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DEAD WRONG IN OKLAHOMA

Randall Coyne*

God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case.

—U.S. District Court Judge Frank H. Seay¹

I. INTRODUCTION

In recent years, Americans have had to come to grips with a proliferation of exonerations of persons condemned to death.² In fact, there is a steadily growing bipartisan consensus that problems with American capital punishment have reached “crisis proportions.”³ Some say that capital appeals take too long, while many others worry that innocent people are being put to death. According to the latest head count, there are presently 3,415 men and women awaiting execution on death rows throughout this country.⁴ Ninety-seven of these condemned prisoners await death in Oklahoma.⁵

Across the nation, there are presently 121 former death row inmates from twenty-five states who have escaped their death sentences upon proof that they are in fact innocent of the crimes that the prosecution persuaded jurors beyond a reasonable doubt

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1. *Williamson v. Reynolds*, 904 F. Supp. 1529, 1577 (E.D. Okla. 1995) (referring to the conviction and near-execution of Ronald Keith Williamson). There are, of course, death penalty advocates who are willing to admit that even the most exacting system of capital punishment will eventually put to death someone who is actually innocent of the crime which results in his or her execution. Their argument is that the occasional execution of an innocent is worth the benefit of maintaining the death penalty. Certainly, there are other social conventions—driving cars, vaccinating children, drinking alcohol, to name three—that we willingly undertake, knowing full well that each of these activities will claim innocent lives.

2. The specter of innocent prisoners awaiting execution is, of course, hardly a new phenomenon. Following *Furman v. Georgia*, 408 U.S. 238, the landmark 1972 Supreme Court decision which struck down the death penalty throughout the country, four condemned prisoners whose lives *Furman* had spared were ultimately exonerated. James W. Marquart & Jonathon R. Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, in *The Death Penalty in America: Current Controversies* 162, 164 (Hugo Adam Bedau ed., Oxford U. Press 1997).

3. James Liebman, Jeffrey Fagan & Valerie West, *Broken System: Error Rates in Capital Cases, 1973–1995*, Executive Summary, <http://www.thejusticeproject.org/press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf> (accessed Nov. 11, 2006).

4. Death Penalty Information Center, *Facts about the Death Penalty*, <http://www.deathpenaltyinfo.org/FactSheet.pdf> (accessed Sept. 21, 2006).

5. *Id.*

they had committed.⁶ This is not at all surprising when one considers the research of Professor James Liebman, whose comprehensive and exhaustive study of error in death penalty cases revealed a reversible error rate of sixty-eight percent.⁷ As Liebman observed, a company that manufactured toasters could not expect to survive for long if for every hundred toasters made, only thirty-two were free from serious defects.⁸ And yet, America's love affair with the death penalty continues even though the system is at risk of collapsing under the weight of its own mistakes.

Since reinstating capital punishment in 1977, Illinois alone has accounted for seventeen men who were condemned to die for murder, only later to be legally absolved.⁹ In Oklahoma, since 1978, seven men have narrowly avoided falling victim to the unpardonable sin of the American criminal justice system: wrongful extermination at the hands of the state.¹⁰

The effect of Congress' restrictions on habeas corpus relief over the past decade dramatically increases the already significant risk—acknowledged by Supreme Court Justice Sandra Day O'Connor¹¹—that innocent persons are being wrongfully executed. As many are aware, there is a bill pending in Congress that would speed up the process even more. So-called habeas reform brings to mind the lethal technique of a boa constrictor.¹² Some may have been taught that the boa constrictor slithers out of a tree, drops on top of its victims, and quickly crushes them in its powerful coils. That is not how the boa kills.

On the contrary, extensive research . . . which consisted of . . . looking up “boa constrictor” in the *Encyclopedia Americana*, has revealed the true modus operandi of this dangerous reptile. Let me read it to you: “Ordinarily the snake places two or three coils around the chest of its prey. Then, each time the victim relaxes and exhales its breath, the snake simply takes up the slack. After three or four breaths, there is no more slack. The prey quickly suffocates and is swallowed by the boa.”¹³

Similarly, recent habeas revisions—enacted in the face of mounting evidence of wrongful condemnations—have slowly and methodically squeezed the life out of genuine claims of innocence. My modest goal throughout this article is to attempt to persuade each of you of the wisdom of Justice Harry Blackmun's observation, made after wrestling with capital cases for more than twenty years: “The basic question—does the system accurately and consistently determine which defendants ‘deserve’ to die?—

6. *Id.*

7. Liebman et al., *supra* n. 3. Liebman et al. examined 4,578 state capital cases between 1973 and 1995. During this period, courts found serious, reversible error in nearly seven out of ten capital sentences that were fully reviewed.

8. *Id.* at 14.

9. Death Penalty Information Center, *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (accessed Sept. 21, 2006).

10. *Id.*

11. In a speech to a group of women lawyers in Minnesota in July 2001, Justice O'Connor, who frequently voted to uphold death sentences, admitted: “If statistics are any indication, the system may well be allowing some innocent defendants to be executed.” *Justice O'Connor on Executions*, 150 N.Y. Times A16 (July 5, 2001).

12. The boa constrictor metaphor is borrowed from Richard Dowis, *The Lost Art of the Great Speech* 126 (AMACOM 2000).

13. *Id.*

can not be answered in the affirmative.”¹⁴ Through a searching examination of the exonerations of three former Oklahoma death row inmates,¹⁵ I hope to demonstrate that credit for sparing the wrongfully condemned from execution owes as much to happenstance, serendipity, and dumb luck as it does to the proper functioning of the criminal justice system.¹⁶

II. ADOLPH HONEL MUNSON

Adolph Munson, convicted and sentenced to die for the 1985 abduction and murder of convenience store clerk Alma Hall, may be the most hapless inmate ever to spend time on Oklahoma’s death row. A true child of calamity,¹⁷ Munson possessed a great deal of luck—all of it bad.¹⁸

Munson grew up in poverty in segregated Dennison, Texas, and abandoned formal education in the eighth grade.¹⁹ By age nineteen, he had drifted to the north side of Tulsa, Oklahoma, where he worked as a café cook and shared a home with his girlfriend.²⁰ Munson’s girlfriend apparently hid from him the fact that she was married.²¹ After returning home on May 31, 1965, Munson found all of his belongings on the porch and a note saying that he had been kicked out.²²

Munson tracked down his girlfriend and her husband at a local bar and their conversation degenerated into a knife fight.²³ When the fight ended, Munson lay on the barroom floor “with his intestines spread about him.”²⁴ Worse, Munson’s girlfriend and her husband were dead, and Munson faced two first-degree murder charges.²⁵

Relying on advice from his court-appointed lawyer, and without any plea

14. *Collins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

15. The three former death row inmates are Adolph Munson, Ron Williamson, and Robert Miller.

16. Thus far, researchers have documented that Oklahoma juries have wrongfully convicted and sentenced to death a total of seven innocent defendants since the 1976 reinstatement of the death penalty. Death Penalty Information Center, *supra* n. 9. This article focuses on the three condemned inmates most recently exonerated and released from Oklahoma’s death row. The first four wrongfully condemned men to gain release from Oklahoma’s death row are Charles Ray Giddens (convicted in 1978, released in 1981); Clifford Henry Bowen (convicted in 1981, released in 1986); Richard Neal Jones (convicted in 1983, released in 1987, acquitted in 1988); and Greg Wilhoit (convicted in 1987, released in 1993).

17. Munson’s path to death row brings to mind the admonition attributed to Akhenaton:

Perils, and misfortunes, and want, and pain, and injury, are more or less the certain lot of every man that cometh into the world. It behooveth thee, therefore, O child of calamity! Early to fortify thy mind with courage and patience, that thou mayest support, with a becoming resolution, thy allotted portion of human evil.

Akhenaton, in *Wisdom for the Soul: Five Millennia of Prescriptions for Spiritual Healing* (Larry Chang ed., Gnosophia Publishers 2006) (available at <http://www.geocities.com/wisdomforthesoul/authors/akhenaton.html>).

18. Richard L. Fricker, *Reasonable Doubts*, 79 ABA Journal 39, 40 (1993) (“Of Munson, it truly can be said that if it weren’t for bad luck, he would have no luck.”).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Fricker, *supra* n. 18, at 40.

24. *Id.*

25. *Id.*

agreement,²⁶ Munson pleaded guilty and, not yet twenty years old, began serving two consecutive life sentences.²⁷ After ten years, he was paroled from his first life sentence but remained behind bars serving his second life sentence.²⁸

By 1984, Munson had earned such a positive reputation among prison staff at the Jess Dunn Correctional Center that he was allowed to participate in a work-release program as a baker in Taft, Oklahoma.²⁹ During his periods of release, in what Samuel Johnson might describe as the “triumph of hope over experience,”³⁰ Munson again began living with a woman.³¹ In June 1984, just three days before Alma Hall was kidnapped from her job at Love’s convenience store in Clinton, Oklahoma, Munson’s girlfriend told him that their romance was over.³² Munson returned to their home to collect his belongings that, again, awaited him on the front porch.³³

Rather than risk another potentially perilous confrontation, Munson unwisely chose to run.³⁴ Even though he was approaching parole eligibility on his second life sentence, Munson decided not to return to prison.³⁵ Instead, he gathered his possessions, loaded them into a car he had purchased but which was titled in his girlfriend’s name, and drove to Oklahoma City.³⁶

Munson spent two days in Oklahoma City, drinking heavily, then headed west on Interstate 40, hoping to relocate to California.³⁷ En route, Munson checked into the Glancy Motel in Clinton, Oklahoma, during the afternoon of June 27.³⁸ Because he was AWOL from prison (and therefore an escapee),³⁹ Munson registered under a fictitious name, then went to a pay phone and called prison employees about possibly returning to prison.⁴⁰

26. *Id.* It could be argued that the legal system first failed Munson at this early stage. Even putting aside self-defense as a possibility, the circumstances under which Munson killed are more consistent with second-degree (spontaneous, impulsive killing) murder than first-degree (premeditated, deliberate killing) murder. Regardless, urging Munson to enter two guilty pleas without any plea bargain arrangement in place could fall beneath the admittedly low standard of providing effective assistance of counsel established in *Strickland v. Washington*, 466 U.S. 668 (1984). In either case, Munson’s court-appointed trial lawyer had a well-established ethical duty to represent his client zealously. The woeful performance of Munson’s attorney becomes easier to understand—but no easier to defend—when considered in light of the fact that the lawyer, though somehow admitted to practice in Oklahoma, had never completed the course work at the Missouri law school from which he pretended to have graduated. Eventually, the lawyer was disbarred. *Judge Rejects Review of Life Sentences*, *Tulsa World* A6 (Dec. 1, 1989).

27. Like most other states in 1965, Oklahoma did not have a life without parole sentencing option.

28. Mark A. Hutchison, *Jury Declares Man Wrongly Convicted: Defendant Served 10 Years on Death Row*, *Daily Oklahoman* 29 (Apr. 6, 1995).

29. Fricker, *supra* n. 18, at 40.

30. Samuel Johnson, <http://www.poemhunter.com/quotations/hope/page-7> (accessed Feb. 18, 2007).

31. Fricker, *supra* n. 18, at 40.

32. *Id.*

33. *Id.*

34. *State v. Munson*, 886 P.2d 999, 1001 (Okla. Crim. App. 1994).

35. Fricker, *supra* n. 18, at 40.

36. Oklahoma prisoners are prohibited from owning cars. Thus, Munson had the car’s title in the name of his girlfriend. *Id.*

37. *Id.*

38. *Id.*

39. *Munson*, 886 P.2d at 1001.

40. Fricker, *supra* n. 18, at 40.

According to Munson, he returned to his room and continued drinking.⁴¹ While intoxicated, Munson broke one of the three liquor bottles found in his room, cut himself, stumbled against the walls, fell down several times, and then passed out.⁴² By 6:00 a.m. the following day, Munson had dropped his room key in the key repository and continued on his trek to California.⁴³

Four hours earlier, and four blocks from the Glancy Motel, Alma Hall disappeared. At 2:05 a.m. on June 28, a customer at Love's convenience store in Clinton notified authorities that the store was unattended.⁴⁴ Alma Hall had reported for the night shift just before midnight. Known to be a dependable worker, Hall was reportedly last seen by a customer at around 1:55 a.m.⁴⁵ Just over \$300 in cash was discovered missing from one of the store's cash registers.⁴⁶

Later that morning, a blood-stained blouse and a smock bearing Hall's name tag were recovered in a roadside ditch outside of Elk City, Oklahoma.⁴⁷ One week later, on July 4, 1985, Hall's body was found between Shamrock and McClean, Texas, about 4.5 miles northeast of I-40.⁴⁸

Dr. Ralph Erdmann, a Texas state medical examiner, conducted an autopsy in the parking lots of a nearby hospital and National Guard armory.⁴⁹ Erdmann testified at Munson's preliminary hearing that Hall died from two gunshot wounds to her head.⁵⁰ He said that the bullets used were medium or large caliber but, in either case, definitely were not .22 caliber bullets.⁵¹ Although no attempt was made to recover the bullets from the body, Erdmann indicated that the entry wounds were too large to have been caused by a .22 caliber bullet.⁵² He was excused from the stand and was told he was free to return to Texas.⁵³

The prosecution, which had built its case against Munson in large part upon a spent .22 caliber bullet claimed to have been found in Munson's motel room, quickly moved for a brief recess.⁵⁴ Five minutes later, the State was permitted to recall Erdmann to the stand.⁵⁵ This time Erdmann testified that maggots had enlarged the hole in the skin to

41. *Id.* at 41.

42. *Id.*

43. *Id.* Munson succeeded in making it to California but again encountered fate's curse. His car, which was registered in his girlfriend's name (and which she had reported stolen), was stolen from him. When the pair of car thieves was arrested in August 1984 in Los Angeles, they led the police to Munson. *Id.*

44. Fricker, *supra* n. 18, at 41.

45. *Id.*

46. *Munson*, 886 P.2d at 1000.

47. *Id.* at 1001.

48. *Id.* Hall's body was found in a field near Wheeler, Texas, approximately 150 miles west of Clinton. Fricker, *supra* n. 18, at 41.

49. *Id.*

50. *Munson*, 886 P.2d at 1001.

51. Fricker, *supra* n. 18, at 45-46.

52. *Id.*

53. *Id.* Eventually, after pleading guilty to seven felonies committed in connection with autopsies he "allegedly performed or failed to perform," Erdmann was stripped of his license to practice medicine in Texas. *Id.*

54. *Id.* at 46.

55. Fricker, *supra* n. 18, at 46.

make it appear larger than one made by a .22.⁵⁶ Defense lawyers failed on re-cross to bring out the fact that the hole was in the skull and the skin was gone.⁵⁷

Early on, Clinton police focused their suspicion on Ralph Judson Yeary, a Florida fugitive suspected of involvement in a series of robberies, sexual assaults, and abductions of convenience store clerks in Florida and Texas.⁵⁸ Yeary was identified as one of two suspicious characters captured on videotape at a different Love's convenience store across town.⁵⁹

Clinton police learned that Yeary had lived and worked in Clinton only a few months earlier and that he had worked in Wheeler, Texas, the area where Hall's body was discovered.⁶⁰ Clinton authorities notified other police agencies that they wanted to question Yeary as a suspect in connection with Hall's murder.⁶¹ In less than two days, officials in Corpus Christi called to notify the Clinton police that they had arrested Yeary and impounded his pickup truck.⁶² All that was required was for the Clinton police to authorize Corpus Christi authorities to hold Yeary for their investigation.⁶³ The Clinton police never called back.⁶⁴

The Clinton police never pursued their investigation of Yeary because they were convinced that they had already gathered enough evidence to prove that Hall had been abducted and murdered by Adolph Munson.⁶⁵ And, more to the point, when Munson's trial lawyers noticed Yeary's name on Oklahoma State Bureau of Investigation (OSBI) reports and pressed for further information, they were told that Yeary was not a viable suspect because he was in jail at the time Alma Hall was kidnapped.⁶⁶ This was a lie.⁶⁷

Additional evidence which the State used to connect Munson to Hall's abduction and murder may be summarized by looking at the *Munson* case.⁶⁸

Shortly before Hall was abducted, Munson, who was serving time in prison for murder, escaped from the Jess Dunn Correctional Center while out on a prison work release program. Witnesses, telephone records and a handwriting analysis of the motel register placed Munson at the Glancy Motel in Clinton, Oklahoma on June 27 . . . in Room 103.⁶⁹

The motel was four blocks from the Love's convenience store where Hall worked. "By the morning of June 28, [the morning Mrs. Hall was abducted,] Munson had left the

56. *Id.*

57. *Id.*

58. *Id.*; see also *Munson*, 886 P.2d at 1003.

59. Fricker, *supra* n. 18, at 43.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Fricker, *supra* n. 18, at 43.

65. The predilection of police officers to disregard evidence inconsistent with their theory of a particular suspect's guilt doubtless contributes to the wrongful conviction rate. Liebman et al., *supra* n. 3.

66. *Munson*, 886 P.2d at 1003-04.

67. *Id.* Munson's original trial lawyers were Melrose "Trey" Minton, III, a young lawyer three years out of law school with no capital experience, and Joe McMillian, a civil lawyer who seldom handled criminal matters. Fricker, *supra* n. 18, at 41.

68. The summary of the State's evidence against Munson is taken from *Munson*, 886 P.2d at 1001.

69. *Id.* Even though all the evidence is circumstantial, its powerful incriminatory thrust is undeniable.

Glancy Motel.”⁷⁰

The maid who cleaned Room 103 on the morning of June 28 discovered blood-stained sheets and towels in the room. A .22 caliber spent shell was recovered from the room as well as a broken earring which matched the earring found on Hall’s body. Another witness recalled hearing a scream and a thud coming from Room 103 around 2:30 a.m. on June 28. . . . [A] towel and a tag bearing the brand name “Dundee” were found near [Hall’s] body. The towel and tag were consistent with towels from the Glancy Motel.⁷¹

Munson’s car was recovered in California. “An OSBI criminalist testified that a strand of hair found in Munson’s car matched hair samples taken from Hall.”⁷² Donald Bruner, a Jess Dunn inmate serving fifteen years for second-degree murder, testified that Munson confided to him that Munson “escaped from prison, went to ‘some little town’ in Oklahoma, robbed a convenience store, kidnapped the woman, killed her and dumped her body in a wooded area.”⁷³ To avert any suspicion of having an incentive to lie, Bruner also “testified he did not receive any promises or special treatment for his testimony.”⁷⁴

Munson’s trial lawyers were seriously handicapped by the judge’s denial of their motion for funds to hire an investigator and forensics experts.⁷⁵ As a result, Munson’s lawyers were required to fashion a defense using the information gathered by the prosecutors’ investigators.⁷⁶ As is routine in criminal cases, Munson’s lawyers filed a *Brady* motion,⁷⁷ seeking from the prosecution any and all evidence which might tend to exculpate the defendant. In this respect, the trial judge was solicitous of Munson’s rights, advising prosecutors “that anything that the State has in their files regarding the investigation that could help the defense attorneys in any way, they’re just asking for

70. *Id.*

71. *Id.*

72. *Id.*

73. *Munson*, 886 P.2d at 1001.

74. *Id.*

75. *Munson v. State*, 758 P.2d 324, 330 (Okla. Crim. App. 1988). Munson’s motion for funds to pay for expert assistance was based on *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that due process is denied when access to a psychiatrist is not provided in a case where sanity is at issue). Judge Gary P. McGinn advised trial counsel that he would have to pay for expert services and then seek reimbursement from the Oklahoma Supreme Court. *Id.* Years later, after he had left the bench to return to private practice, McGinn defended his decision to deny the defense funds. He told an American Bar Journal reporter that there was no money available, and the State’s case against Munson “was coming together so well.” Pressed as to how he knew the details of the prosecution before trial, McGinn replied that he “just knew.” Fricker, *supra* n. 18, at 42. On direct appeal, the Oklahoma Court of Criminal Appeals held that Munson failed to demonstrate substantial prejudice from the lack of expert and investigative assistance. *Munson*, 758 P.2d at 330. The court also noted that *Ake* had not been extended to include expert assistance other than a psychiatrist. *Id.* It seems obvious that in order to provide effective assistance, even skillful defense counsel must be given the tools from which they can fashion a vigorous defense.

76. Denying the defense independent investigators and experts seriously impedes the presentation of a vigorous defense. More often than not, the key to a defense victory lies not in what appears in a police report but what is omitted from a police report. Police investigators have no legal duty to put all information they gather into written reports. Consequently, once the police have decided that a particular suspect is guilty, evidence inconsistent with this theory—and potentially exculpatory—is likely to be disregarded and not written down.

77. *Brady v. Md.*, 373 U.S. 83, 87 (1963) (holding “suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor”).

reversal if it's not furnished to the defense attorneys."⁷⁸ Thus, the court ruled "that any exculpatory evidence must be furnished, regardless of what law enforcement agency has it."⁷⁹ The court further ruled that defense counsel be permitted to view all photographs.⁸⁰

Before trial, the prosecution assured the court that the State had complied with the discovery orders and had provided "copies of all police reports, including Oklahoma State Bureau of Investigation reports from field agents."⁸¹ Whether intentionally misleading or not, these assurances were patently untrue.⁸²

Nonetheless, based upon what documents and files the prosecution *did* turn over to the defense, Munson's lawyers were able to establish several facts in Munson's favor. First, no one saw Hall at the motel. Second, none of the fingerprints recovered from Room 103 matched Munson or Hall. And, finally, a search of the car Munson drove to California revealed no bloodstains nor Hall's fingerprints.⁸³ None of this, apparently, provided sufficient doubt. The jury found Munson guilty of the murder and kidnapping of Alma Hall.⁸⁴

During the sentencing stage, Munson's lawyers failed to present any additional evidence in mitigation. Without objection, the State incorporated all first-stage evidence which proved sufficient to persuade the jury of the existence of two aggravating circumstances: (1) Munson had committed murder to avoid a lawful arrest or prosecution and (2) Munson constituted a continuing threat to society.⁸⁵ Weighing the aggravating evidence against the non-existent mitigating evidence, the jury sentenced Munson to death.⁸⁶

Granted, Munson's prior double homicide conviction and his escape from prison may have made any attempt at mitigation appear hopeless. If so, Munson's trial lawyer was too easily discouraged. Of course, he did not know about *Mak v. Blodgett*⁸⁷—a case in which failure to put on any mitigating evidence after the defendant had been convicted of thirteen murders was ruled ineffective representation.⁸⁸ Indeed, two of Mak's co-defendants, including the primary shooter, avoided death sentences. And certainly Munson's trial attorney had no way of knowing that twenty-plus years later an Oklahoma

78. *Munson*, 886 P.2d at 1001–02.

79. *Id.* at 1002.

80. *Id.*

81. *Id.*

82. Indeed, under *Brady*, whether the prosecutor knowingly lied or negligently misspoke is beside the point. *Brady*, 373 U.S. at 87.

83. *Munson*, 886 P.2d at 1001.

84. *Munson*, 758 P.2d at 327.

85. *Id.* If indeed Munson's trial attorneys put on no mitigating evidence during the sentencing phase, this is yet another example of Munson's continuing bad fortune. The error was apparently compounded by appellate counsel, who did not raise the issue on direct appeal. *Id.* at 335. Although most capital defense lawyers would consider the failure to present any mitigating evidence as *per se* incompetent representation, only recently the Supreme Court for the first time granted relief to a death row inmate based upon an inadequate presentation of mitigating evidence during the sentencing phase. *Williams v. Taylor*, 529 U.S. 362 (2000). The statutory aggravators which the jury found are codified at Okla. Stat. tit. 21, § 701.12(5) (2006) (murder to avoid arrest or prosecution) and § 701.12(7) (continuing threat).

86. *Munson*, 758 P.2d at 327, 330.

87. 970 F.2d 614 (9th Cir. 1992).

88. *Id.* at 617–18.

jury would spare from death a man named Terry Nichols, who was twice convicted of crimes which led directly to 168 murders in the Oklahoma City bombing.⁸⁹ The point is that Munson was entitled to a vigorous defense at both stages of his capital murder trial.

On direct appeal, Munson was represented by Thomas Purcell, an assistant appellate public defender from Norman, Oklahoma. It took Oklahoma's Court of Criminal Appeals fewer than ten pages to reject Munson's claims.⁹⁰ The high court was unmoved by the denial of Munson's pretrial request for funds to hire an expert serologist, an expert in hair analysis, and an investigator.⁹¹ Similarly, because Munson at this stage was unable to show that the prosecution had withheld exculpatory evidence, his pretrial motion to discover the names of all witnesses having knowledge of the case was properly denied.⁹² Nor was Munson entitled to the appointment of a magistrate to review the State's files to insure that all exculpatory evidence had been handed over.⁹³

Notwithstanding the Court of Criminal Appeals' cavalier dismissal of Munson's legal claims, his conviction and death sentence were so obviously fraught with error that his case garnered considerable media attention. In December 1993, the American Bar Association Journal published as its cover story an investigative report chronicling Munson's case.⁹⁴ Although in state postconviction proceedings Munson ended up with an outstanding team of pro bono lawyers—Richard Anderson, David Autry, William Devinney, and Sherry Wallace—he almost certainly would have been put to death, buried, and forgotten if not for the remarkable, serendipitous discovery made by defense investigator Cliff Everhart. As part of the case reinvestigation, Everhart sought to track down the lead prosecution investigator, Clinton Police Detective Tom Siler. Everhart knocked on the door of the Siler residence and was informed by Mrs. Siler that her husband Tom was no longer among the living.⁹⁵

I have no idea why Mrs. Siler let Cliff Everhart rummage through her deceased husband's case files, which had been stored years before and had remained ignored in the Siler attic. But she did. What Everhart found in the Siler attic must have made his heart beat ever-faster: between 300 and 500 pages of law enforcement reports regarding other suspects in the Alma Hall murder.⁹⁶ Everhart had stumbled upon a mountain of documentary evidence of an enormous *Brady* violation. And the mountain grew when OSBI turned over 165 photographs never before seen by Munson's defenders.

Several witnesses said that they had seen two white men at the store at the time Alma Hall was kidnapped.⁹⁷ Adolph Munson was then, is now, and always has been black. One witness actually said that she had seen these two white men carry Hall away

89. Wikipedia, *Terry Nichols*, http://en.wikipedia.org/wiki/Terry_Nichols (accessed Feb. 18, 2007).

90. *Munson*, 758 P.2d at 327–36.

91. *Id.* at 330.

92. *Id.*

93. *Id.* at 331.

94. Fricker, *supra* n. 18.

95. Interview with David Autry, (Sept. 30, 2005) (on file with author).

96. *Munson*, 886 P.2d at 1003.

97. Stanley Cohen, *The Wrong Men: America's Epidemic of Wrongful Death Row Convictions* 231 (Carroll & Graf Publishers 2003).

from the Love's convenience store in a pickup truck.⁹⁸ But there's more. A different witness positively identified Ralph Yeary, a white man who was known to have previously kidnapped convenience store clerks.⁹⁹ Photographs of tire prints at the Texas dump site did not match the tires on the car Munson was driving.¹⁰⁰

And more. Initial reports filed by Detective Siler, the motel manager, the motel maid, and OSBI agents make no mention of the finding of a sea-shell earring in Munson's motel room on June 28, the day Hall disappeared.¹⁰¹ Munson's new defense team also learned something else that had been withheld from his original trial lawyers: the motel manager and the motel maid, who testified at trial that the earring had been found in Munson's room, did so only after having been hypnotized. Detective Siler's testimony as to where and when he located the mysterious earring was thrown into serious doubt.

Apart from the exculpatory facts revealed by the previously undisclosed *Brady* material, there were other problems with the State's original case against Munson. Donald Bruner, the convicted murderer-turned-jailhouse-snitch who denied having received any benefit from the prosecution in exchange for his testimony, was found to have perjured himself.¹⁰² The prosecutor had written a letter on his behalf to the pardon and parole board.¹⁰³

Finally, Dr. Erdmann, the malleable medical examiner, was doctor no more. Following his testimony against Munson, Erdmann had been convicted of seven felonies involving the manufacture of evidence and misrepresentation of facts in other cases.¹⁰⁴ Erdmann's indiscretions caused the State of Texas to revoke his medical license.¹⁰⁵ Erdmann would no longer play doctor.

After Munson's pro bono postconviction defense team effectively dismantled the State's entire case, Custer County District Judge Charles Goodwin overturned Munson's conviction.¹⁰⁶ Munson had been on Oklahoma's death row for eight years at the time of Judge Goodwin's ruling.¹⁰⁷ In an act of unconscionable defiance, the State appealed and opposed a new trial for Munson. This time the Court of Criminal Appeals ruled in Munson's favor, finding that his right to a fair trial and to due process had been violated by the prosecution's suppression of exculpatory evidence.¹⁰⁸

The jury empanelled for Munson's retrial took just over two hours to acquit him.¹⁰⁹ Alma Hall's killer was never found.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Cohen, *supra* n. 97, at 231.

103. *Id.*

104. *Id.*

105. *Id.*

106. Associated Press, *Judge Overturns Conviction in '84 Slaying*, Daily Oklahoman 10 (Aug. 12, 1993).

107. *Id.*

108. *Munson*, 886 P.2d at 1004.

109. Hutchison, *supra* n. 28.

III. RONALD KEITH WILLIAMSON

A case which presents similar issues involves Ron Williamson. On December 8, 1982, the father of Debbie Carter, a twenty-one-year-old cocktail waitress at the Coachlight Club in Ada, Oklahoma, discovered his daughter's murdered and perversely defiled body on the floor of the bedroom of her garage apartment.¹¹⁰ Except for a pair of white socks, Carter was nude and had been raped.¹¹¹ Her attacker had used ketchup to write on her back the words "Duke Graham."¹¹² On her chest, written in fingernail polish, was the word "die."¹¹³ Carter died from suffocation after a blood-soaked washcloth was forced into her mouth and a ligature (an electric cord and a belt) was tightened around her neck. An internal examination revealed internal bruising. The cap to the ketchup bottle was found inside her rectum.¹¹⁴

Within a few days, a high school classmate of Carter, Glen Gore, told investigators that he had seen Carter on the night she was murdered at the Coachlight.¹¹⁵ A club patron had been pestering her for a dance and she pleaded with Gore to rescue her. Gore said that he swept her onto the dance floor, away from her unwelcome admirer.¹¹⁶ Eventually, Gore would testify that the man he saw hassling Carter for a dance the night she was murdered was Williamson.¹¹⁷

OSBI forensic chemist Mary Long testified that Carter was blood type A.¹¹⁸ Semen collected from Carter's sheets and vaginal swabs suggested that her attacker was a non-secretor.¹¹⁹ In 1987, exactly four years and five months after Carter was discovered dead, Williamson and his friend, Dennis Fritz, were charged with her murder.¹²⁰ Both men are non-secretors.¹²¹

Williamson was convicted by a jury that deliberated for six hours. The same jury spent a mere fifty-five minutes before deciding that he should die by lethal injection.¹²² Before gaining his freedom in 1999, Williamson would spend nine years of his life awaiting execution at the Oklahoma State Penitentiary in McAlester.¹²³ In 1994, he

110. *Williamson v. Reynolds*, 904 F. Supp. 1529, 1534 (E.D. Okla. 1995); see also *Williamson v. Ward*, 110 F.3d 1508, 1510-11 (10th Cir. 1997); see generally Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* 130-147 (Doubleday 2000).

111. *Williamson*, 904 F. Supp. at 1534.

112. *Id.*

113. *Id.*

114. *Williamson v. State*, 812 P.2d 384, 390-391 (Okla. Crim. App. 1991).

115. Scheck et al., *supra* n. 110, at 130.

116. *Id.* at 131.

117. *Id.* at 141.

118. *Williamson*, 812 P.2d at 391.

119. *Id.*

120. *Williamson*, 904 F. Supp. at 1535.

121. *Williamson*, 812 P.2d at 391.

122. Robby Trammel, *Man Sentenced to Death in Sex-Slaying of Ada Woman*, Daily Oklahoman 10 (Apr. 29, 1988). Williamson's friend, Dennis Fritz, was convicted in a separate proceeding and received a life sentence.

123. I am often asked my opinion as to why Oklahoma has such a disproportionately large death row population. On a per capita basis, Oklahoma has the second largest death row population in the country. Also, until just this past September when our Red River rival Texas lethally injected Frances Newton, Oklahoma led the nation in the number of women put to death since 1976. Oklahoma is now tied for that honor. Death Penalty Information Center, *List of Females Executed since 1900*, <http://www.deathpenaltyinfo.org/>

came within five days of being put to death.¹²⁴ Much of Williamson's time behind bars was spent screaming to all within ear shot that he was innocent.¹²⁵ It is fair to say that Williamson's conviction and death sentence resulted from a combination of mental illness, junk science, political pressure, unscrupulous police work, and incompetent counsel.

A. *Mental Illness*

Mental illness had robbed Williamson's life of its storybook quality long before it rendered him particularly vulnerable to wrongful conviction. After graduating from Asher High School in 1971, Williamson signed a professional baseball contract. The Oakland Athletics selected Williamson during the second round of the amateur draft. Among 569 high school ballplayers, he was picked forty-first.¹²⁶ Before heading off to the minor leagues in 1971, he married a former Miss Ada beauty queen.¹²⁷ But, when an arm injury ended his prospects as a major league pitcher and his marriage ended in divorce, Williamson's life continued on a downward spiral.¹²⁸

There is not much doubt that Williamson's mental illness made him an especially attractive suspect, one particularly vulnerable to wrongful conviction. After his dream of playing in the major leagues crumbled in the mid-1970s and his marriage disintegrated, his mental health deteriorated.¹²⁹ He accepted a job with Aetna Insurance in Tulsa and became one of their top salesmen.¹³⁰ A steady diet of Quaaludes and beer did little to improve his circumstances. He roamed from job to job. While in Tulsa, Williamson was accused twice of committing rape, and, though he was ultimately cleared of both charges, the impact on him was devastating.¹³¹

He eventually moved back into his parents' home in Ada, about a block from Carter's apartment¹³² and literally hibernated. He slept twenty hours a day and spent his four waking hours prowling bars. He developed a fear of his bedroom, and, if it was dark out, he would sleep only on the living room couch.¹³³ On occasion, he would jump onto the couch to escape the spiders and snakes he had hallucinated.¹³⁴ The sad truth is

article.php?scid=24&did=229 (accessed Nov. 11, 2006).

I'm pretty sure that Oklahoma's hearty embrace of the death penalty has something to do with the ratio between the number of liquor stores and the number of churches scattered throughout the state. I am also convinced that much can be gleaned about the Oklahoma mindset when one considers the story, perhaps apocryphal, that in the early 1900s McAlester's civic leaders turned down the opportunity to become home to the nascent University of Oklahoma, preferring instead to become the locus of the state's maximum security prison and death row.

124. Amnesty International, *Old Habits Die Hard: The Death Penalty in Oklahoma*, 51/055 AMR 61, 64 (2001).

125. Scheck et al., *supra* n. 108, at 147.

126. *Id.* at 132.

127. *Id.*; see also *Williamson*, 904 F. Supp. at 1577 (aff. of Williamson's sister, Annette Hudson).

128. Scheck et al., *supra* n. 110, at 132.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 132-33.

133. Scheck et al., *supra* n. 110, at 132.

134. *Williamson*, 904 F. Supp. at 1578 (aff. of Williamson's sister, Annette Hudson).

that Williamson had been observed and treated for mental illness since 1979, three years before Carter's murder.¹³⁵ From age twenty-six on, he had been repeatedly diagnosed as displaying behavior indicative of schizophrenia, bipolar disorder, borderline personality disorder, and paranoid personality disorder, to name just a few.¹³⁶

In 1985, just three years before his murder trial, Williamson was charged with escape from house arrest for a bogus check conviction.¹³⁷ He was officially adjudicated as being "unable to appreciate the nature of the charges against him, consult with his counsel or rationally assist in his defense."¹³⁸ The judge found that Williamson was a mentally ill person, as defined by Oklahoma law, and based his findings on his in-court observations of Williamson and a doctor's assessment that Williamson was delusional.

Williamson was sent to Eastern State Hospital and was evaluated by Dr. R.D. Garcia, who concluded that he exhibited disturbed, psychotic behavior. Garcia diagnosed Williamson as having borderline personality disorder and found that he was a sociopath. Dr. Garcia prescribed Thorazine, Dalmane, Ristoril, Duadacin, and Mellaril. Thus, Williamson was magically restored to competency, and Garcia released him to stand trial, provided he took one hundred milligrams of Thorazine four times per day.¹³⁹

B. *Junk Science*

At his 1988 murder trial, Williamson was represented by appointed counsel W. Barney Ward, a sole practitioner who, although blind, was an experienced criminal attorney.¹⁴⁰ Unfortunately for Williamson, Ward's criminal defense experience did not include capital defense work.¹⁴¹ Ward was nonetheless paid the statutory maximum fee of \$3,200.¹⁴² He received no funds for investigative or expert services.¹⁴³

Apart from the semen evidence, the only physical evidence linking Williamson to Carter's murder were hairs collected at the crime scene allegedly found to be "microscopically consistent" with hairs harvested from Williamson.¹⁴⁴ Of hundreds of hairs submitted to the OSBI for analysis, prosecution expert Melvin Hett testified that two pubic hairs from the bedding and two scalp hairs on the blood-soaked washcloth stuffed down Carter's throat *could have* come from Williamson.¹⁴⁵ Although Hett acknowledged that microscopic consistence is not the same as a positive identification,¹⁴⁶ the clear implication of his testimony was that four of the hairs found at

135. *Id.* at 1536.

136. *Id.*

137. *Id.* at 1537.

138. *Id.*

139. *Williamson*, 904 F. Supp. at 1537.

140. *Williamson*, 110 F.3d at 1512.

141. *Id.* To Ward's credit, he requested that co-counsel be appointed because of "'the seriousness of the charges . . . and the complexity and time consuming nature of the case.'" *Id.* at 1512. Although the court appointed co-counsel, three weeks before trial that lawyer withdrew as Williamson's counsel to accept a position as an assistant district attorney. *Id.*

142. *Id.* at 1522.

143. *Williamson*, 100 F.3d at 1522.

144. *Williamson*, 904 F. Supp. at 1552.

145. *Id.* at 1554.

146. *Id.* at 1554-55.

Carter's apartment belonged to Williamson.¹⁴⁷ Certainly that's what the prosecutor suggested when he "said in his closing argument, '[T]here's a match.'"¹⁴⁸ Even the Oklahoma Court of Criminal Appeals misinterpreted and overstated the hair evidence in its opinion denying relief to Williamson. According to Judge Lumpkin's opinion, "Hair evidence placed [Williamson] at [Carter's] apartment."¹⁴⁹

A similar travesty occurred with respect to Hett's testimony that he had compared samples from Gore—the man who claimed to have saved Carter from unwanted advances the night she was killed—to hairs found at Carter's apartment.¹⁵⁰ Ward completely missed the critical fact that Hett's report could not eliminate Gore as a suspect, and the jury was left with the opposite impression.¹⁵¹ This misimpression was reinforced when the prosecutor was permitted to argue in closing—without objection—that Gore had been eliminated as a suspect.¹⁵² In fact he had not.

Had Ward done some basic research, he would have learned that the Law Enforcement Assistance Administration had sponsored a national Laboratory Proficiency Testing Program.¹⁵³ Somewhere between 235 and 240 crime labs throughout the country participated in a comparison between police laboratory reports and analytical laboratory findings on different kinds of evidence, including hair. Overall, the police labs scored the lowest in the area of hair analysis. Error rates for this so-called forensic science went as high as sixty-seven percent on individual samples. The majority of police labs made mistakes on four out of five hair samples analyzed. Their accuracy rate was thus lower than if they had simply guessed.¹⁵⁴ To Ward's credit, when his motion for funds to hire a defense hair expert was denied at trial, he turned to an alternate source of funding, Williamson's sister.¹⁵⁵ To Ward's discredit, she refused to provide the money for an expert after Ward told her that her brother's chances for an acquittal were slim.¹⁵⁶

C. Political Pressure

On the fourth anniversary of Carter's death, Ada officials had still not charged anyone with her murder.¹⁵⁷

147. *Id.* at 1557.

148. *Id.*

149. *Williamson*, 812 P.2d at 397.

150. *Williamson*, 904 F. Supp. at 1550.

151. *Id.*

152. *Id.*

153. *Id.* at 1556.

154. *Id.*

155. *Williamson*, 904 F. Supp. at 1579 (aff. of Williamson's sister, Renee Simmons).

156. *Id.* In her affidavit, Williamson's sister explained that she had to be careful with money she sent to her brother. Once, while awaiting trial, Williamson spent money she sent to him to buy a barbeque dinner for the entire jail. The Oklahoma Court of Criminal Appeals upheld the denial of funds for a defense hair expert, citing Adolph Munson's case for the proposition that the Supreme Court landmark decision of *Ake v. Oklahoma* only applied to the expert assistance of a psychiatrist. *Williamson*, 812 P.2d at 395.

157. Scheck et al., *supra* n. 110, at 135.

D. Unscrupulous Police Work

Four hairs found at the crime scene, allegedly left there by Williamson, were not enough to convict, let alone secure, a death sentence. More was needed, and more was provided by Terri Holland. Holland was a drug-using, check-kiting scam artist whose four-month stay as a guest in the Pontotoc County jail made her a prosecutorial treasure.¹⁵⁸ While in jail, Holland testified that she heard Karl Fontenot confess to the murder of Denice Haraway, a young woman who disappeared without a trace.¹⁵⁹ She claimed that there was no deal offered her in exchange for her testimony against Fontenot. Nonetheless, despite two prior felony convictions, she was given a sentence of no more than eleven months for feloniously uttering bad checks. “Karl Fontenot went to death row. Terri Holland went home.”¹⁶⁰

Once released, Holland continued to pass bad checks and fled Oklahoma for the refuge of New Mexico. Although it was unusual—to say the least—for police from Ada to have the time, money, or inclination to pursue a check kiter who has left the state, someone in Pontotoc County wanted her back desperately, so Oklahoma detectives tracked her down and returned her to Oklahoma.¹⁶¹ These detectives knew Holland from her exemplary work in the Fontenot case and they were now working on the Williamson case.

Facing a fourth felony conviction and serious jail time, Holland made a remarkable revelation. Not only had she heard Fontenot confess to capital murder, she also heard Williamson confess to capital murder—during the same four-month period in the Pontotoc County jail. Holland, you see, is just one of these people that complete strangers cannot help but confess capital murder to.¹⁶² This time, the district attorney dropped all charges against Holland after she promised to pay restitution. Without Holland, the odds of convicting Williamson were slim. But with her testimony, Williamson’s chances for an acquittal all but evaporated.¹⁶³

158. *Id.* at 134.

159. Robert Mayer, *Dreams of Ada* (Viking 1987).

160. Scheck et al., *supra* n. 110, at 134.

161. *Id.* at 134–35.

162. And why had Holland not come forward with this information before? Well, she assumed that everyone knew that Williamson had confessed. *Id.* at 135.

163. According to informed estimates, four out of ten arrests result in a confession, and in nearly twenty-five percent of all prosecuted cases the defendant would not have been convicted but for his confession. Paul Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 *Nw. U. L. Rev.* 387, 424 (1996); see also National Center for Policy Analysis, *Handcuffing the Cops: Miranda’s Harmful Effects on Law Enforcement*, <http://www.ncpa.org/studies/s218/s218a.html#confession> (accessed Sept. 23, 2006). In Illinois, false confessions contributed more than any other problem to the seventeen wrongful convictions and death sentences since 1977. Scott Turow, *Ultimate Punishment: A Lawyer’s Reflections on Dealing with the Death Penalty* 9, 31 (Farrar, Strauss & Giroux 2003).

On his last Friday in office, January 10, 2003, Illinois’ Republican Governor George Ryan pardoned four men on death row on grounds of innocence. These four men—released not only from the shadow of a death sentence but from prison itself—had another thing in common. All were convicted largely based on the strength of confessions obtained during the 1980s at the now notorious Area Two Violent Crimes station house in Chicago. Evidence that surfaced during a police disciplinary proceeding and a related federal civil rights trial revealed that station house Commander Jon Burge had approved the use of systematic torture to induce reticent suspects to clear their consciences. Commander Burge’s men employed interrogation techniques that bring to mind the recent international scandals involving atrocities committed by American soldiers against detainees both at Abu Ghraib prison in Iraq and Camp X Ray in Guantanamo, Cuba. In Chicago, Illinois,

E. *Incompetent Counsel*

Ward and Williamson got along about as well as Bobby Kennedy and Jimmy Hoffa. For some reason, Ward failed to inspire Williamson's confidence. Perhaps it was because Ward was blind, or maybe it had something to do with the fact that Ward had never before tried a capital case. Then again, even through the distorting haze of his mental illness, Williamson may have perceived that Ward would be a less than zealous advocate when Ward told the judge, "I don't intend to . . . spend any more time than is necessary on this, . . . Judge, I've got to make a living. I can't spend all my time on this case."¹⁶⁴

Because of Williamson's unpredictable and often violent behavior, Ward moved to withdraw as counsel.¹⁶⁵ He flatly told the court, "I can't represent him, Judge; I just can't do it. I don't know who's going to, but I can't. . . . I'm too damn old for it. I don't want anything to do with him, not under any circumstances."¹⁶⁶ Ward's motion was denied.¹⁶⁷ Ward's relationship with his client was so poor that he later swore in an affidavit that because he "expected some trouble [from Williamson.] . . . I arranged to have my son sit behind him during the trial with instructions to bring him to the ground if he made any sudden move toward me."¹⁶⁸ Ward's fears were not unfounded. During the preliminary hearing, Williamson became abusive and violent, knocking over counsel's table and threatening his co-defendant Fritz.¹⁶⁹ Williamson was physically restrained and the hearing continued in his absence.¹⁷⁰

Inexplicably, Ward did not request a competency evaluation for Williamson before his murder trial. His explanation for not pursuing this potentially life-saving issue was that Williamson had been found competent *three years earlier* in the escape from house arrest case, and none of the mental health professionals of whom Ward was aware had ever indicated that Williamson did not know right from wrong.¹⁷¹ Ward's palpably unsound decision was based on outdated and inadequate information and his obvious confusion between the tests for sanity and competency to stand trial.¹⁷²

police detectives applied electric shock to the genitals of prisoners, deprived suspects of oxygen by hooding them with typewriter covers, hung inmates from their handcuffs, beat and burned defendants, and forced games of Russian roulette on those unwilling to talk. One torture victim, Aaron Patterson, a violent gang leader, said that he confessed to murder only after being beaten and nearly suffocated over a twenty-four hour period. During a break in his interrogation, he found a paper clip and scratched a dated message which read "I lied about murders / Police threatened me with / violence slapped and / suffocated me with plastic." An investigator for Patterson's public defender later found and photographed this message. *Id.* at 96. The four pardons granted by Governor Ryan brought to seventeen the number of exonerated inmates in Illinois since that state reinstated capital punishment in 1977. Ryan also commuted the sentences of the other 167 people left on Illinois' death row. Three of these received sentences of forty years; 164 others were re-sentenced to life without the possibility of parole. *Id.* at 98.

164. *Williamson*, 110 F.3d at 1512.

165. *Williamson*, 904 F. Supp. at 1543.

166. *Id.* at 1543-44.

167. *Williamson*, 110 F.3d at 1512.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Williamson*, 904 F. Supp. at 1536-37.

172. The test for a defendant's competency to stand trial is whether he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as

Had Ward conducted the most basic of investigations into his client's mental health history, he would have stumbled upon significant evidence casting doubt on the validity of Dr. Garcia's conclusions. Garcia, who certified that, once properly sedated with Thorazine, Williamson was competent to stand trial, was himself suffering from severe untreated bipolar disorder.¹⁷³ In 1986, the year after diagnosing Williamson, Garcia committed suicide.

Perhaps most egregious, Ward failed to investigate and present to the jury the fact that another man, Ricky Simmons, had confessed to Carter's murder.¹⁷⁴ And unlike Williamson's purported confession to Holland, Simmons' videotaped confession recounts that he raped and strangled Carter.¹⁷⁵ Although Simmons' confession was inaccurate in other respects, had Ward introduced the evidence available to him the jury would have learned that two men, both with apparent mental problems, had given factually inaccurate confessions to the same crime.¹⁷⁶ Finally, like Adolph Munson's trial attorneys, Ward presented no evidence in the sentencing phase to seek to persuade the jury to return a sentence other than death.¹⁷⁷

In a sweeping eighty-six-page opinion, federal Judge Frank Seay of the Eastern District of Oklahoma reversed Williamson's conviction and sentence in 1995. In affirming Judge Seay's conclusion that Williamson was entitled to a new trial, the Tenth Circuit Court of Appeals rejected Seay's heavy reliance on the patent unreliability of hair evidence and focused instead on the ineffectiveness of Williamson's trial lawyer.¹⁷⁸ Specifically, the Tenth Circuit held that Ward provided constitutionally inadequate assistance

in failing to fully investigate Mr. Williamson's history of mental illness, failing to seek a competency determination, failing to challenge the credibility of his client's confession, and failing to investigate and present to the jury the fact that another man [Ricky Simmons] had confessed to the crime.¹⁷⁹

Williamson and Fritz were finally released after DNA screening ruled both men out. The DNA evidence taken from Carter's body and clothing did not belong to her, did not belong to Fritz, and did not belong to Williamson. On April 15, 1999, twelve years after their wrongful convictions, Williamson and Fritz were set free.¹⁸⁰

Soon after officials announced the release of Williamson and Fritz, Gore escaped from prison. Gore, the last person seen with Carter, was the only witness who placed

well as a factual understanding of the proceedings against him" *Dusky v. U. S.*, 362 U.S. 402, 402 (1960).

173. *Williamson*, 110 F.3d at 1519. In the expert opinion of Dr. Phillip J. Murphy, a clinical psychologist who reviewed Dr. Garcia's personal medical history and his history of patient evaluations at Eastern State Hospital, Dr. Garcia's illness, in its manic form, was severe enough to affect his treatment and impair and distort his diagnostic judgment. *Id.*

174. *Id.* at 1521.

175. *Williamson*, 904 F. Supp. at 1552.

176. *Id.*

177. *Williamson*, 812 P.2d at 393.

178. Scheck et al., *supra* n. 110, at 146.

179. *Williamson*, 110 F.3d at 1523; see also Mark A. Hutchison, *Court Overturns Murder Verdict*, *Daily Oklahoman* 12 (Apr. 11, 1997).

180. Charles T. Jones, *DNA Tests Clear Two Men in Prison: Escapee Sought in Slaying of Waitress*, *Daily Oklahoman* 1 (Apr. 16, 1989).

Williamson at the Coachlight Club the night Carter was murdered.¹⁸¹ According to Gore's testimony at Williamson's preliminary hearing, that night Carter told Gore that Williamson was "bugging" her and asked him to rescue her.¹⁸² At the time of his escape, Gore was serving forty years as a result of a plea bargain made a week after he was listed as a witness in Williamson's case.¹⁸³ Gore had been convicted on numerous counts including burglary, kidnapping, shooting with intent to injure, and feloniously pointing a weapon—all arising from his attack on a young woman and her daughter.¹⁸⁴ Gore was eventually recaptured and DNA tests ultimately linked him to the murder of Carter.¹⁸⁵

IV. ROBERT LEE MILLER, JR.

Finally, the third case to be examined in this article is the wrongful conviction of Robert Lee Miller, Jr. The northwest Oklahoma City Military Park neighborhood was struck with revulsion and terror in late 1986 when eighty-three-year-old widow Anna Laura Fowler was discovered dead in her bed, a victim of rape and murder.¹⁸⁶ Four months later, Zelma Cutler, a ninety-two-year-old widow who lived in a corner house in the same neighborhood, met the same cruel fate.¹⁸⁷ A forensic search of the Fowler and Cutler crime scenes yielded scant physical evidence: semen testing showed that both rapes were committed by someone with type-A blood, and three hairs found on sheets covering Cutler's body were said to have "negroid" characteristics.¹⁸⁸

There were striking similarities in the crimes: both women lived in the same neighborhood along the 1100 block of NW 31st Street.¹⁸⁹ Indeed, the houses in which the murders occurred were catty-cornered to each other.¹⁹⁰ Both women lived alone.¹⁹¹ Both women lived in corner houses.¹⁹² Both women were white.¹⁹³ No property was taken from either home.¹⁹⁴ No murder weapon was discovered.¹⁹⁵ Both women were suffocated under the weight of their attacker. In both victims' bedrooms, police found knotted rags.¹⁹⁶ In both victims' yards, someone had pulled the telephone wires out of the ground.¹⁹⁷ Someone had killed the power to both homes by switching off the circuit

181. *Williamson*, 110 F.3d at 1511 n. 2.

182. *Id.*

183. *Id.*

184. *Id.*; *Williamson*, 904 F. Supp. at 1549.

185. Mark Fuhrman, *Death and Justice* 21 (HarperCollins 2003).

186. Blyline, *Man Reported Competent*, Daily Oklahoman 2 (May 22, 1987) (noting that Anna Fowler was murdered on September 3, 1986).

187. *Id.* (noting that Zelma Cutler was murdered on January 11, 1987).

188. Stanley Cohen, *The Wrong Men* 207 (Carroll & Graf 2003).

189. Nolan Clay, *Suspect Says He Saw Killings of 2 Women in Dreams*, Daily Oklahoman 1 (Aug. 15, 1987).

190. Scheck et al., *supra* n. 110, at 79.

191. *Id.*

192. *Id.*

193. *Id.*

194. Cohen, *supra* n. 97, at 207.

195. *Id.*

196. Scheck et al., *supra* n. 110, at 79.

197. *Id.* at 79–80.

boxes.¹⁹⁸

Twelve of Oklahoma City's finest were assigned to a Military Park task force.¹⁹⁹ Detectives soon had a list of the usual suspects: 173 black men, all of whom were interrogated.²⁰⁰ From this group, twenty-three suspects gave blood.²⁰¹ Miller was among those tested whose blood was A-positive.²⁰² He lived three blocks from the homes of the murdered women.²⁰³ During the four months between the Fowler and Cutler murders, a Thanksgiving Day attempt to break-and-enter into the Military Park home of a third elderly woman was thwarted when a group of nuns heard the scuffle between the attacker and the victim and called the police.²⁰⁴ The attacker eluded capture.²⁰⁵

On February 23, 1987, detectives visited Miller at home and asked for his assistance in solving the murders.²⁰⁶ Miller was not himself that day.²⁰⁷ A regular drug user, Miller believed that that morning an angry roommate may have slipped him some PCP, a powerful hallucinatory drug.²⁰⁸ Nonetheless, he wanted to help, so he accompanied the detectives to the station.²⁰⁹

A. "Details Only the Killer Would Know"

Detective Jerry Flowers led the interrogation. When Miller said, "I've got these powers' . . . 'I can see things through the killer's eyes,'"²¹⁰ he began fashioning his own noose. Detective Flowers signaled his partner David Schupe, watching through a two-way mirror, to turn on a hidden video recorder.²¹¹ Miller continued, "I was dreaming about it one night and you know, probably almost the same night it happened' . . . 'You know, I have dreams like that, you know, come to me all the time.'"²¹² According to one account, "[t]he next twelve hours were a numbing drone of hallucination, interrogation, exorcism, revival, and nonsense."²¹³ Another researcher observed, Miller "proceeded to regale his interrogators with an array of dreams and visions that regularly invaded his sleep, offering premonitions, paranoid warnings, and insights into events that had already occurred."²¹⁴ Nonetheless, as Miller's court-appointed public defender, Ron Evans, correctly noted, the videotapes—characterized by the prosecution as Robert

198. *Id.* at 80.

199. *Id.*

200. *Id.*

201. Scheck et al., *supra* n. 110, at 79.

202. *Id.*

203. *Id.* at 80.

204. Telephone Interview with Lee Ann Peters, Robert Miller's Attorney (Nov. 1, 2005).

205. *Id.*; Scheck et al., *supra* n. 110, at 80 (reporting that a man had been seen on the back porch of the third elderly woman's home, unscrewing a light bulb and trying to force his way inside).

206. *Id.*

207. Telephone Interview, *supra* n. 204.

208. Scheck et al., *supra* n. 110, at 80.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Scheck et al., *supra* n. 110, at 80.

214. Cohen, *supra* n. 97, at 208.

Miller's confession—were the chief evidence against him.²¹⁵

Near the beginning of the taped interrogation, when Miller complains of being disturbed by demons, spirits, and spells, Detective Bob Woods helpfully yells out—presumably to no one in particular—“Satan, get back in the corner!”²¹⁶ To prevent future interruption by uninvited guests, Detective Woods gave Miller a pocket Bible.²¹⁷ Then, in what can only be described as a particularly clever faith-based initiative, Miller and Detectives Woods and Flowers each solemnly placed a hand on the Bible, a collective embrace which lasted for several hours.²¹⁸

Inspired perhaps by the infamous Christian burial speech of *Brewer v. Williams*,²¹⁹ as the interrogation progressed, the detectives quoted Bible verses, prayed, and called upon God himself to help Miller better remember his dreams: “Oh Lord, give this man the power to recall the vision,” beseeched one detective.²²⁰ Once the detectives sprang their trap and began insisting that Miller was the killer, Detective Flowers performed the evangelical equivalent of the *Miranda* warnings: he put Miller's hand on the Bible and told him he can't lie to God.²²¹ Miller prayed right back at him: “my Father, Lord in Heaven, let them know that I did not do this.”²²² No worries. One half expects the good detectives to inform Miller of his right to the assistance of an exorcist.

In one sense, as soon as prosecutors were able to characterize Miller's vision statement—his recounting of his dream—as a confession, Miller was as good as convicted. Studies show that seventy-three percent of juries will vote to convict even in the face of a defendant's repudiation of the so-called confession and physical evidence contradicting the confession.²²³ Miller did testify at trial and explained, “I told them I had a vision from the Lord. An angel came to me—I assume it was my grandmother—warning me someone was trying to frame me.”²²⁴ The jury chose to believe that Miller had not been visited in his dream by his dead Choctaw grandmother and sentenced him to death. Twice.²²⁵

Commenting on the videotaped statements, District Attorney Robert “Cowboy Bob”²²⁶ Macy told Miller's jury, “He knew detail after detail after detail. Details only the killer would know.”²²⁷ Prosecutor Ray Elliott would later argue in court that Miller

215. Clay, *supra* n. 189.

216. *Id.*

217. *Id.*

218. *Id.*

219. 430 U.S. 387, 392–93 (1977).

220. Clay, *supra* n. 189.

221. *Id.*

222. *Id.* Miller's faith would survive his conviction. When jurors took only ninety-five minutes to find him guilty, Miller denied his guilt and said, “I want to ask for a special prayer for the jurors for they know not what they done.” Nolan Clay, *Jurors Decide Death Penalty in City Killings*, Daily Oklahoman 1 (May 20, 1988).

223. Scheck et al., *supra* n. 110, at 92.

224. Nolan Clay, *Man Denies Slays, Cites Visions for Details*, Daily Oklahoman 10 (May 19, 1988).

225. *Id.*

226. Macy's colorful nickname derived from his penchant for wearing cowboy regalia—boots and Stetson—along with his trademark bolo tie. Miller's nickname, on the other hand, was “Rob Dog.” Clay, *supra* n. 188. Both nicknames bring to mind Ambrose Bierce's observation that for every man there is something in the vocabulary which will stick to him like a second skin. It only remains for his enemies to find it. Ambrose Bierce, *The Devil's Dictionary* 102 (Bloomsbury 2003).

227. Clay, *supra* n. 224. This oft-repeated artifice, that the soon-to-be-framed suspect “knew details only the

knew some “[forty-five] facts”²²⁸ that were known only to the killer.

Half a second of reflection should be sufficient to give life to this absurd assertion. Facts “known only to the killer” are by definition known also by the police officers and the prosecutors. And just because the police withhold select details from the press does not mean that these undisclosed facts do not soon become common knowledge, particularly among neighbors of the crime victims. Miller’s court-appointed attorney did his best to convince the jury that Miller also gave police details that did not match crime scene evidence and that the details which did match the evidence were mere coincidence.²²⁹ Miller’s lawyer’s best was not good enough.

Let’s examine just one small portion of the interrogation which the prosecution claimed resulted in Miller disclosing facts known only to the killer.

Elliott argued in public and in the press that Miller told the detectives things about each of the murders that were so knowing, he had to have been part of the murders. During the questioning, Miller was brought to the scenes of the crimes, which included the two murders and a third case, an attempted break-in on Thanksgiving Day, 1986, that was thwarted when the police arrived and the burglar fled. At the scene of the break-in, Elliott said, Miller showed the detectives the escape path. “He was like a bird dog on point,” said Elliott.

Yet on the transcribed tape, Miller seems to know little about the flight of the burglar until he is prompted by the detectives. Asked about the events of that Thanksgiving in 1986, Miller says he ate turkey dinner with his sister. The detective, Jerry Flowers, lays out the basics.

FLOWERS: Think . . . Go into your vision, I wanna see this, I wanna hear it, this is real important, by that church Thanksgiving morning, it’s a full moon, something happened up there around one of those churches, or up around that church.

MILLER: That must have been when this stuff happened.

FLOWERS: What happened?

MILLER: Something happened up that way . . .

FLOWERS: Did this demon, did this demon, working through this body, this, person, try to do something that day or that night?

MILLER: Maybe.

FLOWERS: What?

MILLER: Did something, I can’t, I can’t recollect. They did something.

FLOWERS: What?

MILLER: ‘Cause that was when I left my sister’s house . . . Naw, I was with my

killer could know,” was trotted out during Miller’s marathon interrogation by detective David Shupe. Miller responded, “I never done anything like that in my life. I never would. . . . I had dreams about it. It’s not me.” Clay, *supra* n. 189.

228. Ed Godfrey, *Judge to Mull Charge Reinstatement*, Daily Oklahoman 11 (Mar. 1, 1997).

229. Clay, *supra* n. 224.

parents, my brother came for Thanksgiving from the penitentiary, and we had dinner with him.

FLOWERS: Okay. Now let me ask you this. . . . Is that the day that this demon-possessed person nearly got caught, that morning, early that morning?

MILLER: I think so.

FLOWERS: How did he nearly get caught? Look through your eyes and see. . . .

MILLER: I think the police was chasing him, somebody was chasing him.

In this exchange, Miller says nothing about an escape until Flowers tells him about it. A few minutes later, they return to this attempted break-in.

FLOWERS: You're there, you're there right now, you're there at the back door, looking through the eyes of the person kicking on the back door, trying to get in, you see that? You're there, you see the police, you hear the police coming up here, you're scared, you want to run away.

MILLER: It's not me.

Some 130 times during the tape, when detectives switch from the third person to the second, from "he" to "you," Miller cuts off the conversation and denies that he is present.

Then there was the matter of the underwear. No one could forget the dramatic presentation by District Attorney Macy of the underwear band dropped at one of the murders. Fruit of the Loom, the same as that worn by Miller.

That Robert Miller had a "vision" of underwear left at the scene was not surprising at all: early in the interrogation, he was asked repeatedly what the killer had left at the scene. Miller guessed about articles of clothing, tools, until he at last hit on the underwear. Then the detectives locked in on that detail.

FLOWERS: When the man got through doing what he was doing to the woman, think really hard 'cause this is really important. Did he leave anything with her?

MILLER: He might have.

FLOWERS: What would he have left, look into your dreams and tell me what he would have left. Did he leave any articles?

MILLER: Yeah, something.

FLOWERS: What did he leave.

MILLER: 'Cause he was in a hurry.

Five questions. Miller is on a verbal wander. The help of a Higher Power was summoned.

FLOWERS: Jesus, help this man to recall. . . . What would he have left there with that woman?

WOODS: Help this man remember, Jesus.

MILLER: He left something.

Maybe he ran out and left something behind, not knowing it. Maybe he did it on purpose. Maybe . . .

FLOWERS: Was it some type of article or what kind of article was it, a rock, was it some type of object, was it a clothing item?

MILLER: Maybe.

FLOWERS: Maybe what?

MILLER: 'Cause I have some clothes missing, too, at 29th Street.

What kind of stuff, Flowers wanted to know. Pants, said Miller. Tools. Coats. Slacks. Shirts. Many things. He would have to go through it all.

FLOWERS: What did—look at me, Robert. Let's go back in your dream. Let's go back in your dream. What did this person leave inside that house, that maybe it was stolen from you . . . ? What was left in the house?

MILLER: Might have been something of my hair. I don't know.

Frustrated, the detectives returned to the subject of clothing. Close your eyes. What kinds of clothes would he have left?

MILLER: Maybe a shoe or something. I don't know. I'll have to check my shoes again.

That wasn't the right answer. Look in the dream and see what the killer was holding in his hand. Or did he forget something?

MILLER: He might have left that knife or he left something out of his pocket.

That wasn't it, either. The detectives pressed on. What would he have left to set you up, Robert. Miller suggested hair.

FLOWERS: Look at this person's body, what's this person missing off of his body. Does he have his shirt on, what is he missing?

MILLER: It might have been the shirt.

FLOWERS: What is he missing, look at the person.

MILLER: She tore something off of him. . . . She tore some of the clothes. Probably the knife.

FLOWERS: Does he have shoes on?

MILLER: I don't . . . He might have left one.

FLOWERS: Does he have pants on?

MILLER: Uh-huh.

FLOWERS: Look at this person, he's fixing to leave, but he realizes he's leaving something, what is it he's leaving?

MILLER: It might have been underwear or something, he left something in the house.

FLOWERS: Did he intentionally leave it in the house?

MILLER: Un-huh.

FLOWERS: Accidentally?

MILLER: Uh-huh. Didn't know he left it. He left it, but he didn't know he left it.

WOODS: What is it. Look at your dream. What is it?

MILLER: When he raped her, he took his clothes off, he might have left his underwear or something, but he left something I know, he didn't know he left it, though, but he left it.

FLOWERS: He left what?

MILLER: He, uh, when he took his pants off and raped her, I don't know.

What, what, what, they demanded.

MILLER: He might have left his hat, ski mask, or something he left because. . . He forgot to put something back on because he was in a hurry.

FLOWERS: What would it be?

MILLER: I don't know.

A moment later, Miller suggests it was gloves. By that point, he had suggested virtually every stitch or tools that a rapist might have carried.

Many hours later, they return to the underwear. This time, the police deal with it as an established part of Miller's memory.

FLOWERS: You know, you told me a while ago that uh, this guy that's in this vision that you see, even left some clothing articles, either he brought them or forgot to, forgot to, take them.

MILLER: Maybe.

FLOWERS: And you told me that, ah, you this uh, was his underpants, his shorts, that he left at one of them, which one did he leave that at, the first one or the second one?

MILLER: I was trying to tell you then, did you write it down?

FLOWERS: Yea, we was trying, we was doing it but you never really elaborated on it that much. Did he leave that at the first one or the second one?

MILLER: I don't know for sure right now.

FLOWERS: What kind, what kind of underwear was it?

MILLER: I don't know. I don't know exactly.

FLOWERS: Are you hungry?

MILLER: Yes.

They discuss getting hamburgers.

FLOWERS: What kind of underwear do you have on?

MILLER: I think they're Fruit of the Loom.

FLOWERS: Let's see.

They inspect his underwear, see that it is Fruit of the Loom, and that it is size 30-32.

. . . .

In the last hours of the interrogation, they return again to the topic of the underwear.

FLOWERS: What does he do now?

MILLER: Leaves the room.

FLOWERS: Did he put his clothes on?

MILLER: Some of them.

FLOWERS: What did he not put on?

MILLER: I don't know. . . .

FLOWERS: Did he forget to put something on?

MILLER: I think so. . . .

FLOWERS: What? You're there, you can see him, Rob, now tell me, he wants you to tell me.

MILLER: He left something.

FLOWERS: He's wanting you to tell me, Rob. . . . This is it, he's wanting you to tell me. . . . What does he leave in that room?

MILLER: (shakes head no, trying to clear head)

FLOWERS: Look real close. . . . Where does he leave this item in the room, where is it?

MILLER: He forgot something, either his underwear or a glove. . . .

Another powerful detail cited by the prosecution was Miller's supposed knowledge of the method of entry into the women's homes. "He picks the glass out of the frame and stacks it in a sack next to the trash—in the trash next to the door," Assistant D.A. Ray Elliott told the jury.

"Now who knew that trash—that glass—had been stacked in the trash? The police detectives that were there. Who else? The defendant."

In fact, Robert Miller didn't quite describe the glass going into a sack. But he did describe the killer removing the glass with some care. With the cheerleading Detective Flowers pushing for more and more details from Miller's "vision" of the killing, he describes the burglar's entrance to the Cutler residence.

FLOWERS: What's he doing, what's he doing?

MILLER: Trying to get in the back door . . .

FLOWERS: He's cut the lights off, what's he doing to that back door . . . ?

MILLER: Broke the glass . . .

FLOWERS: He broke the glass, how did he break the glass?

MILLER: Some kind of object.

FLOWERS: What's he using?

MILLER: (no answer)

FLOWERS: What's he using on that back door?

MILLER: Tools.

FLOWERS: Has he broke the glass? Where's the glass, what's he doing with that glass, where is it . . . ? Where is the glass?

MILLER: Takes it out.

FLOWERS: What's he doing with it, he's taking it out what . . . ?

MILLER: Out of the frame . . .

FLOWERS: He's taking the glass out of the frame, what's he doing with it . . . ?

MILLER: Put it somewhere . . .

FLOWERS: Where's he putting that glass . . . ? Look at him, Robert, you seen him . . . What's he doing with that glass?

MILLER: I don't know. (inaudible)

FLOWERS: Look, Robert, he's taking it out of the frame, what's he doing with that glass?

MILLER: Puts it somewhere.

FLOWERS: Where's he putting it, Robert, what's he doing with it . . . ? You see him, don't you?

MILLER: He lays it on a back porch somewhere. . . .

FLOWERS: He's laying that glass on the back porch. . . .

MILLER: Somewhere.

FLOWERS: What's he doing with that glass . . . ?

MILLER: He takes it out

FLOWERS: Is he just throwing it down, what's he doing with it?

MILLER: He's removing it.

FLOWERS: He's removing it from the frame. . . .

MILLER: *Uh-huh.*

FLOWERS: *Now what's he doing . . . ? You see him, what's he doing?*

MILLER: *He puts the glass somewhere. . . .*

FLOWERS: *Puts the glass on somewhere.*

MILLER: *On that back porch. . . .*

FLOWERS: *How's he puts it down, what's he doing to it?*

MILLER: *He's trying to be quiet. . . .*

FLOWERS: *He's trying to be quiet, now then the glass is broke, he's removed the glass from the frame, what's he doing . . . ? You see him. . . . Look through his eyes.*

MILLER: *He sticks his arm through.*

FLOWERS: *He sticks his arm through the Door. . . . What's he doing?*

MILLER: *Trying to unlock the door.*

As Ray Elliott said, the DNA did not erase the videotape. Indeed, the videotape saved his life.²³⁰

Eventually Miller was visited by a genuine angel, one more persuasive than his dead Choctaw grandmother: Lee Ann Peters, the public defender assigned to handle his direct appeal.²³¹ Peters had a particular interest in the Fowler and Cutler murders because her grandmother lived in the same Military Park neighborhood.²³² Peters' boss, Oklahoma County Public Defender Robert Ravitz, became convinced of Miller's innocence and called a detective to tell him that he believed that Miller had been wrongfully convicted.²³³ The detective answered, "Then why did the killings stop when Miller was arrested?"²³⁴

Peters' thorough review of the records in the case uncovered a critical report prepared by Dr. Moses Schanfield. Dr. Schanfield's report revealed that he had tested the allotypes of both Miller and one Ronald C. Lott against the crime scene forensic evidence. His conclusion that only Lott could be eliminated as a suspect on this basis was, of course, not helpful. But the fact that Lott had been tested in August—even though Miller had been arrested the preceding February—was suspicious.

Ravitz asked Peters to check on the arrest records of Lott, who by this time was himself in prison—for the rapes of two elderly women within two miles of the murders of Fowler and Cutler.²³⁵ Both of Lott's victims survived the rapes; both were in their seventies.²³⁶ Nothing was stolen from either victim except a handgun which the rapist

230. Scheck et al., *supra* n. 110, at 93–101.

231. Telephone Interview, *supra* n. 207.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Cohen, *supra* n. 97, at 209.

had taken away from one of the women.²³⁷ The handgun was found in Lott's possession, and his fingerprints were found at both crime scenes.²³⁸ Perhaps most significant is the fact that both rapes occurred after Miller's arrest.²³⁹ So the Military Park crime spree continued even after Miller had been taken into custody. One more thing. Lott's blood type? A-positive.²⁴⁰

Further digging by Peters uncovered the fact that OSBI chemist Joyce Gilchrist—an African American woman affectionately known by prosecutors as “Black Magic” because of her unique ability to testify and transform weak forensic evidence into damning, incontrovertible proof of guilt beyond a reasonable doubt²⁴¹—played a role in Miller's conviction and death sentence.²⁴² Gilchrist, who would years later attain national celebrity status, was the darling of Macy's lethal forensics squad—the famed Oklahoma City chemist whose junk science—what some might term “voodoo science”—helped send untold numbers of innocents to prison.²⁴³ Gilchrist revealed that there were twenty-three suspects who voluntarily gave blood in connection with the investigation of the Fowler and Cutler murders.²⁴⁴ A number of these suspects were eliminated by their blood groupings.²⁴⁵ Those not eliminated were asked to submit hair samples.²⁴⁶ More suspects were eliminated through hair analysis. But Peters noticed something curious: there was a name on the list of hair sample donors that did not appear on the list of blood sample donors. Ronald Lott.²⁴⁷

To his credit, Evans had the lab results obtained by Joyce Gilchrist and Mary Long checked through electrophoresis.²⁴⁸ Evans sent cloth samples from the crime scene to Brian Wraxall, an expert in California, for independent testing. But because Gilchrist did not release the material to the defense until just before trial, Wraxall's initial tests were confirmatory of Gilchrist's results.²⁴⁹ Wraxall was unable to exclude Miller and thus not called as a witness.²⁵⁰ In a marvelous stroke of serendipity, Wraxall kept and properly preserved the cloth cuttings, enabling Peters to order more sophisticated tests that had been developed since Miller's trial.²⁵¹

Trial attorney Evans also inquired, perhaps too timidly, into how much newly developed DNA testing would cost.²⁵² When the prosecutor rattled off a figure of

237. *Id.* at 209–210.

238. *Id.* at 210.

239. *Id.* at 209.

240. *Id.* at 210.

241. *Junk Justice and Okie Science: Joyce Gilchrist*, <http://bubbaworld.com/gilchrist.html> (accessed Feb. 18, 2007).

242. Telephone Interview, *supra* n. 207.

243. *Junk Justice and Okie Science*, *supra* n. 243.

244. Telephone Interview, *supra* n. 207.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Telephone Interview, *supra* n. 207.

250. *Id.*

251. *Id.*

252. *Id.*

thousands of dollars, Evans gave up on seeking the test.²⁵³ He considered it, explored it, but took the word of the prosecutor that the test was cost prohibitive.²⁵⁴

When Peters became Miller's direct appeal lawyer, her boss Bob Ravitz authorized DNA testing.²⁵⁵ They sent evidence swatches to Life Codes for testing.²⁵⁶ Life Codes reported that the material was too degraded for accurate testing to occur.²⁵⁷ Because it was believed that there was insufficient material to test, Life Codes did no testing.²⁵⁸

After some time, Miller's defense counsel received a bizarre offer from an unlikely ally. Prime Time Live, then the epitome of high-class, hard-hitting investigative television reporting, offered to have the Miller case evidence subjected to more sophisticated analysis, the newly-developed DQ Alpha testing, for no charge.²⁵⁹ Prime Time Live required but one small stipulation: Peters and Miller would not learn the results until they were revealed during a live national television broadcast.²⁶⁰ No deal. Even though Peters deeply believed in Miller's innocence, she was unwilling to entrust his life to a third party.²⁶¹

She did, however, with some admitted trepidation, accept Wraxall's suggestion that he perform DQ Alpha testing on the case evidence.²⁶² Wraxall tested the Miller evidence using the DQ Alpha protocols and his results excluded Miller. Peters could not expect Oklahoma prosecutors to accept the test results of a defense expert, particularly one from California. So she encouraged the State to perform its own independent DQ Alpha tests. When the State did so, their results confirmed Wraxall's exculpatory conclusions.

On February 24, 1995—eight years and one day from the date of Miller's so-called confession—the Oklahoma Court of Criminal Appeals granted an application filed jointly by the prosecution and the defense to reverse Miller's convictions as a result of newly discovered evidence obtained through DNA testing.²⁶³ Those of you who suspect that Miller would soon be freed on the heels of his exoneration forget one critical fact. Oklahoma prosecutors do not make—much less admit—mistakes. At least not prosecutors in Cowboy Bob Macy's office. Even after Robert Miller's innocence was established by the defense—and confirmed by the State—he continued to languish in jail another three years.

How could this happen? Simple. The State switched the entire theory of the case. Confronted with DNA evidence linking Lott to the crime scene, the State hypothesized that both Lott and Miller—who had never met—collaborated on the murder. Lott's DNA meant he raped the victims. Miller's confessions showed that he was in on the

253. *Id.*

254. Telephone Interview, *supra* n. 207.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. Telephone Interview, *supra* n. 207.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Miller v. Jones*, 92 F.3d 1196 (table), 1996 WL 421933 (10th Cir. 1996).

killings.

While I was representing Timothy McVeigh in Denver, Colorado, I noticed during a trial recess that Barry Scheck, whose DNA work as a member of O.J. Simpson's "Dream Team" helped acquit Simpson, had come to watch the McVeigh trial. By then, Scheck had been approached to help Miller's defense team. In his book, *Actual Innocence*,²⁶⁴ Scheck recounts a profoundly disturbing chance encounter that day while waiting in line in hopes of getting a seat in the courtroom.²⁶⁵ The man in line in front of Scheck, turned to him and offered his hand.

"Ray Elliott," he said. He was in Denver from Oklahoma to visit his wife, who was working on the case for the feds. The name was well known to Barry [Scheck]: Elliott headed all the criminal prosecutions in the office of the Oklahoma City district attorney.

"You're the same Ray Elliott who still wants to try our client Robert Miller for murder?" asked Barry.

"The same one," said Elliott.

On that morning, Robert Miller had been on death row in Oklahoma for nine years. For six of those years, the state had DNA tests proving that he wasn't the killer. Yet he had languished. The whole plot of Miller's life stood between the two men in their pinstripe suits, shuffling toward the metal detectors.

"I just don't understand what's taking so long," said Barry. "The DNA shows who the real murderer is. And it's not Robert Miller."

"All the DNA proves is that there were two killers, not just Robert Miller," said Elliott. "All we know from the DNA is that he was not the donor of the semen. We know from Robert's own statement that he was there. He knew things that only the killer would have known."

"You know that he made one-hundred and thirty-three wrong guesses in that videotape," said Barry.

Elliott smiled.

"His own words put him at the scene of the murder. Don't you worry about it, Barry. We're going to needle your client."

Needle our client? Barry was bewildered.

"I am sorry," Barry said. "I don't know what you mean."

"You know. Lethal injection, the needle," explained Elliott. "We're going to needle Robert."²⁶⁶

Then one day, another personal hero of mine, Garvin Isaacs, picked up the phone

264. Scheck et al., *supra* n. 110.

265. *Id.*

266. Scheck et al., *supra* n. 110, at 78–79. Ray Elliott has denied ever making remarks about wanting to "needle" Miller, either to Barry Scheck or to Garvin Isaacs. Telephone Interview, *supra* n. 207. It is gratifying to know that either Elliott is innocent of such vulgar and callous insensitivity or that he has sufficient presence of mind to feel ashamed of having made these statements.

and listened as Scheck asked him to look into the Miller case. Issacs agreed to do so and, ably assisted by Nancy Zerr and investigator Bob Thompson, devoted the next eight months to securing Miller's freedom. Garvin was paid \$1 for his services. He has since raised his hourly rate.

According to Miller's other guardian angel, Peters, Issacs and his team took care of Miller and moved the case through the court. When Issacs learned that the charges were to be dropped, in a thoughtful act of generosity, he invited Peters to accompany him to the Oklahoma County jail so they could both inform Miller of the joyous news.

Oklahoma Assistant District Attorney Barry Albert was the original prosecutor handling both the Lott case and the Miller case. In fact, Miller's preliminary hearing had not been completed at the time Lott had his preliminary hearing. So Albert literally juggled both cases simultaneously.

At Lott preliminary's hearing, Albert noted that the Lott and Miller cases were eerily similar and actually used the words "déjà vu" in comparing the two cases. He indicated that he needed to inform Miller's lawyer, Evans, of the similarities and potentially explosive exculpatory evidence. Just what was Albert required to tell Evans? That Ronald Lott, an accused rapist, was a possible suspect. That Lott had been in the neighborhood around the time of at least one of the murders. That the Lott charges—like the charges against Miller—involved the sexual violation of elderly women. That Lott's victims lived within two miles of the murders attributed to Miller. That Lott's victims—like the victims in the Miller case—lived in houses on corner lots. That in the Lott case—as in the Miller case—knotted rags were left at the crime scene. That in both cases, the perpetrator had cut or attempted to cut the power to the victims' houses.

Albert swore until his dying day that he had informed Miller's trial attorney, Evans, of the exculpatory existence of rape suspect Lott and the stark similarities between the offenses Lott pleaded guilty to and the crimes for which the jury eventually sentenced Miller to death.²⁶⁷ If Albert told the truth, Evans is clearly guilty of malpractice. His failure to develop and present this startling evidence is virtually certain to satisfy the nearly insurmountable standard for ineffective assistance of counsel established in *Strickland v. Washington*.²⁶⁸

If Albert lied, then Albert went to his grave—and nearly sent Robert Miller to his own grave—having grossly violated his absolute duty to turn over exculpatory evidence established in *Brady v. Maryland*.²⁶⁹ A less charitable observer might conclude that a deliberate decision to withhold this lifesaving evidence from Miller's defense lawyer amounted to attempted murder in the first degree. Premeditated. Deliberate. Unconscionable. Unforgiveable. Whichever version you believe—here the prosecutors might argue that the truth is known only to Albert, Evans, and God—the justice system miscarried in a nearly fatal way.

267. *Id.*

268. *Strickland*, 446 U.S. at 686.

269. *Brady*, 373 U.S. at 87.

V. POSTSCRIPT

Adolph Munson remains in prison, still serving the second of two life sentences he received from the murders he committed at age nineteen. He is nearing sixty years old.

In 2003, Williamson and Fritz settled a lawsuit against the City of Ada, the State of Oklahoma, and several law enforcement officers. Although the total settlement figure was undisclosed, Ada's part of the settlement was reported to be \$500,000. A few years ago, Williamson came to my capital punishment class and held my students spellbound with his story. After his release, he lived for a time in Norman. He died of liver failure at age fifty-one in a Tulsa nursing home in December, 2004.²⁷⁰ His obituary ran in the *New York Times*.²⁷¹ John Grisham, the brilliantly successful author of numerous works of legal fiction, recently published his first book of non-fiction—a book about Williamson.²⁷²

Gore eventually took Williamson's place on death row. His cell, which he shares with another condemned prisoner, measures seven feet seven inches by fifteen feet five inches.²⁷³

Lott turned down a deal offered by prosecutor Elliott: implicate Miller and we will not seek to add any time to your existing sentences.²⁷⁴ Lott refused and, like fellow death-row inmate Gore, is locked in a two-man death-row cell in McAlester, awaiting death by lethal injection.

Elliott now sits as a district court judge in Oklahoma County. Macy retired and entered the early stages of Alzheimer's disease still bragging that he had tried more death penalty cases to verdict than anyone else in Oklahoma.

Miller moved out of state for a time but, for reasons known only to him, quietly moved back to Oklahoma some time ago.

I'd like to close with the words of Justice William Brennan, a man who serves as my daughter's namesake and continues to inspire me:

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.²⁷⁵

I hope I have approached the modest goal I set for myself at the outset and have demonstrated that, at least for Adolph Munson, and for Ronald Williamson, and for Robert Miller, "the basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—can not be answered in the affirmative."²⁷⁶

270. Jim Dwyer, *Ronald Williamson, Freed from Death Row, Dies at 51*, 154 N.Y. Times G3 (Dec. 9, 2004).

271. *Id.*

272. John Grisham, *The Innocent Man: Murder and Injustice in a Small Town* (Doubleday 2006).

273. Amnesty International, *Conditions in H Unit, Oklahoma State Penitentiary*, 51/34/94 AMR.

274. Telephone Interview, *supra* n. 207.

275. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

276. *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting).