to their determination of the matter before them. Because the inexcusable loss of the evidence prevented the court from offering jurors a meaningful response to their inquiry, it adversely affected the fairness of Deskovic's trial.

CORRECTIVE ACTION

INTRODUCTION

It is obvious that an enormous and horrific injustice was imposed upon Jeffrey Mark Deskovic by the State of New York.

Detectives testified at trial that Deskovic confessed to committing this crime. But the crime scene DNA evidence introduced at trial proved that the semen recovered from the victim's body was not his. You would expect that DNA would trump a "confession." But it didn't. The jury gave more weight to an immature and distraught youngster's unrecorded "confession" than to the DNA and other forensic evidence (e.g., microscopic hair comparison). The juror's gave credence to the prosecutor's theory – unsupported by any evidence – that the semen found in the victim's body was from a consensual sexual relationship with someone else.

As previously discussed, for some time after the conviction, the then-DA refused to run the unknown DNA profile through the ever expanding State and Federal DNA Databases. No New York statute offered a remedy to a wrongfully convicted defendant who was seeking a Database comparison. Courts continually refused to order the DA to act. In June 2006, Janet DiFiore, the newly elected Westchester County District Attorney, met with Barry Scheck of the Innocence Project and promptly agreed to have the Crime Lab conduct the more sophisticated STR analysis on the semen found on the victim and then to seek a match in the CODIS databases for the unknown crime scene DNA profile.

There was a cold hit in November 2006 – almost 17 years after Deskovic was wrongfully

126 See Prosecutor's Summation, Trial Tr. at 1511-12.

127 See Colloquy, Trial Tr. at 1677.

128 See Trial Tr. at 1690-92.

129 See Colloquy, Trial Tr. at 1680-87.

arrested. District Attorney DiFiore consented to his immediate release when the Crime Lab reported that the unknown DNA profile matched the DNA profile of a man who was serving a life sentence for an unrelated murder committed in Westchester County only a few years after the 15-year-old high school student was raped and killed. This man has confessed to killing the young girl Deskovic was convicted of killing. It cannot be said enough times that Janet DiFiore made the command decision that ended Deskovic's nightmare.

On November 2, 2006, the Westchester First Deputy DA told the Court that the People were moving to dismiss the indictment because "Deskovic is actually innocent." Unwritten in the prosecution motion, he added, were "the most sincere apologies we can muster on behalf of the Westchester County District Attorney's Office and the Peekskill police." Deskovic said he appreciated that apology, the first public one he has received.

The judge commended the work of Nina Morrison and Barry Scheck and the other lawyers and students at The Innocence Project who pushed for Deskovic's release. He praised the open-mindedness of Westchester prosecutors, who agreed to have the evidence retested so that a match could be obtained. "Mr. Deskovic, despite my recognition of these laudable efforts undertaken on your behalf, I must also admit the undeniable fact that nothing can be done in this courtroom here today to erase the pain and suffering endured by you and your loved ones over the past 16 years," the judge said.

1. THE UNIDENTIFIED DNA PROFILE: According appropriate defendants basic rights

During the very long post-conviction period, Deskovic made a number of requests to the then DA that the extracted DNA profile be run through CODIS. These requests were continually denied until late in 2006 when the new Westchester County DA – Janet DiFiore -- ordered that the DNA Database be searched for a match. This not only exonerated Deskovic but equally important the real rapist-killer was identified and has been brought to justice.

Had this been done a few years earlier, Deskovic's wrongful imprisonment would not have lasted 16 years. And the real rapist-killer would have been identified and already prosecuted. Why did the former DA consistently reject defendant's application? It may be unlikely today that a crime scene DNA profile would not be run through CODIS. But to avoid another Deskovic case in the future, there is a need for legislation according a court the authority to direct a CODIS search when the defendant's petition is non-frivolous.

A defendant -- either pretrial or post-conviction -- should have a right to have an unidentified DNA profile, whether extracted from crime scene evidence or otherwise, run through the DNA Databases to see if the real perpetrator or an accomplice can be identified. The defendant's application should be granted unless the prosecutor can show (perhaps by a preponderance of the evidence) that it is frivolous and devoid of all merit.

Whenever a DNA profile is extracted from crime scene evidence and the donor of the DNA is unknown, there is never a valid reason for not seeking DNA samples from others or running that profile through CODIS particularly if a defendant has been charged with or

convicted of the crime and makes a request that the profile be compared with other profiles in CODIS or with another person's DNA profile. No DA should be able to oppose a reasonable DNA Database search request, or a reasonable DNA profile comparison request.

VIDEOTAPING THE INTERROGATION

The prosecution's proof against Deskovic rested almost exclusively on the "confession" that he allegedly made during his final police interrogation on January 25, 1990, and on some 16 statements made to detectives on and after December 12, 1989 regarding his "opinions" as to how the crime had occurred. Although there was a wealth of forensic evidence collected from the crime scene and the victim's body at autopsy, all of which was subjected to extensive analysis, not a single item was attributed to Deskovic. For its part, the defense contended that the confession was given by a vulnerable young man under extreme police pressure, and that the forensic evidence (particularly from the semen) established that the confession was false and that Deskovic was innocent of the rape and murder.

The jury was told about the exclusionary results from the FBI Crime Lab's RFLP-DNA testing on the semen from the victim's vaginal swabs. At trial, the DA conceded that Deskovic was not the source of the semen, but argued that the confession nonetheless established his guilt. Although no further forensic testing was performed to identify the actual source of the semen, the DA contended that it was from a prior consensual sexual partner of the victim.

Significantly, the State was not able to identify the actual source of the semen found in the victim. "Freddy," whom the DA argued was "probably" the source, was never ordered to give a DNA sample for comparison purposes. (See discussion, Supra, of conflict problems and defense inadequacies.)

In addition, the prosecution experts excluded Deskovic as the source of the numerous hairs and fibers found on the victim and on evidence in the surrounding area. On April 16, 1990, a hair analyst received numerous slides containing hairs and fibers for trace and transfer evidence analysis. On September 7, 1990, he was also provided with hair exemplars from Deskovic, including head and pubic hairs. He identified the hair removed from the victim's right foot as a fragment of "Negroid origin," and the hair found on the victim's right breast as a "Caucasoid" head hair, for which he could not exclude the victim as the source.

The expert also examined the hair retrieved from the pubic combing, which he identified as a non-pubic, growing "Mongoloid" hair. A shed, medium-brown, non-growing Caucasian pubic hair was also compared with both the victim and Deskovic and the latter was excluded as its source. Deskovic fingerprints were not found when the victim's cassette tape, cassette player, "Dear Freddy" note, and the bottles, twigs, and Gatorade bottle top found at the scene were forensically examined.

The Deskovic case unmistakably demonstrates the desirability of videotaping the entire interrogation of all persons suspected of involvement in a violent felony. Deskovic was questioned by detectives at length, on multiple occasions and over many days. On a very few

occasions a voice tape recorder was used, as discussed at length, previously.

The two most inculpatory statements in the case -- the portion, of the January 10 statement during which Deskovic drew his diagram of the three crime scenes and the January 25 polygraph exam -- were not recorded, although the opportunity to record those statements plainly existed. That other statements were recorded, in whole or in part, makes the failure to record the key statements appear deliberate or tactical. By turning the recorder on-and-off, the interrogation process suggests selectivity and opportunity to record only incriminating statements.

It is a generally unrecognized phenomenon that innocent people have confessed to crimes that they did not commit. Videotaping all interrogations of violent felony suspects not only may improve interrogation techniques but, more importantly, will aid the jury or other fact finder to identify a false confession.

Videotaping custodial interrogations is not only feasible, it is being used in an increasing number of jurisdictions as a way to protect the innocent and ensure the conviction of the guilty.

Thanks to the many DNA exonerations over the last decade, the problem of false confessions by the innocent is now well documented. In fact, in approximately 24% of the 180 post-conviction DNA exoneration cases to date, the wrongful convictions were based, in large part, on confessions, admissions, or inculpatory statements that DNA evidence later proved to be false.

Special caution must be exercised when a juvenile is interrogated by the police. Deskovic was only sixteen years-old at the time of his confession. Social science research indicates that juveniles, possessing marked developmental differences from their adult counterparts, are far more susceptible to interrogative suggestibility and thereby to confess falsely to crimes they did not commit. This conclusion is supported by a range of research, which reveals that adolescents have difficulty understanding lexical language, including legal terminology, have a higher susceptibility to negative feedback, present differences in decision-making, present behaviors more often than adults that are considered "deceptive" by interrogators, and have more negative responses to situational risk factors, such as stress, the presence of authority figures, physical custody and isolation, and confrontation, than adults.

These factors in isolation or taken together place adolescents at a higher risk for confessing to a crime they did not commit. Videotaping the interrogation is a prudent way to minimize wrongful convictions founded on false confessions.

COMMISSION OF INQUIRY

The Legislature should create a "Commission of Inquiry" to deal with persons like Deskovic who are exonerated in New York by post-conviction DNA testing. There is a growing movement throughout the US, UK, Canada, Australia and elsewhere to create such commissions. Canada conducts the most exhaustive -- and expensive -- type of investigation. [The "inquiry" movement does not include the many thousands of defendants -- the exact number is unknown --

exonerated in the past decade by "post-arrest preconviction" DNA testing.]

The purpose of the inquiry, of course, is to learn what went wrong. Was it a systemic error or an individual's mistake or misconduct? The inquiry group should then recommend changed procedures or practices -- or legislation -- to prevent a repetition of the injustice.

Recent recommended changes include, e.g., reform of eyewitness identification procedures; mandatory recording by video of all interrogations of violent felony suspects; training investigators and judges on the special vulnerability of the young and the emotionally or mentally impaired during the interrogation process and on the phenomenon of a "false confession"; a special charge instructing the jury to view certain evidence with care and extreme caution, e.g., testimony of a "jailhouse" informant; closer gate keeping by the trial judge of the admissibility of "questionable science" such as bite mark testimony; reform by law enforcement of its procedures for collecting, preserving and retrieving forensic evidence; and enactment of legislation that explicitly declares that defendants have a right to have crime scene evidence run through the DNA or fingerprint database to see if the real perpetrator can be identified.

An October 8, 2006 editorial in a Westchester County newspaper stated: "Pending in the Assembly is a bill ... that would establish a commission to investigate confirmed instances of wrongful conviction and issue reports and recommendations, so mistakes can be avoided in future cases .... The bill has been pending in the Assembly since February 2005; it is worthy of consideration by the full Legislature."

EVIDENCE COLLECTION AND STORAGE

There is a need for legislation that standardizes the procedures for evidence collection and storage in New York. In too many cases where a defendant is seeking post-conviction DNA testing to prove his innocence, the crime scene evidence is simply lost, misplaced or discarded. In the Deskovic case, fortunately, the biological evidence was in fact properly preserved by the Westchester County Crime Lab and readily available for new STR-DNA testing. In almost half the states - but not New York - there are statutes requiring the preservation of biological evidence. In New York each law enforcement agency has its own practices. A statute formalizing and making uniform the way DNA evidence is collected, stored and retrieved would further the cause of justice.

The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University to assist prisoners who could be proven innocent through DNA testing. To date, over 200 people in the United States have been exonerated by DNA testing, including 15 who served time on death row. These people served an average of 12 years in prison before exoneration and release. The Innocence Project's full-time staff attorneys and Cardozo clinic students provided direct representation or critical assistance in most of these cases. The Innocence Project's groundbreaking use of DNA technology to free innocent people has provided irrefutable proof that wrongful convictions are not isolated or rare events but instead arise from systemic defects. Now an independent nonprofit organization closely affiliated with Cardozo School of Law at Yeshiva University, the Innocence Project's mission is nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment.

INNOCENCE PROJECT, INC.
100 FIFTH AVENUE, 3RD FLOOR
NEW YORK, NEW YORK 10011
WWW.INNOCENCEPROJECT.ORG

BENJAMIN N. CARDOZO SCHOOL OF LAW,
YESHIVA UNIVERSITY