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## Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions

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ANATOMY OF A WRONGFUL CONVICTION: THEORETICAL  
IMPLICATIONS AND PRACTICAL SOLUTIONS

DANIEL S. MEDWED\*

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I. INTRODUCTION

SINCE 1989, post-conviction DNA testing has exonerated 174 criminal defendants<sup>1</sup> and at least another 300 inmates have been released on grounds consistent with innocence during that period,<sup>2</sup> including mass exonerations stemming from the Rampart Scandal in Los Angeles<sup>3</sup> and

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1. For an up-to-date listing of DNA exonerations in the United States, see The Innocence Project, <http://www.innocenceproject.org> (last visited Feb. 16, 2005).

2. See Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 533-35 (2005) (citing 196 exonerations from 1989-2003 that lacked DNA testing, not counting roughly 135 innocent defendants framed by police officers in Rampart Scandal in Los Angeles and in Tulia, Texas).

3. See *id.* at 533-34 (describing how officers in Community Resources Against Street Hoodlums ("CRASH") Unit of Rampart Division of Los Angeles Police Department "routinely lied in arrest reports, shot and killed or wounded unarmed

recent events in Tulia, Texas.<sup>4</sup> These statistics provide a data set for scholars to study in seeking to isolate the factors that lead to wrongful convictions,<sup>5</sup> and also shed light on the potential magnitude of the problem.<sup>6</sup> Moreover, the gathering of quantitative information in the field of wrongful convictions dovetails with the much-acclaimed trend toward empiricism in legal scholarship.<sup>7</sup>

The empirical data, though, is merely part of the story when it comes to actual innocence. Just as learning that Mount Kilimanjaro is 19,443 feet high and that an average of 11,000 climbers annually pursue its peak in-

suspects and innocent bystanders, planted guns on suspects after shooting them, fabricated evidence, and framed innocent defendants," in scandal that resulted in dismissal of at least 100, and possibly up to 150, convictions in 1999 and 2000). See generally Carol A. Chase, *Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767 (2001) (arguing that Rampart scandal was not surprising under current regulation of police misconduct); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001) (presenting independent report on Rampart scandal to Los Angeles Police Protective League); Stanley A. Goldman, *Running from Rampart*, 34 LOY. L.A. L. REV. 777 (2001) (analyzing impact of rule that flight in high crime area is sufficient basis to make stop and frisk); Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787 (2001) (discussing role of judges in Rampart scandal); Gary C. Williams, *Incubating Monsters? Prosecutorial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 829 (2001) (analyzing prosecutorial responsibility in Rampart scandal).

4. See Gross et al., *supra* note 2, at 534 (noting how, "[i]n 1999 and 2000, thirty-nine defendants were convicted of drug offenses in Tulia, Texas, on the uncorroborated word of a single dishonest undercover narcotics agent"). For a discussion of the racial component to these cases, which involved a white narcotics agent framing African American defendants, by the lawyer who spearheaded the Tulia exonerations, see Vanita Gupta, *Critical Race Lawyering in Tulia, Texas*, 73 FORDHAM L. REV. 2055 (2005) (explaining how race lawyering transforms defendants' stories).

5. See generally BARRY SCHECK ET AL., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2001); Gross et al., *supra* note 2.

6. Given the difficulties involved in litigating post-conviction innocence claims and the fact that biological evidence suitable for DNA testing exists in only a handful of cases, chronicled exonerations likely represent only a small part of the overall problem of wrongful convictions. See, e.g., Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 73 (2003) (observing "that for every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands, who have been convicted" on comparable evidence yet whose cases lack physical evidence).

7. For representative arguments in favor of the need for empirical work in legal scholarship in recent years, see Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 834 (1999) (arguing that exercise of empirical legal research would enrich legal literature); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1357-58 (2002) (discussing methods to improve quality and impact of legal academic work). For a discussion of some of the flaws with empirical scholarship in the law academy, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6 (2002) (presenting review of legal literature that showed that law reviews do not contain articles devoted to methodology of empirical legal scholarship).

spires awe,<sup>8</sup> so might the statistics surrounding wrongful convictions, e.g., Scheck, Neufeld and Dwyer's determination that eyewitness misidentifications contributed to the initial convictions in over eighty percent of documented DNA exonerations,<sup>9</sup> or Gross's conclusion that fifteen percent of exonerations from 1989-2003 involved defendants who had confessed to crimes they had never committed.<sup>10</sup> Yet, as fascinating (and frightening) as the overall numbers might be, personal accounts of wrongful conviction are equally compelling, serving as a reminder that each case represents an individual tragedy, a collision at the intersection of human error and chance. And each one must be thoroughly evaluated in order to further the scholarly debate on the topic of wrongful convictions; educate judges, prosecutors, academics, legislators and the public at large about the issue; and generate ideas about potential reforms to the criminal justice system to guard against the conviction of the innocent.

That is precisely what this Article hopes to achieve—to explore the macro-level issue of wrongful convictions by training a microscopic lens on a single case. Part I of the Article serves as a qualitative case study of *People v. Wong*,<sup>11</sup> a case involving a Chinese immigrant who spent seventeen years in state prison for a murder he did not commit. Next, Part II places the Wong case in the context of the broader scholarship in the field and, specifically, analyzes the theoretical implications of the factors that led to Wong's erroneous conviction and discusses some potential solutions.

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8. See *Kilimanjaro Millennium Club Breaks Records*, <http://www.everything2000.com/news/news/kilimanjaro.asp> (last visited June 20, 2005).

9. See SCHECK ET AL., *supra* note 5, at 361.

10. See Gross et al., *supra* note 2, at 544 (stating that in fifty-one of 340 exonerations, defendants confessed to crimes that they had not committed); see also James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000) ("Nationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%."); cf. Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confession*, 22 HARV. J.L. & PUB. POL'Y 523 (1999) (challenging assertion that certain cases involved factually innocent defendants).

11. 784 N.Y.S.2d 158 (App. Div. 2004) (vacating Wong's conviction). . Before proceeding further, I should add an important caveat: I was part of the defense team that ultimately succeeded in vacating David Wong's conviction in 2004. I have informed David Wong that I am publishing this Article and showed him previous drafts to make sure that he is comfortable with the specific points I am raising. He has expressed unqualified support for this project. To be sure, the rules of confidentiality signify that much of my knowledge of the case—the "back story" if you will—is absent from these pages and that should, I hope, minimize the possibility this Article will be construed as partisan rabble-rousing. Even more, the importance of the Wong case lies neither in the strategic decisions made by defense counsel nor in any behind-the-scene musings, but rather in its core, irrefutable facts.

## II. DAVID WONG

A. *The Murder and Trial: 1986-1987*

Kin-Jin "David" Wong, an illegal Chinese immigrant from Fujian province by way of Hong Kong, worked in the Chinatown section of New York City in the early 1980s.<sup>12</sup> In 1984, he was convicted in state court of participating in a robbery,<sup>13</sup> and received a sentence of eight and one-third to twenty-five years in prison.<sup>14</sup> Wong has since publicly acknowledged his culpability for that crime.<sup>15</sup> After his robbery conviction, Wong began a journey through the prison system that in 1986 led him to Clinton Correctional Facility, a maximum security prison in Dannemora, an upstate New York town near the Canadian border.

At approximately 4 p.m. on March 12, 1986, a cold and snowy afternoon, Wong was outside in the Clinton prison yard when another inmate, an African American later identified as Tyrone Julius, was stabbed to death.<sup>16</sup> At the moment of the stabbing, the yard contained 600 to 700 inmates milling around, preparing to line up and return to their cells.<sup>17</sup> Wong and many, if not most, of the other prisoners were dressed identically in state-issued green clothing.<sup>18</sup> Amidst all this activity, a white corrections officer, Richard LaPierre, manned his post in an eighty-foot tall

12. See Michael Brick, *After 17 Years, an Overturned Conviction and New Hope*, N.Y. TIMES, Oct. 22, 2004, at B1 (stating that Wong was immigrant from Fujian province of China who worked as busboy in Chinatown); Steve Fishman, *He Got Life: David Wong's Plight Against a Wrongful Murder Conviction*, N.Y. MAG., June 13, 2005 (describing Wong's life prior to his conviction). For some information regarding David Wong's background, see the David Wong Support Committee Homepage, <http://www.freedavidwong.org/fyi/whois.html> (last visited July 21, 2005) (providing biographical information about Wong).

13. See Brick, *supra* note 12 (stating that Wong was serving time in prison for participating in armed robbery); I-Ching Ng, *Freedom Elusive for Victim of Injustice; Despite Having a Conviction for Murder Overturned, Former HK Resident Has Yet to Be Reunited with Family and Friends*, S. CHINA MORNING POST, Dec. 31, 2004, at 9 (same).

14. See Brick, *supra* note 12 (noting that Wong was serving eight and one-third to twenty-five years in prison); David W. Chen, *Prosecutors Join Effort to Release Immigrant*, N.Y. TIMES, Dec. 11, 2004, at B2 [hereinafter Chen, *Prosecutors Join Effort*] (same).

15. See Ng, *supra* note 13 (quoting Wong as saying that "I was stupid to commit a reckless crime the restaurant robbery when I was young").

16. It should be noted that Julius did not die immediately, but rather passed away eleven days later as a result of his wounds. See Brick, *supra* note 12 (mentioning that Julius died eleven days after being stabbed); see also Brief for Defendant-Appellant at 3, *People v. Wong*, 784 N.Y.S.2d 158 (App. Div. 2004) (A.D. Nos. 15,027 & 13,878) [hereinafter Defendant's Brief] (stating that Julius was fatally stabbed in prison yard); Affirmation in Support of Motion at 7, *People v. Wong*, Ind. No. 6-103-86 (State of New York, Clinton County Ct. Aug. 21, 2002) [hereinafter Defendant's Motion] (same).

17. See Defendant's Brief, *supra* note 16, at 7 (describing scene of Julius's stabbing).

18. See *id.* at 8 (explaining that prison security regulations prohibited inmates from wearing anything other than green outercoats).

observation tower at the edge of the yard, located approximately 120 to 130 yards from the scene of the stabbing.<sup>19</sup> LaPierre claimed that, just prior to the murder, he saw a group of inmates clustered together and watched one inmate, wearing a hood, walk past the group.<sup>20</sup> He then noticed another inmate leave the group, approach Julius from behind, and give him a “shot” to the lower neck or shoulder.<sup>21</sup> Only at this point—after Julius had fallen face-first into the snow—did LaPierre raise his binoculars and attempt to track the assailant’s path.<sup>22</sup> While LaPierre informed his colleagues by radio that an inmate was down and tried to describe the location, he also made an effort to follow the perpetrator winding his way through the yard: crossing the field and stopping by a fence, turning to face the tower, shaking hands with other prisoners and mixing into a crowd gathered to gawk at the victim.<sup>23</sup> In due course, LaPierre succeeded in contacting another tower and alerting the guard as to the site of the person he believed to have committed the crime.<sup>24</sup> Following LaPierre’s communication, corrections officers singled out two Asian inmates in the yard, Tse Kin Cheung and David Wong, and one of them—Wong—soon became the chief suspect.<sup>25</sup>

From the start, Wong seemed an unlikely perpetrator. No weapon or blood was found on Wong’s person,<sup>26</sup> even though the type of wound inflicted on Julius would have “spurred” blood, according to the subsequent testimony of the medical examiner.<sup>27</sup> Furthermore, LaPierre’s physical description of the stabber immediately after the incident failed to match that of Wong in several crucial respects. In the “Unusual Incident Report” he composed on the day of the murder, LaPierre indicated the stabber at first “appeared to be white,”<sup>28</sup> and failed to mention the presence of dark gloves, which Wong happened to be wearing when he was detained by

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19. *See id.* at 7 (stating that Officer LaPierre testified that at time of stabbing, he was in tower eighty feet high and 120 to 130 yards from site of stabbing).

20. *See id.* (restating testimony of Officer LaPierre).

21. *See id.* (describing scene that Officer LaPierre explained in his testimony).

22. *See id.* (noting that Officer LaPierre did not raise his binoculars until Julius fell); *see also* *People v. Wong*, 558 N.Y.S.2d 324, 325 (App. Div. 1990) (“When the victim fell to the ground, the officer [LaPierre] raised his binoculars and thereafter kept defendant continuously in sight.”).

23. *See* Defendant’s Brief, *supra* note 16, at 7-8 (detailing Officer LaPierre’s actions subsequent to stabbing).

24. *See id.* (explaining that Officer LaPierre tried to communicate location of stabber to another officer in different tower).

25. *See* Chen, *Prosecutors Join Effort*, *supra* note 14 (stating that only two inmates were searched after stabbing, Wong and inmate from Hong Kong).

26. *See id.* (“Investigators found neither blood nor a weapon on either man.”).

27. *See* Defendant’s Brief, *supra* note 16, at 8 (describing testimony of medical examiner about Julius’s stab wound).

28. *See id.* (referring to “Unusual Incident Report” that Officer LaPierre filed about stabbing).

another corrections officer in the prison yard.<sup>29</sup> Moreover, LaPierre evidently never cited the presence of a large Chinese language newspaper, an item found in Wong's possession at the time he was apprehended.<sup>30</sup>

Still, LaPierre confirmed his identification of Wong by selecting his picture out of a photo array<sup>31</sup> and prosecutors obtained an indictment of Wong for murder based largely on LaPierre's appearance before the grand jury, where he admitted "it was hard to tell" the perpetrator's race.<sup>32</sup> At trial, after acknowledging that it was initially difficult to discern the racial identity of Julius's assailant, LaPierre testified that the prisoner he saw reach the fence after the incident and face him was "Oriental."<sup>33</sup> Also, during his testimony, LaPierre contradicted himself with respect to his description of the assailant's hands, commenting at one point that he had white hands and elsewhere that he wore dark gloves.<sup>34</sup>

Eyewitness testimony from Officer LaPierre proved to be a vital part of the prosecution's case at trial, especially when corroborated by another witness who purportedly enjoyed an even better view of the stabbing: Peter Dellfava, a white inmate at Clinton Correctional Facility, who stated that he was fifteen feet away when the murder occurred.<sup>35</sup> According to Dellfava's trial testimony, he was walking with another inmate just as the yard was closing that afternoon and:

[T]urned to go back to my area when I had seen an incident in the yard with another inmate . . . and what looked like he was hitting him. I watched the guy, not even take a step actually, thrust along, hit him on the face, and that is where he stayed . . . I saw this man right here [Wong] doing the hit. When he fell, I kind of like didn't realize what was going on and I just like, you know, he looked right at me and then stepped off and I just kind of like started walking away, bumped into another inmate who I

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29. *See id.* (commenting that Officer LaPierre did not note that stabber wore gloves, which Wong did, at time of stabbing).

30. *See id.* (mentioning that Officer LaPierre did not testify that stabber was carrying newspaper, which Wong had at time of stabbing).

31. *See* *People v. Wong*, 558 N.Y.S.2d 324, 326 (App. Div. 1990) (stating that Officer LaPierre viewed photo array after stabbing to confirm that Wong, who was detained, was person who he witnessed commit crime).

32. *See* Defendant's Brief, *supra* note 16, at 8 (recounting Officer LaPierre's testimony).

33. *See id.* (noting that before grand jury, Officer LaPierre testified that it was "hard to tell" race of perpetrator, but at trial he testified that attacker was "Oriental"); *see also* Appendix for Defendant-Appellant, *People v. Wong*, 784 N.Y.S.2d 158 (App. Div. 2004) (A.D. Nos. 15027 & 13878) at Vol. III, A.604-05 [hereinafter Defendant's Appendix] (recounting Officer LaPierre's testimony that he struggled to identify race of perpetrator at first).

34. *See id.* (citing inconsistency of Officer LaPierre's testimony regarding characteristics of attacker's hands).

35. *See id.* at 3, 9 (discussing Dellfava's testimony).

happened to know and just kept getting away from the person on the ground.<sup>36</sup>

Dellfava expressed certainty regarding Wong's identity, alleging that he had seen him many times and talked with him frequently.<sup>37</sup> By the time he testified at trial, Dellfava was no longer incarcerated but, rather, out on parole and living in Medina, New York.<sup>38</sup> Indeed, the Clinton County District Attorney had written a letter to the Parole Board on his behalf, resulting in a successful first appearance before the Board; the fact that Dellfava obtained parole at that stage was no small feat, in part because he had a previous record for attempting to escape from prison.<sup>39</sup>

Entrusted with the task of cross-examining LaPierre and Dellfava, and more generally formulating a defense, were two local lawyers assigned to represent Wong as indigent defense counsel, a duo that neglected to pursue several potentially fruitful investigative leads. Specifically, portions of the Department of Correctional Services' Bureau of Criminal Investigation (BCI) report, completed after the stabbing and disclosed to the defense prior to trial, alluded to the possibility of an alternative perpetrator.<sup>40</sup> The report indicated that Otilio Serrano, a prisoner at Clinton, "advised that an inmate named Gutierrez was the subject who had stabbed the inmate in the yard" before noting that Serrano recanted this assertion in a second interview.<sup>41</sup> In yet a third interview, Serrano stated that Wong could not have committed the stabbing.<sup>42</sup> In addition, the report contained an excerpt from a conversation with another prisoner, Alexander Winston Sylvester, where Sylvester declared that "after stabbing the black inmate, the Puerto Rican inmate threw the blade down behind him onto the snow. A second Puerto Rican inmate picked up the blade, put it in a pair of gloves and walked up the hillside to the courts."<sup>43</sup> Despite these

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36. *Id.* at 9.

37. *See id.* (discussing Dellfava's familiarity with Wong); *see also* Respondent's Brief and Appendix at 18, *People v. Wong*, 784 N.Y.S.2d 158 (App. Div. 2004) (A.D. Nos. 15027 & 13878) [hereinafter Respondent's Brief] (noting that Dellfava made in-court identification of Wong).

38. *See* Defendant's Motion, *supra* note 16, at 9 (commenting that Dellfava was on parole at time of Wong's 1987 trial).

39. *See id.* (discussing circumstances of Dellfava's release from prison).

40. Notably, contrary to New York law, only part of the Bureau of Criminal Investigation (BCI) report—roughly one-third of it—was ever disclosed to the defense. Among the omitted portions were evidently statements made to investigators by LaPierre and Dellfava. *See* Defendant's Brief, *supra* note 16, at 61 (noting that pages of BCI report turned over to defense counsel suggested that remaining two-thirds of report contained accounts of Dellfava and Officer LaPierre).

41. *See id.* at 63 (stating that Serrano identified Nelson Gutierrez as perpetrator on day of Julius's stabbing).

42. *See id.* at 23 (noting Serrano's statement to investigators "that they had the wrong man").

43. *See* Defendant's Appendix, *supra* note 33, at Vol. IV, A.788 (presenting Sylvester's statements as included in BCI report). It should be noted that Sylvester, upon being told about the consequences of perjury, refused to sign a written state-



statements, the defense attorneys spoke with neither Serrano nor Sylvester before trial.<sup>44</sup> The lawyers did, however, decide to present an innocence defense—five inmates (including both Wong and Tse Kin Cheung) testified that Wong did not commit the crime, but these witnesses did not identify the true perpetrator.<sup>45</sup>

Compounding matters from Wong's vantage point was his inability to contribute significantly to his own defense due to linguistic obstacles. To begin with, Wong's English proficiency was limited at the time of trial.<sup>46</sup> More importantly, the interpreter assigned to his case did not speak the regional Chinese dialect with which Wong was most familiar; instead, she spoke Mandarin, a language Wong barely understood.<sup>47</sup> The defense attorneys failed to recognize the barrier this distinction posed for their client, and opted against formally requesting a new translator even in the face of ample opportunities to do so.<sup>48</sup>

In July 1987, an all-white jury<sup>49</sup> convicted Wong of murder in the second degree, and he eventually received a sentence of twenty-five years to life imprisonment, to be served consecutively to the term imposed for the

ment to this effect. *See id.* at Vol. IV, A.789 (citing that Sylvester refused to sign statement acknowledging that he knew about consequences of perjury).

44. *See* Defendant's Brief, *supra* note 16, at 67 (noting that defense counsel failed to ask Serrano or Sylvester about their respective statements to investigators that Wong did not stab Julius). The courts rejected claims of ineffective assistance of counsel raised in a *pro se* brief accompanying Wong's direct appeal and in various post-conviction motions. *See* *People v. Wong*, 682 N.Y.S.2d 689, 691 (App. Div. 1998) (denying Wong's ineffective assistance of counsel claims presented via New York Criminal Procedure Law Section 440.10 motion to vacate his conviction); *People v. Wong*, 558 N.Y.S.2d 324, 326 (App. Div. 1990) (mentioning that "the contention that his legal representation was ineffective is patently without basis in the record"); Defendant's Appendix, *supra* note 33, at Vol. IV, A.743-A.760 (denying ineffectiveness claim in May 2002 by county court).

45. *See* Defendant's Motion, *supra* note 16, at 3 (noting testimony of five inmates that Wong did not stab Julius); Respondent's Brief, *supra* note 37, at 11 (discussing defense counsel's argument at trial).

46. *See* Fishman, *supra* note 12 (observing that Wong did not speak English well at time of his murder conviction).

47. *See* *Wong*, 682 N.Y.S.2d at 691 (noting defense claim that interpreter at Wong's trial could not communicate with him because she was unfamiliar with his dialect).

48. *See id.* The opinion states:

As for defendant's contentions that he was improperly denied the services of a competent interpreter at his arraignment or during the pretrial preparation period, and that the interpreter appointed for the trial was unsatisfactory due to her inexperience and inability to communicate in the particular dialects with which defendant was most familiar, his failure to raise these issues at any time during the trial, despite having been afforded numerous opportunities to do so, precludes their consideration at this juncture.

*Id.*

49. *See* Brick, *supra* note 12 (stating that murder case against Wong was tried before "all-white jury").

robbery conviction.<sup>50</sup> A juror later interviewed about the trial noted that “[t]he jury put a lot of stock into both” LaPierre and Dellfava as witnesses.<sup>51</sup> Even crediting LaPierre’s and Dellfava’s testimony—and discounting the effect of both the defense’s reluctance to investigate and the translation issue—a gaping hole emerges when reflecting on this trial: the lack of any semblance of a motive for the crime. The trial adduced no evidence of a previous altercation between Wong and Julius, nor any festering gang rivalries implicating them. In the end, why would Wong seek to kill Julius, an African American inmate who had only recently arrived at Clinton?<sup>52</sup>

### B. *Fits and Starts: 1987-2000*

Soon after Wong’s murder conviction, Tse-Kin Cheung began to write to prominent Asian and Asian American leaders on his friend’s behalf.<sup>53</sup> These letters did not fall on deaf ears; New York City activist Yuri Kochiyama took an interest in the case and formed the David Wong Support Committee (DWSC).<sup>54</sup> Part-political action committee and part-personal support network for a prisoner whom its members believed to be innocent, the DWSC worked tirelessly throughout the 1990s to publicize the case and raise funds to aid Wong’s defense.<sup>55</sup> As lawyers came and went—by 1999, fourteen attorneys had tried, without success, to free Wong<sup>56</sup>—the organization remained a constant force, keeping the case on

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50. See Defendant’s Motion, *supra* note 16, at 3 (discussing sentence). On August 7, 1987, Wong moved for the verdict to be set aside on the grounds of ineffective assistance of counsel; the prosecutor’s failure to prove his guilt beyond a reasonable doubt; and the defective identification of him as the perpetrator due to the fact that LaPierre viewed a suggestive photo array. See, e.g., Decision and Order of County Court, Clinton County (Lawliss, J.), Sept. 30, 2003, Defendant’s Appendix, *supra* note 33, at Vol. I, A.16 [hereinafter Lawliss Decision] (detailing request to set aside verdict). The trial judge, Charles Lewis, denied this motion orally during Wong’s sentencing on August 24, 1987. *Id.* at Vol. I, A.16-17 (stating judge’s ruling).

51. David W. Chen, *After Stories Change, an Inmate Gets Another Chance to Appeal*, N.Y. TIMES, Apr. 22, 2002, at B1 [hereinafter Chen, *After Stories Change*] (emphasizing effect of witnesses’ testimony).

52. See *infra* note 86 and accompanying text (noting that Julius was killed within days of his arrival at Clinton).

53. See Brick, *supra* note 12 (discussing letters of protest from fellow inmate alleging Wong was framed).

54. See *id.* (noting formation of David Wong Support Committee (DWSC) contemporaneous with protest letters). The history of the DWSC, and its persistence in the face of innumerable obstacles and disappointments, is in and of itself a story worth telling. See, e.g., David W. Chen, *An Inmate’s Family of Strangers; Bonds Sustain 12-Year Quest for a New Murder Trial*, N.Y. TIMES, Mar. 28, 1999, at 1 [hereinafter Chen, *Family of Strangers*] (describing origins of organization); DWSC, <http://www.freedavidwong.org> (last visited July 21, 2005) (same).

55. For further discussion of the DWSC’s activities, see *supra* note 54 and accompanying text.

56. See Fishman, *supra* note 12 (commenting that prior to 1999, “fourteen able lawyers had worked on it over the past decade, including William Kunstler”).

the front burner of the public consciousness in New York legal and political circles (or at least keeping it from being extinguished entirely from the backburner).<sup>57</sup>

The losses mounted during this period. The New York Appellate Division-Third Department, the intermediate state appellate court with jurisdiction over Clinton County, rejected Wong's direct appeal in 1990, concluding that "the evidence is legally sufficient to support [the] defendant's conviction" and noting that "the contention that his legal representation was ineffective is patently without basis in the record."<sup>58</sup> A state post-conviction motion filed in 1997 in Clinton County Court alleged that newly discovered evidence warranted a new trial and included seven affidavits from inmates, each of whom asserted that he had witnessed the stabbing of Julius and that Wong had not committed it.<sup>59</sup> The affidavits even went so far as to insist that a Latino inmate had perpetrated the assault.<sup>60</sup> Not only did the County Court reject the motion, but the Appellate Division unanimously affirmed this decision on appeal, commenting that:

Given defendant's delay in bringing forth this evidence (six of the seven affidavits were obtained more than four years before defendant filed the instant motion), its cumulative nature . . . and the absence of any convincing proof that it could not have been discovered prior to the trial, through the exercise of due diligence . . . County Court cannot be faulted for rejecting it.<sup>61</sup>

In 1999, the Wong defense team filed a federal habeas corpus petition, and this petition was held in abeyance pending the resolution of another state post-conviction submission, which presented a claim of ineffective assistance of counsel concerning the trial attorneys' flimsy investigation and an allegation stemming from the state's failure to turn over the full BCI report.<sup>62</sup> Neither of these motions had been thoroughly resolved by the time the case took an important twist.

57. *See id.* (describing efforts of organization on behalf of Wong).

58. *People v. Wong*, 558 N.Y.S.2d 324, 326 (App. Div. 1990), *appeal denied*, 563 N.Y.S.2d 781 (1990). Wong filed a writ of error *coram nobis* alleging ineffective assistance of appellate counsel with respect to this appeal—a claim that the County Court rejected in 1996. *See* Defendant's Motion, *supra* note 16, at 3 (listing procedural history).

59. *See People v. Wong*, 682 N.Y.S.2d 689, 691 (App. Div. 1998) (noting support for retrial motion). This motion also put forth a series of claims concerning ineffective assistance of counsel and prosecutorial misconduct. *See id.* at 690 (citing grounds for review).

60. *See* Lawliss Decision, *supra* note 50, at A.18 (describing affidavits of some inmates who claimed that assailant was Puerto Rican).

61. *Wong*, 682 N.Y.S.2d at 691.

62. *See* Defendant's Motion, *supra* note 16, at 4 (discussing state post-conviction submissions).

C. *New Evidence: 2000-2003*

Jaykumar Menon, a lawyer at the Center for Constitutional Rights in New York City, inherited the Wong case in 1999 and thereby assumed the mantle previously held by other, more experienced lawyers, among them, fabled civil rights activist William Kunstler.<sup>63</sup> From the outset, Menon pledged to focus on the factual background of the incident—to reinvestigate the case with an eye toward uncovering the true perpetrator’s identity.<sup>64</sup> Aided by Joe Barry, a private investigator, Menon tracked down Peter Dellfava in upstate New York, and during an initial interview with Barry in December 2000 and later in written and videotaped statements, Dellfava recanted his trial testimony.<sup>65</sup> Most notably, in an affidavit executed shortly after Barry’s visit, Dellfava swore that he did not witness the stabbing of Tyrone Julius and that “[t]he first time I ever saw David Wong in person was in court.”<sup>66</sup> As for how he came to testify against Wong, Dellfava asserted that he was friendly with several corrections officers from his prison job as a cook in the staff area and that a sergeant approached him shortly after the stabbing, asking whether “[i]t was an Oriental guy, wasn’t it?”<sup>67</sup> Sensing an opportunity to improve his own situation in exchange for cooperating in the Wong prosecution, Dellfava requested a transfer to a facility closer to his family and a recommendation for parole, both of which materialized.<sup>68</sup> In explaining his choice to come forward fifteen years later to tell the truth, Dellfava claimed “I need to do the right thing.”<sup>69</sup>

Dellfava’s recantation, as important as it was to the defense, represented only the start of the reinvestigation considering that recantations are typically viewed with enormous skepticism by the courts and rarely supply the basis for overturning a conviction collaterally.<sup>70</sup> Shortly after

63. See Fishman, *supra* note 12 (noting trail of fourteen attorneys who had worked on Wong’s case).

64. See *id.* (describing Menon’s strategy).

65. See *id.* (mentioning Barry and Dellfava’s initial meeting); see also Defendant’s Motion, *supra* note 16, at 9-11 (detailing Dellfava’s story); Defendant’s Brief, *supra* note 16, at 10-13 (same).

66. Affidavit of Peter Dellfava, Jan. 5, 2001, Defendant’s Motion, *supra* note 16.

67. See *id.* (explaining sequence of events leading to his false testimony).

68. See *id.* (declaring that transfer was obtained in exchange for his statement against Wong).

69. *Id.*

70. See, e.g., *People v. Shilitano*, 112 N.E. 733, 735-36 (N.Y. 1916) (holding that recantations by witnesses do not necessarily mandate new trial). For a discussion of state cases addressing the issue of whether to grant a motion for a new trial based on recanted testimony, see Tim A. Thomas, Annotation, *Standard for Granting or Denying New Trial on Basis of Recanted Testimony*, 77 A.L.R.4th 1031, 1037-47 (2003) (delineating two major lines of decisions regarding witness recantation). See also Keith A. Mitchell, Note, *Protecting Guiltless Guilty: Material Witness Recantation and Modern Post-Conviction Remedies*, 21 NEW ENG. L. REV. 429, 456-62 (1986) (proposing procedural change in cases where material witness recants); Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based upon Recanta-*

Dellfava executed his affidavit, Menon sought assistance from the Second Look Program at Brooklyn Law School, an organization committed to investigating and litigating post-conviction claims of innocence that do not involve DNA evidence.<sup>71</sup> William Hellerstein and I oversaw Second Look at the time, and we quickly agreed to join Menon as co-counsel.<sup>72</sup> The entire defense team realized that if we were to have any chance of prevailing, we needed specific details about the actual killer; indeed, in the wake of Dellfava's recantation, the most pressing challenge facing the team in 2001 was proving the identity of the perpetrator.<sup>73</sup>

By that stage, discoveries by investigative journalist David Chen of the *New York Times* had already revealed several inmates and prison employees cautiously coming out of the woodwork to describe the culprit as a Hispanic male with a limp, but many prospective witnesses appeared either unable or unwilling to identify the killer by name.<sup>74</sup> The hesitancy to provide a name on the part of even those prisoners who knew the identity of Julius's murderer evidently stemmed from adherence to a code whereby being labeled a "rat" or a "snitch" endangered the recipient of that moniker, if not at the hands of the actual perpetrator himself, then at the hands of other inmates.<sup>75</sup> Ultimately, further investigation by Barry, Menon and Second Look pointed to former Clinton prisoner Nelson Gutierrez as the perpetrator, reinforcing the hint that Otilio Serrano had provided fifteen years earlier when he stated to BCI officials that an inmate named "Gutierrez" had stabbed Julius.<sup>76</sup> What prompted several inmates in interviews with the defense team to take the additional step of attaching Gutierrez's

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*tions as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1454-59 (1986) (proposing relaxation of standard for new trial for certain classes of cases); Daniel Wolf, Note, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 MICH. L. REV. 1925, 1947-49 (1985) (suggesting proper standard for awarding new trial is whether there is significant chance jury would avoid conviction with knowledge of false testimony).

71. For a description of the Second Look Program at Brooklyn Law School, see Second Look Program Description, <http://www.brooklaw.edu/academic/courses/description/?course=116> (last visited July 20, 2005). See also Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1103-04 (2003) (discussing formation and structure of Second Look Program).

72. See Defendant's Motion, *supra* note 16, at 2 (documenting credentials).

73. To obtain a new trial for Wong, the legal standard required us to present newly discovered evidence "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005).

74. See Chen, *Family of Strangers*, *supra* note 54, at 141 (noting common perception that snitches are punished); David W. Chen, *Judge Rejects Inmate's Plea to Hear Case of Jail Murder*, N.Y. TIMES, Apr. 27, 1999, at B5 (reporting anonymous anecdotal evidence of Wong's innocence).

75. See, e.g., Affidavit of Joseph Barry, Aug. 13, 2002, Defendant's Motion, *supra* note 16 (recounting inmates' reluctance to implicate other prisoners).

76. See *id.*; see also *supra* notes 40-42 and accompanying text (discussing BCI report).

name to the general description of the assailant was the circulation of news that the reputed killer had died in the Dominican Republic.<sup>77</sup> Not incidentally, Gutierrez was known as “Chino,” a nickname given to him by virtue of his Asian facial features.<sup>78</sup>

No longer dissuaded by fears of attaining snitch status, seven inmates representing a cross-section of the racial and ethnic make-up of the prison community signed affidavits in 2001-2002 averring that Wong had not committed the crime, and a new, more viable story of the stabbing began to take shape: the incident was retribution for a beating Gutierrez had previously suffered from Julius while at a New York City prison.<sup>79</sup> Teofilo Fernandez signed an affidavit stating that in February 1984 he was incarcerated at Rikers Island, a detention facility in New York City, awaiting his trial for murder when he befriended a fellow inmate named Nelson Gutierrez.<sup>80</sup> According to Fernandez, Gutierrez had a cast on his leg at the time and informed Fernandez “that he had a fight with black people over the telephone—that the black people had the phone and that they didn’t want to give it to the Dominicans.”<sup>81</sup> Later, after Fernandez’s arrival at Clinton Correctional Facility in the spring of 1986, he again ran into his friend Gutierrez who confided in him, “you know the guy who broke my leg, I got the guy who broke my leg in Rikers Island and a Chinese guy paid for it. I didn’t pay for it.”<sup>82</sup> Another inmate, Santo Valdez Cuello, recounted in an affidavit how he and Gutierrez became so close when they lived in the same dormitory at Fishkill Correctional Facility in the early 1990s that Gutierrez viewed him as a “godfather”<sup>83</sup> and one day confessed to having killed the man who had injured his leg at Rikers Island.<sup>84</sup>

An affidavit from Sharon Julius, the wife of the decedent, confirmed the account of the Rikers Island incident as well as Tyrone Julius’s participation in it.<sup>85</sup> Mrs. Julius asserted that someone stabbed her husband only a few days after his arrival at Clinton and that she believed her “husband died as the result of an altercation that he had with a set of Hispanic brothers in prison in New York City.”<sup>86</sup> By way of explanation, Mrs. Julius

77. See Chen, *After Stories Change*, *supra* note 51 (reporting details of Gutierrez’s death in Dominican Republic); Fishman, *supra* note 12 (describing accounts naming Gutierrez that surfaced after his death).

78. See Fishman, *supra* note 12 (“Gutierrez was a New York City Dominican nicknamed Chino—apparently someone thought he looked Chinese.”).

79. See generally Defendant’s Motion, *supra* note 16.

80. See Affidavit of Teofilo Fernandez, Aug. 12, 2002, Defendant’s Motion, *supra* note 16 (explaining his association with Gutierrez).

81. *Id.*

82. *Id.* (describing Gutierrez’s confession to Fernandez).

83. Affidavit of Santo Valdez Cuello, July 25, 2002, Defendant’s Motion, *supra* note 16 (discussing close bond that formed at Fishkill).

84. See *id.* (recounting Gutierrez’s confession to Cuello).

85. See Affidavit of Sharon Julius, May 21, 2002, Defendant’s Motion, *supra* note 16 (describing what she heard when Julius was involved in altercation over phone use at Rikers Island).

86. *Id.*

noted that she spoke with her husband nearly every day when he was imprisoned at Rikers, and one time:

While I was speaking on the phone with Tyrone, I heard my husband get into an altercation. My husband told me that a Hispanic man had wanted the phone, and that he had hit the Hispanic man on the head with the phone, and that as a result they were both placed in the hole.<sup>87</sup>

Later, Sharon Julius learned from one of Tyrone's closest friends that her husband "had run afoul of two or three brothers who were Dominican or Colombian"<sup>88</sup> and that he died as a result of a hit that was put out on him.<sup>89</sup>

Corroborating the bookend accounts provided by Fernandez, Cuello and Sharon Julius—which depicted the preceding tangle in Rikers and the post-stabbing confessions by Gutierrez—were a series of firsthand eyewitness statements from inmates present in the Clinton prison yard at the time of the stabbing. Maximo Vidal and Diogenes Filpo, two Dominican friends of Gutierrez, executed affidavits describing the incident in elaborate detail. Vidal explained that Dominicans were a minority at Clinton and tended to protect one another's interests, forming a small, tight "court" that ate together every day.<sup>90</sup> According to Vidal, on the morning of the stabbing, Gutierrez—a "light-colored" Dominican "with a very visible limp"—mentioned that the night before in the Clinton gym he had seen one of the men who had assaulted him at Rikers Island.<sup>91</sup> That beating had caused the leg injury resulting in Gutierrez's limp.<sup>92</sup> Desperate to retaliate, Gutierrez told Vidal that "he was going to stab Julius, and asked [Vidal] to watch his back," advising that the attack would occur that afternoon.<sup>93</sup> Later that day in the prison yard, Vidal witnessed the stabbing: "[Gutierrez] had a metal implement in his hand, I estimate about ten inches long. . . . He came up behind Julius and stabbed him once in the back of the neck. . . . Julius pitched forward, with his hands still in his pocket, and fell face first into the snow."<sup>94</sup> Vidal recalled that, immediately after the stabbing, Gutierrez disappeared for a few days and later notified Vidal that "he had checked himself into the hospital, to keep inmates and guards from seeing him and asking questions."<sup>95</sup> Unwilling to

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87. *Id.*

88. *Id.*

89. *See id.* (reporting what she heard from friend of Julius regarding Julius's death).

90. Affidavit of Maximo Vidal, Apr. 27, 2001, Defendant's Motion, *supra* note 16 [hereinafter Vidal Affidavit] (explaining his connection with Gutierrez).

91. *See id.* (detailing his conversation with Gutierrez before incident).

92. *See id.* (describing altercation at Rikers).

93. *Id.*

94. *Id.*

95. *See id.* (recounting events following stabbing).

divulge what he knew for many years, Vidal stated in his affidavit that he had refrained from becoming involved in the case for fear of the repercussions of being perceived as a snitch.<sup>96</sup>

Filpo's account mirrored that of Vidal. A fellow member of the Dominican "court" at Clinton, Filpo claimed in an affidavit that Gutierrez had told him about the altercation at Rikers in which he had fought with several black inmates over use of the telephone.<sup>97</sup> At about 3:30 p.m. on March 12, 1986, Gutierrez and Filpo were walking in the prison yard when Gutierrez pointed to a black inmate and declared that the man was responsible for his broken leg.<sup>98</sup> Gutierrez insisted that he intended to do "something" about it and then separated from Filpo.<sup>99</sup> Worried by his friend's claim, Filpo contacted another inmate, Samuel Cabassa, to warn him about the impending attack and assure him it was not "a racial thing" in the hopes that Cabassa would notify African American inmates to that effect.<sup>100</sup> Like Vidal, Filpo witnessed the stabbing, recalling that Gutierrez struck Julius once from behind and that Julius fell forward with his hands in his pockets, and Filpo clarified that he was reluctant to come forward prior to Gutierrez's own death because he did not want "to tell on other inmates."<sup>101</sup>

Three inmates who lacked any apparent personal relationship with Gutierrez also provided affidavits for the defense. Samuel Cabassa independently verified Filpo's recollection by stating that, shortly before the stabbing, Filpo told him that a black inmate was about to be hurt and that Cabassa should be careful where he lined up.<sup>102</sup> Filpo then identified Gutierrez to Cabassa and summarized the Rikers Island incident for him.<sup>103</sup> While in the process of transmitting this news to another prisoner, Cabassa missed the chance to observe the actual stabbing, but turned around in

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96. *See id.* (acknowledging Vidal's reluctance to come forward with information). It should be noted that Vidal had previously been of assistance to Wong; he provided an affidavit that was part of Wong's 1997 motion seeking to vacate his conviction on the grounds of newly discovered evidence. Lawliss Decision, *supra* note 50, at A.17-18 (mentioning affidavits of inmates in support of motion). His earlier affidavit had indicated only that he witnessed a Spanish inmate stab the black inmate. *See id.* at A.18.

97. *See* Affidavit of Diogenes Filpo, July 8, 2002, Defendant's Motion, *supra* note 16 (describing incident involving use of phone).

98. *See id.* (recounting Gutierrez's identification of inmate involved in altercation at Rikers Island).

99. *See id.* (detailing events preceding stabbing).

100. *See id.* ¶ 5 (mentioning Filpo's account of events before stabbing of Julius).

101. *See id.* ¶¶ 6-7 (describing stabbing of Julius by Gutierrez according to Filpo).

102. *See* Affidavit of Samuel Cabassa ¶ 3, May 7, 2002, Defendant's Motion, *supra* note 16 (detailing Cabassa's account of events before stabbing of Julius).

103. *See id.* (recalling conversation with Filpo).



time to see an inmate collapse face-down and Gutierrez walk away.<sup>104</sup> Cabassa reported that he learned about Gutierrez's death after reading a *New York Times* article in April 2002, a discovery that spurred him to talk with the defense team because it "meant I did not have to fear retaliation for being a snitch."<sup>105</sup>

Shakim Allah, an African American prisoner at Clinton, stated that he was also told in advance about Gutierrez's intentions.<sup>106</sup> A self-proclaimed leader within the prison who was "one of the few inmates at Clinton who had the power to influence—to sanction or not sanction—any violence against blacks or Latinos in the yard,"<sup>107</sup> Allah evidently tried to intervene as a peacemaker, yet was rebuffed by the Dominicans and was present in the yard when "one of the Dominicans hit Julius in the neck with a knife or shank."<sup>108</sup> Finally, another inmate, Anthony Scales, came forward to execute an affidavit stating that "from a distance of three to six feet, he saw a light-skinned Hispanic man with a limp walk up behind the deceased and stab him once in the neck with a twelve inch metal shank."<sup>109</sup> Although Scales told officials shortly after the incident that Wong was innocent,<sup>110</sup> he refused to name the killer at that time "out of fear," given that Gutierrez was "a dangerous individual" with "influence in the prison."<sup>111</sup>

The affidavits from these seven inmates and Sharon Julius, coupled with an affidavit from private investigator Joe Barry, comprised the crux of a post-conviction motion filed by the Wong defense team with the Clinton County Court in August 2002.<sup>112</sup> The motion was directed to the judge who had handled recent filings in the case, Patrick McGill, but Judge McGill recused himself on the grounds that one of Wong's trial attorneys now worked for him as a part-time clerk.<sup>113</sup> The court then transferred the motion to one of Judge McGill's colleagues on the Clinton County bench,

104. *See id.* ¶ 4 (stating recollection of stabbing). Cabassa also noted that Gutierrez's face was partially shielded by a hood. *See id.* (indicating that Gutierrez wore hood).

105. *See id.* ¶ 9 (explaining why Cabassa spoke up in 2002).

106. *See* Affidavit of Shakim Allah ¶ 4, May 3, 2002, Defendant's Motion, *supra* note 16 (recalling conversation with fellow inmate).

107. *Id.* ¶ 6.

108. *Id.* at ¶ 4 (providing Allah's recollections).

109. Affidavit of Anthony Scales, Jan. 24, 2002, Defendant's Motion, *supra* note 16 [hereinafter Scales Affidavit].

110. *See* Lawliss Decision, *supra* note 50, at A.18 (noting Scales's 1988 affidavit). A 1988 affidavit by Scales, which was included in Wong's 1997 motion, asserted that Scales had seen the stabbing, and that a Puerto Rican inmate—not Wong—had committed the crime. *See id.* (noting that Scales claimed Wong was innocent).

111. *See* Scales Affidavit, *supra* note 109.

112. *See generally* N.Y. CRIM. PROC. LAW §§ 440.10(1)(f)-(h) (McKinney 2005) (providing available grounds for vacating judgments).

113. *See* Defendant's Brief, *supra* note 16, at 5 (detailing Judge McGill's recusal).

Kevin Ryan, who promptly proceeded to recuse himself as well.<sup>114</sup> Next, the motion landed on the desk of Family Court Judge Timothy Lawliss who, for his part, told the defense team about his own rather intricate web of relationships with participants in the case: Judge Lawliss had been law partners with current Clinton County District Attorney Richard Cantwell and Cantwell's wife in the 1990s; had co-owned a building with Mrs. Cantwell; and had employed Mr. Cantwell as his Court Attorney in the Family Court from 1999 to 2001.<sup>115</sup> Wary of the potential conflict of interest raised by these interactions, the defense team moved for recusal, a request Judge Lawliss denied.<sup>116</sup>

In January 2003, Judge Lawliss ordered an evidentiary hearing to explore the defense allegations.<sup>117</sup> At that hearing, conducted over three days the following spring, the defense called ten witnesses, many of whom had previously executed affidavits contained in the original motion papers.<sup>118</sup> These witnesses included the following: (1) Peter Dellfava, who repudiated his trial testimony; (2) six prisoners who testified as to having witnessed the stabbing, three of whom identified the killer as Nelson Gutierrez and two of whom described the killer physically in a manner that comported with Gutierrez's features; and (3) the victim's widow, Sharon Julius, whose testimony substantiated many inmates' characterization of the attack as revenge for a beating that Gutierrez had sustained from Julius at Rikers.<sup>119</sup> The prosecution, in turn, did not present any witnesses.

At the conclusion of the hearing, Judge Lawliss took the matter under advisement, and in September 2003 formally denied the motion. On the whole, Judge Lawliss termed the inmate testimony "preposterous" and

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114. *See id.* (noting Judge Ryan's recusal).

115. *See id.* at 5-6 (discussing Judge Lawliss's relationship with Clinton County District Attorney).

116. *See id.* at 6 (noting denial of recusal motion).

117. *See id.* (stating that Wong was granted evidentiary hearing).

118. *See id.* at 6-7 (listing witnesses). Vidal and Scales did not testify at the hearing, but three prisoners who did not have affidavits included in the defense motion were called as witnesses: Umar Abdul El Aziz, Otilio Serrano and Melvin Edwards. El Aziz claimed to be a witness to the stabbing and described the perpetrator as 5'9" to 5'10" tall, light-skinned and walking with a limp. *See* Defendant's Brief, *supra* note 16, at 22 (detailing El Aziz's testimony). Serrano also testified that he observed the incident and that a Dominican whom he knew as Nelson came up from behind and stabbed the victim in the back or neck. *See id.* at 23 (summarizing Serrano's testimony). Edwards, in turn, stated at the hearing that he was standing three to four feet away from Julius in the yard when Julius was stabbed in the back of the neck, and that Wong was far away from them at the time. *See id.* at 24-26 (presenting Edwards's testimony).

119. *See id.* at 6-7 (listing witnesses). There were numerous local news accounts of the evidentiary hearing. *See* Stephen Bartlett, *Did 'Code' Wrong Wong? To Avoid Snitch Label, Inmates Didn't Vindicate David Wong*, PRESS-REPUBLICAN (N.Y.), Apr. 12, 2003, at 1 (recounting witness testimony); Anna Jolly, *Inmate Recants, Says Wong Wrongly Accused*, PRESS-REPUBLICAN (N.Y.), Apr. 11, 2003, at 1 (providing details of the evidentiary hearing); Anna Jolly, *Witness Supports Inmate's Innocence*, PRESS-REPUBLICAN (N.Y.), May 17, 2003, at 1 (reporting key testimony at evidentiary hearing).

“unreliable,” while lauding the trial testimony of Officer LaPierre.<sup>120</sup> Dellfava’s testimony at the hearing, in Lawliss’s view, was “particularly unreliable” and his “demeanor wreaked of insincerity.”<sup>121</sup> Perplexed as to why Dellfava had not come forward at an earlier stage, or at least after his parole expired in 1995,<sup>122</sup> Judge Lawliss failed to mention in his decision any of the host of logical explanations for Dellfava’s delay, for instance, fear of exposure to potential perjury charges and/or the triggering effect of Barry’s sudden arrival on his doorstep. With respect to the other inmate witnesses, Judge Lawliss found the claims by Cuello and Fernandez that Gutierrez had confessed to them to be ludicrous,<sup>123</sup> and scoffed at the credibility of the other inmates.<sup>124</sup> Specifically, Judge Lawliss did not believe that Allah and Cabassa would have been alerted to the planned attack before it occurred,<sup>125</sup> and disputed the assertions by several prisoners that knowledge of Wong’s innocence—and Gutierrez’s guilt—was widespread within the Clinton inmate population after the incident.<sup>126</sup>

In “stark contrast” to the inmate witnesses, according to Judge Lawliss, stood the trial testimony of Officer LaPierre.<sup>127</sup> Citing the lack of evidence to “demonstrate that Mr. LaPierre was anything other than a disinterested, unbiased and credible witness,”<sup>128</sup> Lawliss spurned the defense argument that LaPierre was simply mistaken and that his observations were inaccurate. He stated that “[a]ny individual, particularly any individual who works in the correctional facility, would have to understand the significance and enormous responsibility of identifying another human-being as a murderer.”<sup>129</sup> As an aside, Judge Lawliss himself had family members who were or had been employed by the New York State Department of Correctional Services, a point he neglected to disclose until the tail end of the evidentiary hearing.<sup>130</sup> Notable for their absence from Judge Lawliss’s opinion were virtually any reference to Sharon Julius and

120. See Lawliss Decision, *supra* note 50, at A.5-29 (providing reasons for denying motion); see also David W. Chen, *Judge Declines to Grant New Trial in 1986 Prison Murder Case*, N.Y. TIMES, Oct. 5, 2003, at 37 [hereinafter Chen, *Judge Declines*] (reporting Judge Lawliss’s decision).

121. Lawliss Decision, *supra* note 50, at A.20 (noting Lawliss’s opinion of Dellfava’s testimony).

122. See *id.* (citing that fear that parole could be revoked did not exist since 1995).

123. See *id.* at A.21 (noting Judge Lawliss’s disbelief of witnesses’ testimony).

124. See *id.* at A.22-27 (presenting Judge Lawliss’s finding that testimony was preposterous).

125. See *id.* at A.24-25 (finding it unlikely that Gutierrez would trust them with this information).

126. See *id.* at A.24, A.27 (referring to alleged petition attesting to Wong’s innocence signed by inmates).

127. See *id.* at A.27 (comparing defense witnesses to People’s trial witness).

128. See *id.* (finding People’s witness credible).

129. *Id.* at A.27-28 (noting significance of identifying murderer).

130. See Defendant’s Appendix, *supra* note 33, at Vol. II, A.454-55 (acknowledging that he had relatives who worked for corrections).

any mention of the Rikers Island incident, pieces of the evidentiary puzzle that, for the first time, offered a motive for the slaying.<sup>131</sup>

#### D. *Justice Served: 2004*

The Wong defense team sought leave to appeal Judge Lawliss's ruling and received permission from the New York Appellate Division-Third Department in December 2003.<sup>132</sup> In an October 2004 opinion, the appellate division reversed the lower court ruling.<sup>133</sup> Rejecting Judge Lawliss's credibility findings, the appellate division deemed Dellfava's recantation believable, especially considering his possible exposure for perjury prosecution, and suggested the "recantation further acquires an aura of believability because of the testimony of the other witnesses at the hearing and the lack of trial evidence connecting defendant with the commission of the crime or establishing a motive for him to commit the crime."<sup>134</sup> In terms of the other inmate witnesses, the appellate division dismissed the significance of "minor inconsistencies in their testimony" and instead observed how they "uniformly stated that they would not have testified against Gutierrez while he was alive because a reputation as a 'snitch' would place them in a position of peril in any prison population."<sup>135</sup> Moreover, the appeals court emphasized the existence of a motive attributable to Gutierrez (revenge for the Rikers Island beating) and the partial corroboration of that account by Sharon Julius. In light of this newly discovered evidence, as well as discrepancies in LaPierre's statements and the paucity of evidence at Wong's original trial, the appellate division opted to send the case back to Judge Lawliss for a new trial.<sup>136</sup>

In the aftermath of the appellate division decision, it remained uncertain for several weeks whether the authorities would re-try the case. District Attorney Cantwell initially announced that he was "quite seriously" weighing the possibility of a new trial.<sup>137</sup> Judge Lawliss even scheduled jury selection before agreeing to recuse himself from any future proceed-

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131. See generally Lawliss Decision, *supra* note 50 (reporting opinion). The only reference to Sharon Julius in the twenty-five page opinion is as follows: After describing the testimony of Cuello and Fernandez, Lawliss commented that "[w]ith the exception of Sharon Julius, the remaining witnesses claimed to be eyewitnesses to either the murder of Mr. Julius or Mr. Wong's activities on the date in question." *Id.* at A.22; see also Chen, *Judge Declines*, *supra* note 120 (reporting Sharon Julius's testimony at hearing).

132. See Defendant's Brief, *supra* note 16, at 1 (noting order granting appeal).

133. *People v. Wong*, 784 N.Y.S.2d 158, 161 (2004) (vacating judgment of conviction).

134. *Id.* at 161 (stating court's opinion about Dellfava's recantation).

135. *Id.* (noting court's view on inmates' testimony).

136. See *id.* (indicating credibility); see also David W. Chen, *Inmate Convicted in '86 Prison Murder Gets New Trial*, N.Y. TIMES, Nov. 2, 2004, at B1 [hereinafter Chen, *New Trial*] (reporting that trial date set for new trial).

137. See *New Trial*, *supra* note 136 (noting Cantwell's comments after Wong's conviction was overturned).

ings to avoid “the appearance of partiality.”<sup>138</sup> Ultimately, and apparently with a great deal of reluctance, Cantwell filed a motion to drop the charges, remarking that “I think a jury will have a difficult time finding beyond a reasonable doubt that David Wong committed the murder,”<sup>139</sup> and Judge Lawliss’s replacement, Judge Richard Giardino, officially dismissed the murder charges in December 2004.<sup>140</sup> The murder case against David Wong had reached an end, but understanding what had transpired in his wrongful conviction—and how to avoid similar tragedies—had only just begun.

### III. DAVID WONG IN CONTEXT: THE FACTORS UNDERLYING WRONGFUL CONVICTIONS

Despite all of the case’s idiosyncrasies and dramatic twists, *People v. Wong* is not as unique as it may seem at first glance. Rather, several patterns emerge from this case that mesh with broader themes from quantitative and qualitative studies of wrongful convictions. First, the manner in which Wong obtained his freedom through the combined efforts of the media, political activists, public interest lawyers and an innocence project is, if not a roadmap for success, a trail blazed in the past.<sup>141</sup> Second, even though DNA exonerations tend to make headlines,<sup>142</sup> the bulk of wrongful convictions, like Wong’s, lack any biological evidence that could be subject to DNA testing.<sup>143</sup> Such cases are notoriously difficult to litigate

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138. See David W. Chen, *Inmate Views New Trial as a Reward for His Faith*, N.Y. TIMES, Nov. 3, 2004, at B1 (noting that Judge Lawliss set start date for new trial); David W. Chen, *Metro Briefing New York: Plattsburgh: Judge Sits Out Murder Retrial*, N.Y. TIMES, Nov. 23, 2004, at B9 [hereinafter Chen, *Metro Briefing New York*] (reporting that Judge Lawliss removed himself).

139. Chen, *Prosecutors Join Effort*, *supra* note 14 (noting difficulty of conviction). In an interesting political twist, Cantwell lost his bid for reelection in November 2005 in what a local reporter termed “a stunning upset.” See Joe LoTempio, *Wylie Pulls Off Upset over Cantwell*, PRESS-REPUBLICAN (N.Y.), Nov. 9, 2005.

140. See David W. Chen, *Metro Briefing New York*, *supra* note 138 (“In a four-page ruling, Richard C. Giardino, acting Clinton County Court judge, said that because of new evidence raising doubts about Mr. Wong’s guilt, any new trial ‘would likely result in an acquittal.’”).

141. See generally Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803 (2002) (discussing impact of journalism on correcting mistakes in criminal justice system).

142. See, e.g., Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 VA. J. SOC. POL’Y & L. 1, 1 (2003) (noting that “headline-making DNA sleuthing can certainly help in remedying individual cases of injustice,” but pointing to broader problems in resolving invalid convictions).

143. See *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 917 (2002) (statement of Barry Scheck) (“The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing.”); Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 78, 105 (citing that “only about 10 percent of criminal cases have any biological evidence—blood, semen, skin—to test”).

given the absence of a method to prove innocence to a degree of scientific certainty.<sup>144</sup>

Third, the principal factors that led to Wong's murder conviction crop up repeatedly in the scholarly literature, namely, eyewitness misidentification, the use of jailhouse informants, ineffective assistance of counsel and race.<sup>145</sup> The conviction of David Wong, to be clear, cannot be attributed solely to these four factors. In addition, prison investigators and county prosecutors exhibited a classic case of "tunnel vision" where, after arresting Wong at the outset, law enforcement officials consistently turned a blind eye to exculpatory evidence as it surfaced over time.<sup>146</sup> Procedural obstacles embedded in New York's state post-conviction regime<sup>147</sup> and judicial skepticism toward newly discovered evidence claims in general<sup>148</sup> may have also, at the very least, prolonged Wong's incarceration. The four factors cited above, however, seem to have had the most influence in this case, and it is to these factors that I now turn.

#### A. *Eyewitness Misidentification*

Without a doubt, Officer LaPierre's eyewitness misidentification contributed significantly to David Wong's plight. The jury relied on LaPierre, the sole non-inmate eyewitness to the stabbing, in reaching its verdict. Courts continued this reliance on LaPierre's identification later on, as reflected in Judge Lawliss's opinion, and LaPierre himself asserted in a 2002 interview that "as of this time I am still sure of what I saw, and will testify to that fact if need be."<sup>149</sup> Even so, notwithstanding LaPierre's internal confidence and the faith expressed in him by external observers (judges and jurors), it is clear that LaPierre's perception was inaccurate—he got it

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144. See Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 *DRAKE L. REV.* 587, 602 (2004) ("Even when DNA evidence is at hand, however, it does not always lead in a steady path to the vindication of an innocent defendant. The evidence still has to be handled properly, and the testing has to be done by independent and appropriately trained scientists."). See generally Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 *ARIZ. L. REV.* 655 (2005) (analyzing procedural obstacles involved in litigating post-conviction non-DNA claims of innocence).

145. See generally SCHECK ET AL., *supra* note 5 (noting that scholars have mentioned numerous factors, beyond those discussed in this Article, as instrumental in wrongful convictions, including false confessions, forensic fraud and junk science).

146. See, e.g., Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 *B.U. L. REV.* 125, 140-43 (2004) (discussing phenomenon of "tunnel vision" displayed by police in investigating crimes after selecting suspect and by attorneys in prosecuting cases after police have provided them with suspect).

147. See Medwed, *supra* note 144, at 663-64, 697-99 (analyzing some advantages and disadvantages of New York's post-conviction procedures).

148. See *id.* at 664-65 (discussing state courts' disdain for newly discovered evidence claims).

149. Chen, *After Stories Change*, *supra* note 51 (noting LaPierre's certainty in his testimony).

wrong, however well-intentioned he may have been.<sup>150</sup> And similar misidentifications have led to scores of wrongful convictions. Virtually all of the pertinent studies since 1932 have pinpointed eyewitness misidentification as the single most pervasive factor in the conviction of the innocent.<sup>151</sup>

The reason why eyewitness misidentifications are so prevalent generally stems both from (a) the imperfect manner in which human beings process visual information at the time of an event, and (b) the design of most police identification procedures, which can serve to reinforce, or exacerbate, any potential flaws in the original observation. As an initial matter, situational factors during the commission of a crime affect the accuracy of any identification.<sup>152</sup> Crimes rarely occur under ideal circumstances; the incident may take place rapidly, at night, under poor lighting conditions and victims, let alone any other eyewitnesses, are usually caught unaware and, thus, are unable to steel themselves to pay attention.<sup>153</sup> The victim or witness may also experience stress and fear during the event, potentially further impairing the ability to perceive the culprit with the requisite clarity.<sup>154</sup> Under those conditions, it is not surprising that many initial descriptions of the perpetrator are vague or misguided. Added to

150. It is interesting, to say the least, that Gutierrez's nickname was "Chino" due to his Asian features, suggesting LaPierre may have genuinely thought he saw an Asian inmate commit the crime.

151. See EDWIN M. BORCHARD, CONVICTING THE INNOCENT xiii (1932) (evaluating sixty-five wrongful convictions and stating that "[p]erhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence"); EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 16-17 (1996) (noting that twenty-four of twenty-eight DNA exonerations contained eyewitness misidentifications); Gross et al., *supra* note 2, at 542 ("In 64% of these exonerations (219/340), at least one eyewitness misidentified the defendant."); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 787 (1995) ("Mistaken identification is the single largest factor contributing to false convictions.").

152. For a lengthy discussion of how eyewitness memory can be affected by the circumstances under which crimes occur, see ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979).

153. See *id.* at 23-32 (discussing how, in general, "event factors," such as exposure time, may influence witness's perception and ability to recall event correctly); see also PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 16-17 (1965) (noting how fear may affect people differently, heightening ability to perceive perpetrator in some instances and hampering that ability in others).

154. See LOFTUS, *supra* note 152, at 33-36 (describing effect that high levels of stress may have on eyewitness). Notably, studies demonstrate that errors occur even when incidents take place under low-stress conditions. See, e.g., Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 339 (1997) (citing several "fairly realistic field experiments" revealing that "attempted identifications of individuals seen briefly in nonstressful conditions and after only short delays were frequently inaccurate: Witnesses often failed to identify targets when they were present and frequently identified innocent persons when targets were not present").

the mix are general cognitive factors that may affect identifications. For instance, people often have difficulty identifying members of a different racial group, a phenomenon known as “cross-racial misidentification,”<sup>155</sup> or may unknowingly associate the perpetrator’s features with those of another person with whom the witness has passing familiarity and implicate that other person in the crime, an occurrence referred to in the scholarly literature as “unconscious transference.”<sup>156</sup> Cross-racial misidentifications in particular, such as LaPierre’s faulty identification of Wong, have surfaced in a disproportionately large number of wrongful convictions.<sup>157</sup>

The risk of erroneous identification engendered by situational and psychological factors that influence the initial observation of a crime is often amplified by post-incident police identification practices. Identification procedures organized by the police normally involve asking the witness to view a group of pictures of individuals (photo arrays) or individuals themselves (physical lineups) who match the original description of the perpetrator. Research shows that, in observing this group of, say, six possible culprits, witnesses may undertake a “relative judgment” approach in which they compare and contrast the suspects to one another, choosing the person who most closely resembles the perpetrator as opposed to making an absolute judgment about whether the person they saw at the crime scene is actually present.<sup>158</sup> This, according to the available data, may heighten the chance of mistaken identification, particularly where the

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155. See, e.g., Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936 (1984) (“In the last fifteen years, psychologists have compiled empirical evidence that incontrovertibly demonstrates a substantially greater rate of error in cross-racial recognition of faces.”); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211 (2001) (“A cross-racial ID occurs when an eyewitness of one race is asked to identify a particular individual of another race. The last half-century’s empirical study of cross-racial IDs has shown that eyewitnesses have difficulty identifying members of another race . . .”).

156. See, e.g., WALL, *supra* note 153, at 119-20 (defining “unconscious transfer” and noting that most people are unaware of occurrence when it is happening); George Castelle & Elizabeth F. Loftus, *Misinformation and Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 17, 24 (Saundra D. Westervelt & John A. Humphrey eds., 2001) [hereinafter *WRONGLY CONVICTED*] (“Unconscious transference is the term applied to the phenomenon in which a person seen in one situation is confused with or recalled as a person seen in another situation.”).

157. In the Scheck, Neufeld and Dwyer study, for instance, mistaken eyewitness identifications contributed to eighty-one percent of the wrongful convictions studied. See SCHECK ET AL., *supra* note 5, at 361. Additionally, of those mistaken identifications, forty-four percent involved whites erroneously identifying African American defendants as the perpetrator. See *id.* at 362.

158. See, e.g., Bruce W. Behrman & Regina E. Richards, *Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis*, 29 LAW & HUM. BEHAV. 279, 280 (2005) (citing research testing relative judgment process); Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, CHAMPION, June 2005, at 12, 13-14 (“[W]itnesses compare one lineup member to the other lineup members, determine who looks most like the perpetrator, and then tend to select that person.”).



true perpetrator is missing from the array or lineup.<sup>159</sup> Furthermore, conduct by police officers during and after the identification procedure itself can artificially boost a witness's confidence in the accuracy of her identification.<sup>160</sup> Typical examples include an officer giving confirmatory feedback after a witness has made an identification—"Good, that's who we thought it was" or "His fingerprints were all over the crime scene, too."<sup>161</sup>

The foregoing discussion may explain, in rudimentary terms, why mistaken eyewitness identifications arise; as for their impact on wrongful convictions, one need only grasp the tremendous impact that eyewitness testimony has on juries.<sup>162</sup> By way of illustration, one empirical study of mock trials revealed that positive eyewitness testimony was more likely to produce a conviction than positive testimony by experts about fingerprint, polygraph or handwriting evidence.<sup>163</sup> In another simulation involving a robbery trial, a jury found the defendant guilty eighteen percent of the time where the prosecution's case lacked an eyewitness.<sup>164</sup> The addition of a single eyewitness to those experimental cases boosted the conviction rate to seventy-two percent.<sup>165</sup> Qualitative evidence further suggests that eyewitness testimony is much prized in attempting to secure a conviction and, in the words of one prosecutor, viewed as "cast-iron, brass-bound, copper-riveted, and airtight."<sup>166</sup> Together, the existence of a high potential error rate for eyewitness identification and the powerful effect of this evidence on jurors signal that reforms are necessary.

159. See Wells, *supra* note 158, at 14 (noting that relative judgment process only works if actual perpetrator is in lineup because if actual perpetrator is not, great risk exists of misidentification).

160. See, e.g., Castelle & Loftus, *supra* note 156, at 24-25 (discussing malleability of confidence and how person administering photo array/physical lineup can affect witness's confidence level).

161. See, e.g., *id.* (listing several examples of statements that can inflate witnesses' confidence).

162. See, e.g., Edmund S. Higgins & Bruce S. Skinner, *Establishing the Relevance of Expert Testimony Regarding Eyewitness Identification: Comparing Forty Recent Cases with the Psychological Studies*, 30 N. KY. L. REV. 471, 472 (2003) ("In the courtroom, a confident-appearing eyewitness and accompanying testimony represents to the jury an almost irresistible justification that the defendant should be convicted of the charges brought against him."); Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 231 (2000) ("Eyewitness testimony is among the most damning . . . evidence that can be used in a court . . . . When an eyewitness points a finger at a defendant and says, 'He did it! I saw him. I was so shocked I'll never forget that face!' the case is as good as over.").

163. See Higgins & Skinner, *supra* note 162, at 472 (citing study conducted by Loftus and Doyle where analysis of mock trials found that positive eyewitness identification leads to conviction more often than positive scientific testimony).

164. See LOFTUS, *supra* note 152, at 9-10 (describing methodology of study and results when no eyewitness existed).

165. See *id.* (reporting results from study where eyewitness identified defendant as robber).

166. Judges, *supra* note 162, at 231 (noting what one prosecutor thought about eyewitness testimony).

Criminal justice scholars have bandied about any number of prospective changes in recent years. To be fair, little can be done to alter the situational and psychological factors that undermine the veracity of eyewitnesses' identifications. What can be done is to provide jurors with greater information about the weaknesses inherent in eyewitness identifications. To that end, lengthy instructions could be submitted to juries that extend far beyond a run-of-the-mill identification charge emphasizing how identification must be proven beyond a reasonable doubt, and instead apprise jurors about the problems with eyewitness identifications and urge that this evidence be viewed with caution.<sup>167</sup> Another popular suggestion is to allow expert testimony concerning the reliability of eyewitness identifications.<sup>168</sup> Several courts have seemed receptive to this notion, as evidenced by a 2001 decision from New York's highest court holding that expert testimony on this topic "is not inadmissible per se" and could not be excluded solely on the basis that jurors have the common sense to make an informed judgment about the accuracy of identification evidence.<sup>169</sup>

With respect to police identification procedures themselves, scholars have put forth a series of concrete reforms.<sup>170</sup> To address the problems spawned by the relative judgment process that may occur when viewing a traditional photo array or physical lineup, some commentators have pressed for the adoption of so-called "sequential" procedures where witnesses observe one photo/person at a time, state whether it is the perpe-

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167. See, e.g., Thomas Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1061 (2001) (citing use of cautionary jury instructions as means of informing jurors about intrinsic problems with eyewitness identifications); cf. Peter J. Cohen, *How Shall They Be Known?* *Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 PACE L. REV. 237, 272 (1996) ("There is no scientific evidence that cautionary jury instructions, given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are effective.").

168. See Higgins & Skinner, *supra* note 162, at 472-73 ("A tactic defense attorneys have employed to illuminate the complexities and unreliability of eyewitness testimony is to bring in an expert, who can educate the jury on the considerable problems with human memory."); see also Christopher M. Walters, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1406-08 (1985) (discussing role of expert as "tutor" in order to help jury assess eyewitness identification evidence).

169. See *People v. Lee*, 750 N.E.2d 63, 67 (N.Y. 2001) (reciting holding); see also James C. McKinley, Jr., *Court Lets Experts Challenge Witnesses' Accuracy in Trials*, N.Y. TIMES, May 9, 2001, at A1 (summarizing holding of *Lee*).

170. Recent changes in the structure of police identification procedures can be traced not only to the groundbreaking social scientific research conducted by scholars such as Gary Wells and Elizabeth Loftus, but to several reports published by the National Institute of Justice. See generally JOHN ASHCROFT ET AL., NAT'L INST. FOR JUSTICE, *EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT* (2003) (noting how this training manual should supplement *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* and discussing why certain procedures should be used when interrogating eyewitnesses); JANET RENO ET AL., NAT'L INST. FOR JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999) (discussing study conducted in May 1998 and proposing best practices and procedures to employ when dealing with eyewitnesses).

trator and then progress to view the next one independently.<sup>171</sup> Although the data is quite impressive in suggesting that sequential lineups and photo arrays reduce the rate of misidentification,<sup>172</sup> opponents of this reform have argued that the superiority of these procedures has not yet been scientifically established.<sup>173</sup> Among other, less controversial possible reforms is demanding that officers conducting identification procedures do so “blind”: without any knowledge as to the identity of the chief suspect, or whether the lineup even contains such a person.<sup>174</sup> This requirement prevents the officer from communicating, either unwittingly or purposefully, information about the identification that could improperly bolster the witness’s confidence in its correctness.<sup>175</sup> Additionally, proponents of systemic reform have recommended that, prior to the administration of identification procedures, witnesses receive warnings that the perpetrator may or may not be present,<sup>176</sup> and then, post-procedure, be asked to state the degree of confidence with which they would describe their identification, e.g., ninety percent certain, sixty percent and so forth.<sup>177</sup> Over the past five years, police departments in a handful of states

171. See, e.g., Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 616-17 (1998) (describing different methods for lineup identification that will reduce the likelihood of “relative judgment”).

172. See *id.* at 617 (“The evidence in support of the sequential procedure for preventing relative judgments is rather impressive.”).

173. See, e.g., Seth M. Lieberman, *Sequential Lineups: A Closer Look Gives Reason to Pause*, N.Y.L.J., Dec. 3, 2003, at 4, col. 4 (listing reasons why sequential lineups have not been well-accepted by New York police departments).

174. See, e.g., Castelle & Loftus, *supra* note 156, at 25-26 (defining how “blind” lineup works).

175. See *id.* at 26 (explaining how if police officer does not know who main suspect is in lineup, then officer is less likely to suggest who suspect is to eyewitness).

176. See, e.g., Barry C. Scheck, *Mistaken Eyewitness Identification: Three Roads to Reform*, CHAMPION, Dec. 2004, at 4, 4 (noting several ways eyewitness misidentification can be reduced, including informing witness that real perpetrator may not be present in lineup). In September 2005, the Connecticut Supreme Court held that juries should be given a curative instruction in situations where the police fail to inform eyewitnesses that a suspect may not be present in an identification procedure, with an exception for cases where overwhelming evidence supporting the identification exists. See *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005) (discussing instances when jury instruction is required).

177. See Scheck, *supra* note 176, at 4 (stating that because of strong scientific proof, certain reforms, such as post-procedure confidence assessments, should be adopted); see also Behrman & Richards, *supra* note 158, at 297 (“Witnesses who display high levels of certainty or witnesses who make their identifications rapidly without using eliminative processes are unlikely to choose innocent persons from lineups.”); Wells & Seelau, *supra* note 151, at 765 (noting that one means of reducing false identifications is to ask for witness’s degree of certainty after identification of alleged perpetrator). Wells and Seelau continued:

The risk of eyewitnesses making false identifications is influenced by the methods used to construct and conduct lineups. The legal system could impose 4 simple rules to reduce false identifications: (a) Eyewitnesses should be informed that the culprit might not be in the lineup, (b) the

and municipalities—either on their own volition or by executive fiat—<sup>178</sup> have revised their identification procedures along the lines described above, with promising results thus far.<sup>179</sup>

Jury instructions and expert testimony can assist jurors in evaluating the reliability of eyewitness identifications at trial, whereas installing sequential identification procedures and the “blind” administration of these procedures could go a long way toward improving the accuracy of identifications before the case even reaches the trial stage. Given the data proving that eyewitness misidentifications play a prominent role in wrongful

suspect should not stand out in the lineup, (c) lineups should be administered by someone who does not know who the suspect is, and (d) witnesses should be asked how certain they are of their choice before other information contaminates their judgment.

*Id.* at 765. Nonetheless, some scholars—and courts—have displayed concern regarding the chance that jurors may overvalue the significance of an eyewitness’s expression of confidence at trial as to her identification of the perpetrator. For instance, the Georgia Supreme Court recently prohibited the use of an instruction that explicitly informs jurors that they may consider a witness’s certainty level in gauging an identification’s reliability. See *Brodes v. Georgia*, 614 S.E.2d 766, 771 (Ga. 2005) (“[W]e can no longer endorse an instruction authorizing the witness’s certainty in his/her identification as a factor to be used in deciding the reliability of the identification.”).

178. See, e.g., Dori Lynn Yob, Comment, *Mistaken Identifications Cause Wrongful Convictions: New Jersey’s Lineup Guidelines Restore Hope, but Are They Enough?*, 43 SANTA CLARA L. REV. 213, 216 (2002) (describing 2001 decision of New Jersey Attorney General to mandate sequential identification procedures in state); see also Abby Goodnough & Terry Aguayo, *25 Years Later, DNA Testing Comes to a Prisoner’s Defense*, N.Y. TIMES, Aug. 3, 2005, at A12 (noting that New Jersey, North Carolina and Boston have implemented sequential lineup procedures).

179. See, e.g., Scott Ehlers, *Eyewitness Identification: State Law Reform*, CHAMPION, Apr. 2005, at 34, 34-37 (discussing recent state legislative activity regarding eyewitness identification reform); Leonard Post, *Lineup Innovations Showing Promise; Fewer False IDs and Challenges*, 27 NAT’L L.J. 1 (2005) (“Jurisdictions that now use sequential, double-blind lineups include New Jersey; most of North Carolina; Santa Clara County, Calif.; Suffolk and Norfolk counties in Massachusetts, which includes Boston; and parts of Hennepin County, Minn., including Minneapolis. The new methods will start . . . in parts of Wisconsin and more of Virginia.”); Alex Wood, *New Rules Being Drawn for Eyewitness Identifications*, J. INQUIRER (CONN.), Sept. 23, 2005, available at [http://www.nacdl.org/sl\\_docs.nsf/freeform/EyewitnessID017](http://www.nacdl.org/sl_docs.nsf/freeform/EyewitnessID017) (quoting Gary Wells as declaring that State of New Jersey has had “absolutely no difficulty” implementing double-blind procedures despite fact that its police departments range in size from two to roughly 2000 officers); David Ziemer, *Legislature Holds Hearing on Avery Task Force Reforms in Wisconsin*, Wis. L.J., Sept. 14, 2005, available at 2005 WLNR 14638693 (noting that proposed legislation in Wisconsin requires “law enforcement agencies to adopt written policies governing identifications”). “[It] does not require any specific policies, but requires that agencies consider, among others, double-blind identifications (the person administering the identification does not know which person is the suspect and which are fillers), and sequential, rather than simultaneous, showings.” *Id.*; cf. Michele McPhee, *Long Hot Summer of Cold Cases; Investigators: New Rules Cripple Probes*, BOSTON HERALD, July 1, 2005, at 5 (mentioning that one year after Boston Police Department’s Homicide Unit began to follow new guidelines designed to diminish risk of mistaken eyewitness misidentification, including double-blind lineups, “investigators complain the rules make it harder for the unit to clear murder cases”).

convictions, as exemplified by the David Wong case, suitable reforms such as those described above should be considered by jurisdictions and employed, where appropriate, to minimize the frequency with which errors occur.

### B. Jailhouse Informants

David Wong's fate was sealed not just by inaccurate eyewitness testimony from Officer LaPierre, but by Peter Dellfava's lie that he observed the stabbing from a distance of fifteen feet and that David Wong had committed it. This recipe of a mistake (misidentification) and a lie (perjured testimony) all too often produces a wrongful conviction.<sup>180</sup> Perjured testimony on its own accord is a common contributor to the conviction of innocent defendants; in fact, Gross's 2005 study found that "at least one sort of perjury is reported" in over forty percent of all exonerations.<sup>181</sup> Of the various types of perjured testimony, perhaps the most problematic and peculiar derives from jailhouse informants.<sup>182</sup> These prisoners usually provide information to the government in exchange for either leniency on a pending charge or, if already convicted, favorable treatment of another form.<sup>183</sup> Jailhouse informants possess incentives to fabricate statements,<sup>184</sup> including the opportunity to improve their penal situations, and

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180. See Gross, *supra* note 2, at 542-45 (describing how in this population of exonerated individuals, "[a]n eyewitness misidentification by a stranger is easy to spot, once you know that the person identified is innocent. Detecting a deliberate lie is harder; there may be no simple way to tell if a statement was false").

181. See *id.* at 544 (discussing results of study).

182. The general use of informants—and not just jailhouse informants—is rampant in the American criminal justice system. As one commentator noted: [A] review of all 1989 search warrant affidavits filed in the U.S. District Court in Atlanta showed that the police used confidential informants in ninety percent of the cases, up from sixty percent in 1980. In addition, a recent study demonstrates the number of federal search warrants relying exclusively on an unidentified informant nearly tripled, from 24 percent to 71 percent, between 1980 and 1993.

Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 ARIZ. L. REV. 563, 563-64 (1995).

183. See, e.g., ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 63-64 (2002) (describing two general types of jailhouse informants with prisoner awaiting trial on pending charges being most common). The specific kind of favorable treatment afforded to jailhouse informants varies considerably, and sometimes borders on the absurd. See, e.g., Jack King, *Twisted Justice: Prosecution Function in America Out of Control*, CHAMPION, Mar. 1999, at 10, 10-11 (mentioning that San Diego prosecutors "lavished an informer and star witness with privileges such as a private cell with color TV and a shower and conjugal visits in the prosecutor's office with the informer's wife and three of his girlfriends—and concealed these inducements from defense counsel").

184. See BLOOM, *supra* note 183, at 63 ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence.") (quoting *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987)); C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1, 7 (2003) ("Common sense suggests that a witness who is already incarcerated, has a trial pending, or may soon be indicted has more incentive to lie

virtually no disincentive considering that perjury is hard to detect, much less prosecute.<sup>185</sup> The Center on Wrongful Convictions at Northwestern University School of Law has determined that false testimony by informants is the leading cause of wrongful convictions in capital cases, and recently issued a report asserting that fifty-one people have been exonerated of crimes for which they received a death sentence based wholly or partly on the testimony of jailhouse witnesses.<sup>186</sup> Despite intrinsic reliability concerns, the use of jailhouse informants by police and prosecutors is routine and dates back to ancient Greece and Rome.<sup>187</sup>

The potential impact of jailhouse informants on wrongful convictions is illustrated by the 1989 Los Angeles County Jail investigation in which informants admitted to perjury and falsified confessions in dozens of felony convictions.<sup>188</sup> One detail that emerged from that grand jury investigation was the discovery that detectives seeking to bolster a case not infrequently arranged with jail officials to place their chief suspect in a holding cell located in the “informant tank,” a section of the facility brimming with informants so that one of them might elicit (or more likely contrive) a confession from the suspect.<sup>189</sup> Even though numerous people were implicated in the investigation, only a single informant ever faced

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in favor of the prosecution, which is in a position to offer her some benefit, than to testify in a manner favorable to the defendant.”)

185. For a further discussion of an example of a jail house informant who had incentives to lie, see *infra* note 190 and accompanying text.

186. See CTR. ON WRONGFUL CONVICTIONS, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3* (2004-05), [www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf](http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf) [hereinafter *SNITCH SYSTEM*] (recognizing that majority of witnesses were jailhouse informants who were promised certain incentives, like leniency).

187. See, e.g., Clifford S. Zimmerman, *From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED*, *supra* note 156, at 55, 57-58 (offering brief history of use of informants).

188. See BLOOM, *supra* note 183, at 64-66 (detailing story of rogue informant, Leslie Vernon White, who admitted to “fabricating confessions of fellow inmates and offering perjured testimony to courts”); Zimmerman, *supra* note 187, at 56 (reporting that informants who admitted to committing perjury were “linked to 225 murder and other felony convictions”); see also REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY (1990) [hereinafter *LOS ANGELES REPORT*]. The grand jury inquiry into the use of jailhouse informants in the Los Angeles County Jail was far-reaching, involving 120 witnesses and the introduction of 147 exhibits into evidence. See *id.* at 2.

189. See BLOOM, *supra* note 183, at 66 (discussing how this was most disturbing aspect of investigations). Under the jail’s longstanding policy prior to the investigation, informants were given the same classification (“K-9”) and the roughly sixty to eighty informants were typically housed together. See *LOS ANGELES REPORT*, *supra* note 188, at 49, 57. The grand jury noted in its report that “[i]t has long been suspected that Sheriff’s Department deputies intentionally placed informants with inmates ‘from whom law enforcements could use a confession.’ The Sheriff’s Department denies such a practice has ever existed, however, the Grand Jury received evidence which indicated [that it] has occurred.” *Id.* at 58.

perjury charges: Leslie Vernon White, the whistle-blower who exposed practices in the jail and described his own penchant for “snitching” on the television program *60 Minutes*.<sup>190</sup>

The use of the prisoner Peter Dellfava by the Clinton County authorities in the David Wong murder prosecution, then, was by no means unusual, especially because the stabbing took place *within* a prison. Nor was the fact that he received a recommendation for parole from the district attorney and a transfer to a different correctional facility a strange development.<sup>191</sup> The most curious and commendable aspect of the Dellfava saga, though, is that he ultimately admitted to lying at the Wong trial, albeit many years later. Assuming most jailhouse informants who perjure themselves are loathe to come clean in the end<sup>192</sup> and that they are valid yet disturbing weapons in the crime-fighting arsenal,<sup>193</sup> the question becomes how best to reform the criminal justice system to decrease the likelihood of perjury from jailhouse informants and thereby guard against wrongful convictions.

First, many proposed reforms relate to enhancing the process for testing the reliability of individual informants—measures designed to make informants and their handlers more accountable to the defendant.<sup>194</sup>

190. See BLOOM, *supra* note 183, at 64-66 (describing situation involving Leslie Vernon White, informant who lied on multiple occasions).

191. See *id.* at 64 (“In addition to monetary compensation, an informant will often be recommended for early release either through the parole system or through a petition to a trial judge for reconsideration of the original sentence.”).

192. Scheck, Neufeld and Dwyer found that jailhouse informants contributed to nineteen percent of the initial convictions of defendants the Innocence Project later exonerated through DNA testing, and “[i]n no instance did the snitch admit to making up stories.” SCHECK ET AL., *supra* note 5, at 203.

193. According to Judge Learned Hand: “Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely on them or upon accomplices because the criminals will almost certainly proceed covertly.” *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); see also Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 660-63 (2004) (describing some utilitarian benefits of using informants); Amanda J. Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 301-02 (2001) (“The informant is a necessary incident to the investigation of so-called ‘victimless’ or ‘consensual’ crimes, such as drug dealing and official corruption.”).

194. See Natapoff, *supra* note 193, at 697-703 (discussing several proposals for reform, such as increased discovery, reliability hearings and depositions, and increasing information available to legislative branch). One important check on the unfettered use of jailhouse informants is the constitutional doctrine that holds that the government may not intentionally elicit information from a suspect outside the presence of counsel after judicial proceedings have commenced. See *Massiah v. United States*, 377 U.S. 201, 203-05 (1964) (reasoning that extracting information from defendant without protection of counsel violates “basic dictates of fairness”). As one commentator has observed, “[i]n the context of jailhouse informants, this means that after a suspect has been formally charged, an informant cannot be placed in the suspect’s cell for the purpose of obtaining incriminating information

Without procedures in place to evaluate reliability, the presence of jailhouse informants who receive benefits for their testimony against criminal defendants raises due process concerns.<sup>195</sup> Reforms geared toward ascertaining reliability include expanded defense counsel discovery into the nature of the informant's background and agreement with the prosecution;<sup>196</sup> pretrial "reliability hearings" in which judges assess the informant's credibility in a manner akin to gauging expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*;<sup>197</sup> permitting the defense to depose informants prior to trial;<sup>198</sup> and requiring that snitch testimony be independently corroborated by other non-informant evidence.<sup>199</sup>

Second, other suggested changes focus on the systemic role of jailhouse informants in criminal cases, and aim to limit potential abuse by imposing statutory restrictions on compensation for informants (a monetary cap) and on leniency (curbs on the types of crimes that can be mitigated via cooperation).<sup>200</sup> Similarly, some observers have lobbied for the creation of local and national registries of informants that would allow for the blacklisting of informant perjurers and the monitoring of recidivist snitches;<sup>201</sup> in fact, this was one of the recommendations that developed from the Los Angeles County Jail scandal.<sup>202</sup> Merely taking perjury seri-

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from the suspect unless the informant is a totally passive agent." Jack Call, *Legal Notes*, 22 JUST. SYS. J. 73, 75 (2001). Notably, "this rule is designed to protect the Sixth Amendment right to counsel. It is not in any way concerned about the reliability of the evidence obtained in this manner." *Id.*

195. See Natapoff, *supra* note 193, at 663-64 ("Courts have held that without procedural protections against unreliability, using criminals who testify in exchange for benefits may raise due process and other fairness issues for defendants against whom informant testimony is levied."); see also BLOOM, *supra* note 183, at 66-69 (discussing due process concerns, especially those relating to Sixth Amendment right to counsel).

196. See Clifford S. Zimmerman, *Back from the Courthouse: Corrective Measures to Address the Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED*, *supra* note 156, at 199, 205-06, 208 (suggesting that prosecutors should provide defense counsel with information about informant's credibility); see also Natapoff, *supra* note 193, at 699 (proposing that defense counsel should have earlier access to information about informants and that government's ability to limit this type of information should be curtailed).

197. 509 U.S. 579 (1993) (providing that judges should serve as "gatekeepers" in evaluating whether to admit expert testimony on particular topic); Natapoff, *supra* note 193, at 699-700 (comparing informant witnesses to expert witnesses because they are "one-sided, potentially unreliable, compensated witnesses with personal motivations who may have great sway over a jury").

198. See Natapoff, *supra* note 193, at 700 (arguing that because informant testimony is difficult to challenge on cross-examination, defendants should be able to depose informants before trial).

199. See Zimmerman, *supra* note 196, at 209 (discussing Oklahoma Court of Criminal Appeals' proposal that informant's statement should be independently corroborated).

200. See Natapoff, *supra* note 193, at 701-02 (proposing reforms).

201. See Zimmerman, *supra* note 196, at 215 (advocating use of registries).

202. See LOS ANGELES REPORT, *supra* note 188, at 149 ("The District Attorney's Office should maintain a central file which contains all relevant information re-



ously and increasing the rate of prosecution for that crime could, on the margins, give jailhouse informants an element of pause when contemplating whether to lie at the start. Third, as in the area of eyewitness identifications, certain recommendations focus on alerting juries to the problem of jailhouse informants by instituting elaborate, cautionary jury instructions when an informant testifies.<sup>203</sup> Several American jurisdictions have implemented one or more of the above-mentioned reforms, yet their efforts generally have been piecemeal and reactive in nature and, thus, largely ineffective.<sup>204</sup>

In contrast, Canadian law enforcement officials have looked deeply at the issue of jailhouse informants in response to the Guy Paul Morin ordeal, a notorious wrongful conviction produced mainly by snitch testimony,<sup>205</sup> and another case involving Thomas Sophonow.<sup>206</sup> An Ontario commission entrusted with analyzing the Morin matter made a variety of

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garding the informant. As a minimum, the file should include information regarding the number of times the informant has testified or offered information in the past and all benefits which have been obtained.”).

203. See Elliott, *supra* note 184, at 10-11 (describing use of cautionary instructions concerning jailhouse informants, referred to as Vetrovec warnings, in Canada); Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 759-61 (2002) (discussing Supreme Court of Canada's 1982 decision in *R. v. Vetrovec*); Zimmerman, *supra* note 196, at 202-03 (assessing use of cautionary jury instructions in United States and finding them, for most part, insufficient to remove taint of jailhouse testimony).

204. For instance, Clifford Zimmerman has criticized the statutory changes that surfaced in California after the Los Angeles County Jail scandal, deeming that legislation indicative of the “reactive and ineffectual” nature of most legislative responses to the problem of jailhouse informants. See Zimmerman, *supra* note 196, at 200-01. Illinois, however, has adopted a series of reforms that are beginning to pay dividends. Specifically, in November 2003, the Illinois General Assembly passed legislation as part of its sweeping death penalty reform package that would require prosecutors to disclose to defendants whether jailhouse informants have been promised anything of value. See SNITCH SYSTEM, *supra* note 186, at 15. In addition, the legislation mandated that in any capital case in which the prosecutor is seeking to introduce testimony from a jailhouse informant, the judge must conduct a pretrial reliability hearing. See *id.* The authors of the Northwestern study on jailhouse informants in Illinois capital prosecutions recently indicated that “it is too early to gauge the effectiveness of the Illinois measure, but it appears to have rendered snitches less ubiquitous than they were in the recent past. In the first 11 months that the reform was in effect, in fact, prosecutors have not proffered snitch testimony in any potential capital case.” *Id.*; see also GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT ii (Apr. 15, 2002), available at <http://www.state.il.us/defender/report.pdf> (recommending barring capital punishment in Illinois when conviction is based solely on testimony of in-custody informant).

205. See REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin> (last visited Oct. 20, 2005) [hereinafter KAUFMAN REPORT] (inquiring into Morin case); see also Skurka, *supra* note 203, at 761-64 (discussing Morin case and Kaufman Commission's findings).

206. See THE INQUIRY REGARDING THOMAS SOPHONOW, available at <http://www.gov.mb.ca/justice/publications/sophonow/toc.html> (last visited Sept. 27, 2005) [hereinafter SOPHONOW INQUIRY] (analyzing Sophonow case).

bold proposals in 1998, including advising the banning of unconfirmed informant evidence and the creation of a unit of special prosecutors to vet informants beforehand.<sup>207</sup> Likewise, the inquiry conducted in Manitoba relating to Sophonow's wrongful murder conviction generated three distinct recommendations in 2001: (1) jailhouse informants should be barred entirely from testifying in criminal cases, with certain narrow exceptions;<sup>208</sup> (2) in cases where such testimony is permitted, no more than one jailhouse informant should be used;<sup>209</sup> and (3) where testimony is allowed, "the jury should still be instructed in the clearest of terms as to the dangers of accepting this evidence."<sup>210</sup> In addition to developments in Ontario and Manitoba, a report issued in January 2005 by a unique consortium of Canadian federal and provincial justice ministers, prosecutors and police suggests the entire nation may be on the cusp of installing vast—and praiseworthy—reforms in the treatment of jailhouse informants.<sup>211</sup>

The United States should learn from Canada's experience and take a similarly expansive and thorough look at the use of informant evidence in American courts. The role played by a jailhouse informant in the Wong murder case highlights the dilemmas inherent in this component of the American criminal justice system: minimal accountability for both the informant and the government, and enormous incentives for the witness to falsify testimony. Only by strengthening the procedures through which informant reliability is tested, decreasing any systemic inducements to lie, and notifying juries about the suspect nature of testimony by jailhouse informants can the havoc wrought by witnesses like Peter Dellfava be avoided in the future.

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207. See Recommendations, in KAUFMAN REPORT, *supra* note 205, available at [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin\\_recom.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf) (last visited Oct. 20, 2005) (proposing reforms).

208. See Recommendations, in SOPHONOW INQUIRY, *supra* note 206, available at <http://www.gov.mb.ca/justice/publications/sophonow/jailhouse/recommend.html> (last visited Sept. 27, 2005) (making recommendations). As an example of a case where jailhouse informant testimony might be allowed, this report cited "a rare case, such as kidnapping, where they have, for example, learned of the whereabouts of the victim." *Id.* In such situations, the report recommended strict police procedures to ensure reliability. *See id.*

209. *See id.* (advising use of only one jailhouse informant).

210. *Id.* (suggesting that courts give cautionary jury instructions).

211. See Skurka, *supra* note 203, at 767 ("Jurisdictions across Canada now recognize that a number of factors contribute to the trial judge's decision regarding the trustworthiness of the informer and the corresponding need for a clear, sharp warning. These include the availability of confirmatory evidence and the importance of the informer's testimony to the Crown's case."); Kirk Makin, *Report Tackles Wrongful Convictions*, GLOBE & MAIL (Toronto), Jan. 26, 2005, at A4 (noting that report recommends creation of registries of jailhouse informants in each province).

C. *Ineffective Assistance of Counsel*

Although the jury depended heavily on LaPierre and Dellfava in convicting David Wong for murder, the less-than-zealous advocacy displayed by the defense team at trial surely contributed to the guilty verdict. In hindsight, the defense attorneys' failure to comprehensively investigate Wong's innocence claim and their obliviousness to the translation snafu seem particularly worrisome. Sadly, lawyering of this sort is not the exception in many criminal cases involving indigent defendants.<sup>212</sup> A study of defense attorneys in the Phoenix, Arizona metropolitan area determined that a little over half of those assigned to a felony case visited the crime scene prior to the felony trial, while only thirty-one percent interviewed all of the prosecution witnesses and fifteen percent chose to interview none at all.<sup>213</sup> Another study, which evaluated the cases of thirteen New York prisoners whose murder convictions were vacated on the grounds of newly discovered evidence of innocence,<sup>214</sup> concluded that ten of those defendants had been represented by court-appointed attorneys, two of whom were later disbarred for commingling client funds.<sup>215</sup> What is more, the majority of criminal defendants in the United States are represented by individual attorneys or institutional public defender organizations assigned to them as indigent defense counsel,<sup>216</sup> suggesting that inadequate performance by such lawyers has troubling implications for the criminal justice system as a whole.

Insufficient funding is typically cited as the primary cause of the low quality of indigent legal services in this country. For many years, indigent defendants in New York City received representation from one of several under-funded public defender offices, or from a panel of assigned counsel attorneys who were compensated at a rate of \$25 an hour for out-of-court work and \$40 for in-court work, with a moderately inflexible fee cap of

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212. See generally Adele Bernhard, *Effective Assistance of Counsel*, in *WRONGLY CONVICTED*, *supra* note 156, at 220; Tracey L. Meares, *What's Wrong with Gideon*, 70 U. CHI. L. REV. 215 (2003).

213. See Bernhard, *supra* note 212, at 236 (describing study of assigned counsel in Maricopa County, Arizona). Closer to the site of the David Wong case, a study in New York City concluded that just one-fifth of assigned counsel used investigative or expert services with regularity and eleven percent never used them whatsoever. See *id.*

214. See Barry C. Scheck & Sarah L. Tofte, *Gideon's Promise and the Innocent Defendant*, *CHAMPION*, Jan.-Feb. 2003, at 38, 38 (mentioning study conducted by *Newsday* and noting that only one of these thirteen cases involved DNA testing).

215. See *id.* (elaborating on study's findings).

216. See, e.g., Note, *Effectively Ineffective: The Failure of Courts To Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1735 (2005) [hereinafter *Effectively Ineffective*] ("In the early 1990s, numerous studies found that 80% or more of defendants charged with felonies in state courts received court-appointed counsel and that public defender programs constituted the primary method of legal defense delivery to approximately 65% of Americans.") (footnotes omitted).

\$1500.<sup>217</sup> To make ends meet, these assigned attorneys, dubbed “18-B” lawyers after the title of the panel, often had to handle hundreds of cases simultaneously and forsake out-of-court work, e.g., investigation, in lieu of in-court appearances.<sup>218</sup> An analysis of the 137 New York City homicide cases completed by 18-B lawyers in 2000 found that in forty-two of those cases, approximately one-third of the total, defense lawyers did less than one week of preparation and the median for all cases was seventy-two hours, far below the benchmark of 200 hours of preparation that is considered adequate diligence prior to a murder trial.<sup>219</sup>

Other locales are similarly frugal when it comes to expenditures for public criminal defense. For example, one county in Georgia hired a local lawyer to take on every indigent criminal case in the region for a flat fee of \$25,000, nearly \$20,000 below the next highest bidder.<sup>220</sup> Georgia got what it paid for—over four years of contract attorney work, that lawyer tried only three assigned cases and filed three motions, yet submitted over 300 guilty pleas.<sup>221</sup> Moreover, jurisdictions invariably provide greater funding to prosecutors than to public defenders, a budget-line disparity that is accentuated by the reality that prosecutors obtain free investigative services from the police, whereas any expenses for defense investigation must come directly from the defenders’ coffers.<sup>222</sup>

The absence of quality control mechanisms and performance incentives for indigent defense counsel aggravate the problems caused by under-funding. As a preliminary matter, it is difficult to evaluate work quality in criminal defense because outcomes do not always correlate with effort and client satisfaction is a dubious barometer.<sup>223</sup> Additionally, in a world of set salaries and fees, not to mention limited public respect, many assigned defenders battle to remain motivated and to ward off creeping

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217. See, e.g., Jane Fritsch & David Rohde, *Lawyers Often Fail New York’s Poor*, N.Y. TIMES, Apr. 8, 2001, at A1 (reporting amount of New York attorneys’ fees); Sabrina Tavernise, *Debt Deal Lets Legal Aid Society Stay in Business*, N.Y. TIMES, Dec. 21, 2004, at A1 (discussing financial difficulties of New York Legal Aid Society). The fee structure for 18-B lawyers in New York was recently changed to \$75 per hour, with no distinction between in-court or out-of-court work. See John Caher, *Statewide Standards Urged for Indigent Defense Counsel*, N.Y.L.J., Apr. 26, 2005, at 1 (noting increase in attorneys’ fees).

218. See Fritsch & Rohde, *supra* note 217 (discussing attorneys’ workload); see also Myrna S. Raeder et al., *Convicting the Guilty, Acquitting the Innocent; Recently Adopted ABA Policies*, 20-WTR CRIM. JUST. 14 (2006) (“Underfunding’s twin sister is overwork.”).

219. See *id.* (analyzing New York City homicide cases).

220. See Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 788-89 (discussing particular Georgia attorney).

221. See *id.* at 789 (reporting disposition of Georgia attorney’s cases).

222. See Bernhard, *supra* note 212, at 229 (noting impact of inadequate funding); see also Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (arguing for parity of financial resources).

223. See Bernhard, *supra* note 212, at 230 (citing absence of quality control).

cynicism toward their own client's potential innocence.<sup>224</sup> As one commentator has observed:

No one receives a salary increase for winning a case or creating a new legal theory. Promotions within a public defender office are rare and not always awarded on merit. Clients are notoriously dissatisfied, and gratitude is scarce. . . . Outside the courthouse doors, the public variously views defenders as incompetent at their job or immoral for doing it.<sup>225</sup>

Rigid doctrinal tests for determining ineffective assistance of counsel serve to perpetuate the provision of lackluster legal services. The Sixth Amendment of the U.S. Constitution guarantees that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”<sup>226</sup> Since 1963, in *Gideon v. Wainwright*,<sup>227</sup> the U.S. Supreme Court has interpreted the right to counsel to signify that indigent criminal defendants are entitled to an attorney free of charge. Pursuant to later Supreme Court jurisprudence, defendants have a right not only to the assistance of counsel, but to “effective” assistance of counsel. As set forth in the 1984 case of *Strickland v. Washington*,<sup>228</sup> the test for ineffectiveness is two-fold: a convicted defendant must demonstrate (1) “that counsel’s representation fell below an objective standard of reasonableness” and (2) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>229</sup> Attorney performance rarely constitutes ineffectiveness under this standard, and court decisions have deemed trial lawyers satisfactory in cases where they were not aware of the governing law, sober or even awake at trial.<sup>230</sup> In the vernacular, many observers refer to the *Strickland* rule as a “breath test”—“[i]f a mirror fogs up when placed beneath the lawyer’s nostrils, he or she is not ineffective, as a matter of law.”<sup>231</sup> Empirical studies, moreover, support the popular image of ineffectiveness. For instance, one scholar analyzed 4,000 federal and state appellate opinions that involved allegations of ineffective assistance of counsel and determined that

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224. See generally *id.* (discussing “presumption of guilt”).

225. *Id.* at 231 (analyzing effect of motivation).

226. U.S. CONST. amend. VI.

227. 372 U.S. 335 (1963).

228. 466 U.S. 668 (1984).

229. *Id.* at 688, 694 (setting forth ineffectiveness of counsel test).

230. See Bright, *supra* note 220, at 785-86 (describing Supreme Court precedent); see also Raeder et al., *supra* note 218 (observing that “[e]thical standards often do little better” and may allow “even neophyte lawyers to handle criminal cases even when the cases are a ‘wholly novel field’ to the lawyer, so long as counsel studies hard using universal lawyering skills”). The Supreme Court’s failure to define precisely what qualifies as “indigency” may also be problematic, leaving the states to develop wide-ranging and disparate definitions. See Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 573-75 (2005).

231. SCHECK ET AL., *supra* note 5, at 237 (summarizing *Strickland* test).

the courts had found ineffectiveness in only 3.9% of the cases.<sup>232</sup> The recent trend in the courts toward affording public defenders immunity from personal liability for malpractice has not helped matters in that it provides assigned attorneys with even greater protection from public sanction and reprobation.<sup>233</sup>

Most suggestions for reform stress the need for increased funding above all,<sup>234</sup> and impact litigation is seen as one potential method for achieving that goal.<sup>235</sup> Over the past fifteen years, a series of counties, public defenders and public interest organizations have sued individual states, claiming they are not in a position to comply with their constitutional obligations to render effective legal assistance at the current levels of funding.<sup>236</sup> Several of those lawsuits had successful resolutions, including one filed by the Connecticut Civil Liberties Union that led to a settlement with a promise by the state to raise assigned counsel rates and adopt specific performance standards for indigent defense counsel.<sup>237</sup> History, though, suggests victories of this nature may prove short-lived.<sup>238</sup>

In addition to an infusion of money, imposing greater oversight and monitoring of public defenders, and enforcing stricter continuing legal education guidelines could aid defender performance.<sup>239</sup> On a long-term basis, simply educating the public about the crucial function of criminal defense lawyers and forging a stronger link between defenders and the communities they serve could augment the sense of responsibility that defenders have toward their clients.<sup>240</sup> Furthermore, tweaking the *Strickland* standard so that it prods attorneys to improve the quality of their work

232. See Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 n.5 (mentioning study of appellate decisions).

233. See Bernhard, *supra* note 212, at 231 (discussing recent movement toward giving public defenders immunity).

234. See, e.g., Bright, *supra* note 220, at 816 (“The most fundamental reason for the poor quality or absence of legal services for the poor in the criminal justice system is the refusal of governments to allocate sufficient funds for indigent defense programs.”)

235. See, e.g., Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2063 (2000) (arguing “that the best short-term means for overcoming this political process failure and improving the quality of indigent defense is litigated reform—institutional change accomplished by obtaining court decrees that require states to provide counsel that meets the Constitution’s demand for competence”).

236. See Bernhard, *supra* note 212, at 233-34 (noting lawsuits against states); see also Adam Liptak, *County Says It’s Too Poor to Defend the Poor*, N.Y. TIMES, Apr. 15, 2003, at A1 (discussing one such state lawsuit).

237. See Bernhard, *supra* note 212, at 234 (describing alternative approaches).

238. See generally *Effectively Ineffective*, *supra* note 216 (discussing series of similar lawsuits, many of which only resulted in short-term positive changes to provision of indigent defense services in particular jurisdiction).

239. See Bernhard, *supra* note 212, at 234-35 (explaining effects of oversight, monitoring and legal education).

240. See *id.* at 235 (noting desirable effects of educating public about defense attorneys’ roles).

product, rather than giving them comfort that mediocrity will go unpunished, would be desirable.<sup>241</sup> Only through a blend of additional cash outlays, oversight, training and increased expectations regarding what equals effective assistance of counsel might the dreams of *Gideon* come closer to realization, and the nightmares of defendants like David Wong recede.

#### D. Race

Finally, the subject of race cannot be overlooked as a factor in the Wong conviction: a case in which two white eyewitnesses wrongly implicated an Asian inmate in the slaying of an African American who, in fact, had been harmed by a Latino man. Beyond the overt effects of eyewitness misidentification, a jailhouse informant and uninspired defense lawyering in the conviction, more covert racial issues suffuse the entire matter, rearing their ugly head in myriad, intangible ways. Did the jurors believe LaPierre and Dellfava to some degree because they were white? Was Dellfava approached by the authorities initially by virtue of his race? Did the fact that Wong was only one of a handful of Asian inmates in the facility at the time and thus devoid of a support network, either gang-affiliated or otherwise, enter into the equation to prosecute him for an intra-prison homicide—and help explain the reluctance of other inmates to come forward in droves to clear him? In general, to what extent did stereotypes of Asians and Asian Americans affect the case?

Advocates of Critical Race Theory (“CRT”) might perceive the Wong narrative in terms of broad, systemic themes of racial injustice and subordination in the United States.<sup>242</sup> Asians and Asian Americans, in the view of some CRT scholars, suffer different racial biases than those incurred by other groups due in part to “nativistic racism” (a view of them as perpetually “foreign”) and the “Model Minority Myth” (the notion that they are hard-working and successful), with the result that the dominant culture often struggles to accept the idea that Asians can be disempowered and face discrimination.<sup>243</sup> Overall, the perceived “foreignness” of Asians,

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241. Another problem with the *Strickland* test is that it is, “by its nature, an ex post analysis; therefore, it cannot be used preemptively to challenge the effectiveness of an attorney, regardless of the limitations on time or resources that may hamper the attorney’s ability to provide an adequate defense.” *Effectively Ineffective*, *supra* note 216, at 1732. See generally Bibas, *supra* note 232 (suggesting that retrospective nature of *Strickland* test itself, which looks back at attorney performance during trial, may be fundamentally flawed).

242. See Sheila R. Foster, *Critical Race Lawyering: Foreword*, 73 *FORDHAM L. REV.* 2027, 2037 (2005) (“One of the gifts that CRT has imparted to those who study its methodology is the importance of narrative to understanding the nature of contemporary racial injustice and subordination.”). For an introduction to the field of critical race theory, see DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS* 1-39 (2003).

243. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 *CAL. L. REV.* 1241, 1255-65 (1993) (discussing “nativistic racism” and “model minority myth”); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81

both ethnically and linguistically, combined with the stereotype of them as flourishing, may make the larger public less empathetic to their situation.<sup>244</sup> Injustices against Asians and Asian Americans may accordingly be glossed over, rationalized or simply ignored.<sup>245</sup>

Moreover, the topics of race and racial bias are common aspects of wrongful convictions generally. People of color are wrongfully convicted at a disproportionate rate, a phenomenon encapsulated by the following data: a study of DNA exonerations by the Innocence Project at Benjamin N. Cardozo School of Law in New York City reported that fifty-five percent of the exonerations in cases of sexual assault or murder involved African American defendants and white victims, a percentage four times higher than the rate at which cross-racial crimes of those types actually occur.<sup>246</sup> Other studies of wrongful convictions largely buttress these findings.<sup>247</sup> To be sure, the data regarding race and wrongful convictions must be interpreted in light of studies demonstrating the vast racial disparities in arrests, sentencing and pretrial decisions in the first place;<sup>248</sup> that is, racial minorities are over-represented and over-punished in the criminal justice system as a whole, and therefore naturally experience wrongful convictions at a high level. Nevertheless, racial minorities appear especially susceptible to being wrongfully convicted. Not only can cross-racial misidentification lead to the conviction of the innocent, but so can more subtle problems of racism and stereotyping on the part of jurors, judges,

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MINN. L. REV. 367, 423-41 (1996) (explaining “foreignness”); cf. Elbert Lin, *Identifying Asian America*, 33 SW. U. L. REV. 217, 219 (2004) (evaluating contemporary Asian American critical race theory and advocating for more identity-based approach that might have greater practical application).

244. See, e.g., Chang, *supra* note 243, at 1258-59 (“But, the dominant culture’s belief in the ‘model minority’ allows it to justify ignoring the unique discrimination faced by Asian Americans. The portrayal of Asian Americans as successful permits the general public, government officials, and the judiciary to ignore or marginalize the contemporary needs of Asian Americans.”) (footnote omitted); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 71 (1997) (arguing that “model minority myth” and concept of “yellow peril” are inter-related).

245. See *supra* notes 242-44 and accompanying text.

246. See SCHECK ET AL., *supra* note 5, at 267. This finding dovetails with the scholarship indicating that blacks are punished more severely, in general, for crimes against whites than those perpetrated against people of color. See, e.g., John Blume et al., *Explaining Death Row’s Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 167 (2004) (explaining death row’s racial disparity); Adam Liptak, *Death Penalty Found More Likely if Victim Is White*, N.Y. TIMES, Jan. 8, 2003, at A12 (reporting results of Maryland study).

247. See Karen F. Parker et al., *Racial Bias and the Conviction of the Innocent*, in WRONGLY CONVICTED, *supra* note 156, at 114, 116-18 (discussing four major studies on wrongful convictions).

248. See *id.* at 114-16 (noting effects of racial disparity); see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17-18 (1998) (arguing that prosecutors have responsibility to help eradicate discriminatory treatment of African Americans).



prosecutors and defense lawyers.<sup>249</sup> Also, in comparison to whites, people of color more often lack the financial resources to hire private defense lawyers and investigators, and might endure inadequate legal representation with greater frequency as a result.<sup>250</sup> In the end, overtones of race and potential racial bias echo throughout the Wong case, as in many other cases of injustice, and must not be discounted in analyzing the factors that help to produce wrongful convictions.

#### IV. CONCLUSION

The growing volume of empirical research on wrongful convictions and the factors underlying them is commendable. Such work helps in understanding the problem and, perhaps more importantly, formulating solutions. Even so, if the lessons from recent exonerations are to instigate a "New Civil Rights Movement" for the twenty-first century, as Scheck, Neufeld and others maintain,<sup>251</sup> and yield genuine systemic change, then the individual stories of those cases must not be lost amid the sea of quantitative data and policy debate. Like Rosa Parks and Emmett Till during the Civil Rights Movement of the twentieth century, narratives of wrongfully convicted defendants can serve to galvanize political support for re-vamping the criminal justice system by touching the public in a personal fashion and bringing the issue, which may seem amorphous and beyond comprehension to some, into sharp focus.<sup>252</sup> The Wong case reflects a

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249. See Parker et al., *supra* note 247, at 121-22 (discussing cross-racial identifications).

250. See *id.* at 122 (mentioning effect of socio-economic status).

251. See Press Release, The Innocence Project, As 100th Innocent Prisoner Is Freed by DNA Tests, Innocence Network Convenes to Map the Future of "New Civil Rights Movement" in Criminal Justice (Jan. 17, 2002), <http://www.deathpenaltyinfo.org/article.php?did=280&scid=1> (noting effect of exonerations). The rise in the number of post-conviction exonerations of wrongfully-convicted prisoners in recent years has also frequently been characterized as a "revolution." See Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 267 (2004) ("The lessons of the Innocence Revolution begin with the realization that our system is not as accurate as we believed even 10 years ago."); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004) ("Spawned by the advent of forensic DNA testing and hundreds of post-conviction exonerations, the innocence revolution is changing assumptions about some central issues of criminal law and procedure."); see also Daniel S. Medwed, *Looking Foreword: Wrongful Convictions and Systemic Reform*, 42 AM. CRIM. L. REV. 1117, 1118 (2005) (noting that "if the DNA era has genuinely spawned a 'New Civil Rights Movement' . . . then concerned citizens, activists, and scholars must capitalize on the growing public awareness of wrongful convictions and effect true systemic changes").

252. To be sure, there are risks associated with advocates of criminal justice reform trumpeting the cases of individual exonerees, risks that include both untoward pressures on the individuals involved, who might be uncomfortable with the media spotlight, and the possibility that such a campaign might "backfire." For instance, reform-minded lawyers and activists in Wisconsin publicized the exoneration of Stephen Avery in encouraging the legislature to implement reforms, that is,

singular instance of injustice as well as a window into the root causes of wrongful convictions more generally. It is these twin features of David Wong's story—micro-level tragedy and macro-level significance—that I hope will prove useful in the current reform efforts and create a sufficient legacy for him as he builds a new life in his native China, free at last.

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until Avery was arrested for the murder of a photographer in his auto salvage yard. See Monica Davey, *Freed by DNA, Now Charged in New Crime*, N.Y. TIMES, Nov. 23, 2005, at A1.

