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What We Can Learn About Appeals From Mr. Tillman's Case: More Lessons From Another DNA Exoneration

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**WHAT WE CAN LEARN ABOUT APPEALS
FROM MR. TILLMAN’S CASE:
MORE LESSONS FROM ANOTHER DNA EXONERATION**

*Giovanna Shay**

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* Assistant Professor of Law, Western New England College School of Law. J.D., Yale Law School. Thanks to Bridgette Baldwin, Laura M. Berg, Tina Cafaro, G. Jack Chin, Timothy Everett, Keith Findley, Brandon Garrett, Karen Goodrow, Christopher N. Lasch, Arthur Leavens, Daniel Medwed, Barbara Noah, and Sudha Setty for helpful comments. Of course, these readers sometimes contributed to the project by disagreeing with me. Thanks too to Jonathan Goldman who provided fine research assistance. Most of all, thanks to Mr. James C. Tillman for his graciousness and generosity. Any errors that remain are mine alone. Comments may be directed to gshay@law.wnec.edu. In the spirit of full disclosure, and out of an abundance of caution, I note that during the 1997–98 court term—six years after Mr. Tillman’s direct appeal was decided by the Connecticut Supreme Court and one year before his habeas appeal was considered by the Appellate Court—I clerked at the Connecticut Supreme Court for then-Senior Justice Ellen Ash Peters, the Justice who wrote the 1991 Supreme Court opinion in Mr. Tillman’s case. As is probably apparent from the dates, I was not involved with Mr. Tillman’s case in any way.

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In 2006, Mr. James Calvin Tillman became the first person in Connecticut to be exonerated through the use of post-conviction DNA testing. He joined a group of DNA exonerees that currently numbers more than 200 nationwide. In many ways, Mr. Tillman's case is a paradigmatic DNA exoneration—involving a cross-racial mistaken eyewitness identification, issues of race, and faulty forensic testimony. This Article uses the published opinions affirming Mr. Tillman's conviction—particularly his direct appeal to the Connecticut Supreme Court, and his appeal from the state habeas proceeding—to reflect on the meaning of appellate and postconviction proceedings. Does Mr. Tillman's exoneration reveal any problems with appellate litigation, or is it the product of mistakes in investigation and adjudication that are beyond the purview of appellate courts? There is no question that the root causes of Mr. Tillman's wrongful conviction must be addressed at the investigatory and trial level. In this article, I argue that state appeals courts play an important role in signaling the types of issues that should concern judges, prosecutors, and defense attorneys. Certain features of appellate review that appear in the Tillman opinions—heavy reliance on tools that I describe loosely as “harm-type” and “preservation-type” analyses, as well as deferential ineffective assistance of counsel standards—can contribute over the long-term to local criminal justice cultures that fail to guard adequately against wrongful convictions.

INTRODUCTION

In 1991, the Connecticut Supreme Court issued an opinion in the case of *State v. Tillman*,¹ affirming the conviction of Mr. James C. Tillman for the kidnapping and sexual assault of a Hartford office worker.² Mr. Tillman, an African-American man charged with the rape of a white woman, was convicted by a jury of five whites and one Hispanic.³ At trial, Mr. Tillman took the stand to maintain his innocence, and offered a childhood friend as an alibi witness.⁴ On appeal, Mr. Tillman claimed that the composition of the pool from which his jury was drawn—containing only two African-Americans (both women) and only one

1. *State v. Tillman*, 600 A.2d 738 (Conn. 1991).

2. *Id.* at 748.

3. *Tillman v. Warden*, No. 90844, 1997 WL 374961, at *3 (Conn. Super. Ct. 1997), *aff'd sub. nom.* *Tillman v. Comm'r of Corr.*, 738 A.2d 208.

4. Trial Transcript at 422, 434, *Tillman*, 600 A.2d 738 (No. 53889).

resident of Hartford—was racially skewed.⁵ He argued that this was especially damaging to him, since his trial followed a murder that received extensive publicity, a case in which another African-American man, Daniel Webb, ultimately was convicted and sentenced to death for the rape and murder of a white female Hartford office worker.⁶ In fact, Mr. Tillman was innocent.

Unaware that it was dealing with an actually innocent defendant, the Connecticut Supreme Court rejected Mr. Tillman's claim.⁷ It also rejected a claim that Mr. Tillman's jury should have been instructed that it could consider whether the victim was physically impaired or under stress in judging the potential accuracy of her identification of Mr. Tillman as her assailant.⁸ Mr. Tillman's forty-five year sentence was affirmed, over a dissent by Justice Berdon.⁹ The U.S. Supreme Court denied certiorari.¹⁰ Eight years after the decision on direct appeal, the Connecticut Appellate Court—Connecticut's intermediate appeals court—affirmed the rejection of Mr. Tillman's ineffective assistance of counsel claims in state habeas proceedings.¹¹ The Connecticut Supreme Court denied a petition for certification.¹² The state proceedings were at an end.

The opinions in Mr. Tillman's case were published in the Connecticut reports. The Connecticut Supreme Court said that the defendant had failed to offer sufficient supporting evidence for his jury array claim.¹³ Given the victim's "positive identification testimony," it was not reasonably probable that the jury had been misled by the lack of the eyewitness identification instruction.¹⁴ In the habeas proceeding, the Appellate Court affirmed the conclusion that trial counsel was not ineffective for failing to request a hearing on the jury selection claim.¹⁵ Trial counsel's investigation of that claim—consisting of a conversation with the jury clerk and observation of the racial make-up of the jury sitting in the next courtroom—was deemed professionally adequate.¹⁶

5. *Tillman*, 600 A.2d at 740.

6. *Id.* at 752 (Berdon, J., dissenting).

7. *Id.* at 743–44 (majority opinion).

8. *Id.* at 744–45.

9. *Id.* at 740.

10. *Tillman v. Connecticut*, 505 U.S. 1207 (1992).

11. *Tillman v. Comm'r of Corr.*, 738 A.2d 208 (Conn. App. Ct. 1999).

12. *Tillman v. Comm'r of Corr.*, 739 A.2d 1250 (Conn. 1999).

13. *Tillman*, 600 A.2d at 742–43.

14. *Id.* at 745.

15. *Tillman*, 738 A.2d at 212.

16. *Id.* at 212–13.

The petitioner had failed to establish prejudice.¹⁷ Mr. Tillman's story seemed to end like so many other criminal cases.

Eighteen years after Mr. Tillman's arrest, the script flipped. In 2006, with the help of Connecticut Innocence Project attorneys Karen Goodrow and Brian Carlow, Mr. Tillman was exonerated by postconviction DNA testing.¹⁸ Governor M. Jodi Rell signed a bill giving Mr. Tillman \$5 million in compensation.¹⁹ After Mr. Tillman was freed, the DNA evidence from the case was linked to another man, then incarcerated in Virginia.²⁰ James Calvin Tillman joined the ranks of an estimated 238 others in the United States exonerated by postconviction testing.²¹

This Article seeks to use Mr. Tillman's exoneration as an occasion to reflect on the appellate and postconviction processes in local criminal courts. State appeals courts function as leaders in local criminal justice systems. In their opinions, they not only resolve legal issues, but also signal to judges, prosecutors, and defense attorneys where they must tread carefully, and which types of issues they can safely ignore without worrying about a reversal or a finding of ineffectiveness. Mr. Tillman's case is interesting precisely because it initially presents as a run-of-the-mill criminal appeal, without a clear-cut claim of actual innocence or a slam-dunk legal issue. It challenges us to consider the aggregate impact of state courts' treatment of apparently routine cases, both on the development of doctrine and on the customary practice and psyche of the bench and bar.

Although this story takes place in Connecticut, it has national relevance and teaches lessons of general import. This is in part because *State v. Tillman* is in some ways nearly a paradigmatic DNA exoneration case. The case presents the recurring issues of mistaken eyewitness identification,²² and particularly erroneous cross-racial identification.²³

17. *Id.* at 212.

18. Matt Burgard & Elizabeth Hamilton, *Dogged Pursuit Freed Inmate; Lawyers Kept Up Hunt Until Finding Key DNA*, HARTFORD COURANT, June 11, 2006, at A1; Matt Burgard, *His Challenge Now: Freedom; Wrongly Convicted, Tillman is Formally Exonerated*, HARTFORD COURANT, July 12, 2006, at A1.

19. Mark Pazniokas & Colin Poitras, *Payment for the Pain; Putting a Price on 18 Stolen Years, Lawmakers Approve \$5 Million Award for Wrongly Imprisoned Man*, HARTFORD COURANT, May 17, 2007, at A1.

20. Colin Poitras & Tina Brown, *A Cold Case Suspect*, HARTFORD COURANT, Feb. 1, 2008, at A1.

21. As of May 29, 2009, the Innocence Project recorded 238 people exonerated by DNA. See The Innocence Project, <http://www.innocenceproject.org/know> (last visited May 29, 2009).

22. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 73 (2008) [hereinafter Garrett, *Judging Innocence*] (identifying four types of faulty evidence which "typically" supported the 200 erroneous convictions: "eyewitness identifications, forensic evidence, informant testimony, or

Through the jury venire claim,²⁴ the case also highlights the role of race in wrongful conviction.²⁵ An evidentiary issue that was litigated in Mr. Tillman's case raised the specter of faulty police investigation,²⁶ another common contributing factor to wrongful convictions.²⁷ The appellate opinions are also noteworthy for the issues that are *not* raised about the suggestive eyewitness identification procedure and inaccurate serology testimony.²⁸

While this Article is informed by social science research, it is not a "post-mortem" of *State v. Tillman*, as have been skillfully done in other cases.²⁹ Nor do I outline recommended criminal justice reforms: critical reforms have been urged, and in some areas are taking place, at the level of investigation,³⁰ trial adjudication,³¹ and forensic analysis.³² Indeed,

confessions").

23. *Id.* at 79 (noting that "48% of exonerees convicted based on eyewitness testimony were identified cross-racially").

24. *State v. Tillman*, 600 A.2d 738, 740–44 (Conn. 1991).

25. Garrett, *Judging Innocence*, *supra* note 22, at 66 (noting that "[m]any more exonerees were minorities (71%) than is typical even among average populations of rape and murder convicts").

26. *Tillman*, 600 A.2d at 747.

27. See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585 (2005) (discussing generally how wrongful convictions have highlighted the problem of faulty investigation).

28. As discussed further in Part III, Professor Brandon Garrett has pointed out that review of a transcript of the forensic analyst's testimony at Mr. Tillman's trial, as part of an article by Garrett and Peter J. Neufeld, *Improper Forensic Science and Wrongful Convictions*, 95 VA. L. REV. 1 (2009), uncovered that the analyst testified inaccurately about the serology evidence. Among other things, he failed to acknowledge that testing results might have been inconclusive due to degradation of a key sample. Email from Professor Brandon Garrett to author (May 22, 2008) (on file with author) (discussing Trial Transcript, *supra* note 4, at 317–27). As in so many other exoneration cases that involved faulty forensic science, see Garrett, *Judging Innocence*, *supra* note 22, at 85, this evidence was not challenged on appeal or in postconviction proceedings in Mr. Tillman's case.

29. See, e.g., Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337 (2006); Susan Rutberg, *Anatomy of a Miscarriage of Justice: The Wrongful Conviction of Peter J. Rose*, 37 GOLDEN GATE U. L. REV. 7 (2006).

30. See NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE (1996). See also Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); Daniel S. Medwed, *Innocence Lost . . . and Found: An Introduction to the Faces of Wrongful Conviction Symposium Issue*, 37 GOLDEN GATE U. L. REV. 1 (2006); Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 DRAKE L. REV. 597 (2006). See also Paul C. Giannelli & Myrna S. Raeder, *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, 37 SW. L. REV. 763 (2008).

31. See, e.g., Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1494–95 (2008) (arguing for a rule requiring corroboration of eyewitness testimony for a conviction). See also Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. L. REV. 965 (2008).

32. See NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE U.S.: A PATH FORWARD (2009) (urging increased standardization and professionalization of forensic science

one of the areas most often targeted for change is present in Mr. Tillman's case—eyewitness identification procedures.³³

My project is to focus on the appellate opinions in *State v. Tillman*. In some ways, the *Tillman* opinions function as an interesting specimen of routine local criminal appellate process: marked more by analysis of preservation issues and weighing of facts than by enunciation of new legal principles. On direct appeal, the Connecticut Supreme Court rejected four out of five appellate issues in Mr. Tillman's appeal based on what I will describe loosely as defense counsel's omissions: to request an evidentiary hearing;³⁴ to object;³⁵ to raise a claim in the trial court,³⁶ or to "attempt to lay a proper foundation."³⁷

The court said that the defendant had failed to present an adequate record on his claim of racial bias in selection of the jury venire despite the fact that counsel represented that the jury clerk believed that she had excused disproportionate numbers of minority jurors.³⁸ Later, in habeas proceedings, Connecticut courts also rejected the claim that trial counsel had been ineffective for failing to make a record on the jury selection issue—the same record that the Connecticut Supreme Court had said was lacking on direct appeal.³⁹

In its treatment of the only issue not rejected based on counsel's purported inaction—a challenge to an instruction on factors the jury could consider in evaluating the victim's identification of Mr. Tillman as her assailant—the Connecticut Supreme Court relied on the strength of

disciplines); Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 951–58 (2008) (calling for increased regulation of crime laboratories and establishment of a "forensic science oversight commission"); Garrett & Neufeld, *supra* note 28, at manuscript 63–66 (on file with authors) (calling for the creation of a national body to promulgate standards for forensic science).

33. Professor Gary L. Wells has been a leading researcher and reform proponent in the area of eyewitness identification for years. Articles of his that are too numerous to cite document issues relating to eyewitness identification and the impact of proposed reforms. *See, e.g.*, Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006); Gary L. Wells, Amina Memon, & Steven D. Penrod, *Eyewitness Identification: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INT. 45 (2006); *See also* Timothy P. O'Toole & Giovanna Shay, *Manson v. Braithwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109 (2006); Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH. L. REV. 33 (2008). *See also* Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, CREIGHTON L. REV. (forthcoming 2009).

34. *State v. Tillman*, 600 A.2d 738, 740–44 (Conn. 1991).

35. *Id.* at 746.

36. *Id.* at 747.

37. *Id.* at 748.

38. *Id.* at 740–41, 743.

39. *Tillman v. Comm'r of Corr.*, 738 A.2d 208, 213 (Conn. App. Ct. 1991).

the victim's "positive" identification of Mr. Tillman.⁴⁰ This analysis was based largely on the victim's subjective certainty and assessment of her opportunity to view—factors that have been questioned by later social science.⁴¹

Reflecting on the *Tillman* opinions, I make two sets of claims in this Article. Observations in the first group are relatively concrete and directly tied to Mr. Tillman's case. Simply put, in light of DNA exonerations like Mr. Tillman's case, as well as recent social science research, state courts should be careful with single eyewitness cases, particularly those involving cross-racial identifications.⁴² This means demanding the most exacting investigation and vigorous representation; requiring the most scrupulous attention to any claim of racial bias; and mandating all appropriate jury instructions.⁴³

My second set of claims is more general, and it is this set of ideas that is the real focus of the Article. I argue that the work of state appellate courts sets the tone for a criminal justice system, and provides (although imperfectly) important incentives for the allocation of resources at the investigative and trial levels. Certain aspects of the *Tillman* opinion—notably reliance on preservation-type rules and harm-type analysis—can dilute appellate scrutiny. While these appellate conventions are not the primary cause of Mr. Tillman's wrongful conviction, over the long-term and in the aggregate, they can increase the likelihood of miscarriages of justice.

Mr. Tillman's story has become part of an ongoing national conversation about the meaning of the DNA exonerations.⁴⁴ Commentators ask what the DNA exonerations can teach us about our criminal justice system.⁴⁵ They debate how often wrongful convictions occur,⁴⁶ and, if we can establish an error rate, whether it is an acceptable

40. *Tillman*, 600 A.2d at 745.

41. *Id.* See *infra* notes 171–72 and accompanying text.

42. See *infra* notes 178–224 and accompanying text.

43. See David E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, 23 CRIM. JUST. 4 (Spring 2008) (proposing a special jury instruction for cross-racial eyewitness identification cases).

44. Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES, July 23, 2007, at A1; Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. TIMES, April 19, 2004, at A15.

45. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003); WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE (Sandra D. Westervelt & John A. Humphrey, Eds., 2001).

46. See D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 779–80 (2007) (positing an "empirical minimum of 3.3% and a fairly generous likely maximum of 5% for factually wrongful convictions in capital rape-murders in the 1980s"). See also Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y.

one.⁴⁷ Observers consider what parts of the system could be fixed to reduce the potential for error.⁴⁸ They warn that, with the increasing use of pretrial DNA testing, the window for using DNA exonerations to learn about systemic flaws is rapidly closing.⁴⁹

Other commentators have examined the legal claims raised by the exonerated, and how those claims were treated by the courts. Most notably, Professor Brandon Garrett conducted a study of all of the claims raised by 200 exonerees—tracking legal contentions on direct appeal, state postconviction, and in federal habeas.⁵⁰ Mr. Tillman's case is one of the 200 analyzed by Professor Garrett.⁵¹ Professor Garrett determined that, of the exonerees whose wrongful convictions were based on bogus forensic science, untruthful informant testimony, or a mistaken eyewitness identification, less than half brought legal claims challenging those types of evidence on appeal or in postconviction proceedings.⁵² Of those who did raise such claims, only a handful gained relief.⁵³ The reversal rate for the exonerees was roughly comparable to the reversal rate for a matched comparison set of defendants convicted of similar crimes who were never exonerated.⁵⁴ Thus, Professor Garrett concluded that appellate and postconviction courts were unable to “effectively review claims relating to the unreliable or false evidence” supporting the exonerees' wrongful convictions.⁵⁵

State courts are a critical bulwark against miscarriages of justice. Always on the frontline of criminal justice, state courts increasingly operate without even the emergency safety hatch previously provided by

TIMES, March 25, 2008, at A14.

47. Risinger, *supra* note 46, at 763–64 (discussing historical debate regarding the acceptable error rate for a criminal justice system). See also Morris B. Hoffman, *The 'Innocence' Myth*, WALL ST. J., April 26, 2007, at A19.

48. Solomon Moore, *Exoneration Using DNA Brings Change in Legal System*, N.Y. TIMES, October 1, 2007, at A1.

49. Writing in the New York Times, Adam Liptak concluded his coverage of Prof. Brandon Garrett's study of the DNA exoneration cases by saying, “The era of DNA exonerations should be a finite one. These days, DNA testing is common on the front end of prosecutions, meaning that in a few years, the window that the 200 exonerations have opened on the justice system will close. We should look carefully through that window while we can.” Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, *supra* note 44. See also Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 110 (2005) [hereinafter Garrett, *Harmless Error*] (“[I]f pretrial DNA testing becomes routine, the window of opportunity that exonerations provide may begin to close.”).

50. Garrett, *Judging Innocence*, *supra* note 22.

51. *Id.* at app. A.

52. *Id.* at 76.

53. *Id.*

54. *Id.* at 102.

55. *Id.* at 94.

federal habeas.⁵⁶ Federal habeas has been restricted by successive judge-made rules over the course of thirty years.⁵⁷ A little over a decade ago, it was constrained decisively by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).⁵⁸ Federal courts' ability to grant state prisoners habeas relief is now hobbled. As a result, state courts possess nearly exclusive responsibility to protect state prisoners' federal constitutional rights—and to guard against miscarriages of justice.⁵⁹ State trials and state habeas proceedings are overseen by state appellate courts, and, in numerous ways, state appeals court decisions circumscribe the rights protected and relief available in those proceedings.

At the same time, state courts are increasingly overwhelmed by caseload pressures. The United States currently incarcerates 2.3 million people—the highest incarceration rate (and indeed largest prisoner population) in the world.⁶⁰ Predictably, rising incarceration rates can strain the resources of local courts.⁶¹

56. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036, 1041 (1977) (positing that the Warren Court had designated federal habeas as the enforcement mechanism for its constitutional criminal procedure revolution, employing a strategy of “redundancy,” in which state and federal courts could check one another). My thoughts on the increased pressure on state courts after AEDPA also have been influenced by a panel on state-federal court relations held on March 7, 2008, as part of the Liman Colloquium at Yale Law School, featuring Justice Randall Shepard of the Indiana Supreme Court, Justice Margaret H. Marshall of the Massachusetts Supreme Judicial Court, former Chief Justice of the Connecticut Supreme Court Ellen Ash Peters, and Judge Janet C. Hall of the United States District Court of the District of Connecticut. See also Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 11–15 (2009).

57. See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 22.1 (5th ed. 2005) (summarizing judge-made and statutory restrictions to federal habeas); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 5–13 (1997) (outlining doctrinal restrictions on habeas).

58. 28 U.S.C. § 2254(d)(1) (2006). See also Adelman, *supra* note 56, at 15–20.

59. See Christopher N. Lasch, *The Future of Teague Retroactivity or “Redressability” after Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Court Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1 (2009); Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211 (2008). See also Ana M. Otero, *In Harm's Way—A Dismal State of Justice: The Legal Odyssey of Cesar Fierro*, 16 LA RAZA L.J. 119, 121 (2005) (arguing that misapplication of harmless error doctrine is even more inimical to constitutional rights after restrictions of federal habeas).

60. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1. See also PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008, available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

61. DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 23 (2006) (describing an “extraordinary rise in the number of appellate filings beginning in the late 1960s and continuing through the last third of the twentieth century” that places appellate courts, particularly those responsible for first appeal as of right “under the constant threat of

Let me be clear that my purpose is not to criticize the Connecticut Appellate Court and Connecticut Supreme Court for failing to identify Mr. Tillman as a factually innocent person. We know more now than we did when Mr. Tillman was charged and tried. Moreover, the causes of wrongful conviction are complex, and as the Article discusses in Part III, appellate courts' institutional role and capacity are limited. I have considerable respect for Connecticut institutions, and it is fair to say that Connecticut's criminal justice system at least strives to protect defendants' rights in important ways that many jurisdictions do not.⁶² Connecticut courts have not been insensitive to the possibility of wrongful convictions.⁶³ Nor have they shrunk from exercising supervisory authority over the criminal courts,⁶⁴ sometimes in cases involving allegations of racial bias.⁶⁵ It is entirely possible that no amount of rigorous appellate review could have counter-balanced an erroneous eyewitness identification by a sympathetic victim.

Nonetheless, it is worthwhile to examine Mr. Tillman's case closely. Appellate opinions are an artifact of the case, and, in Professor Dianne Martin's terms, shed light on how the prosecution was "constructed."⁶⁶

engulfment and the build-up of unacceptable backlogs"); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C. R.-C.L. L. REV. 339, 340 (2006) (arguing that "mass incarceration has created serious obstacles to the reliable administration of criminal justice and overwhelmed post-conviction review mechanisms.")

62. For example, Connecticut provides a generous statutory right to appointed counsel. *See, e.g., State v. Casiano*, 922 A.2d 1065 (Conn. 2007); *Gipson v. Comm'r of Corr.*, 778 A.2d 121 (Conn. 2001). *See State v. Golding*, 567 A.2d 823 (Conn. 1989) (discussing review of unpreserved constitutional error on direct appeal). *See also State v. Oquendo*, 613 A.2d 1300 (1992) (discussing the heightened protection of individual rights under the state constitution); *State v. Stoddard*, 537 A.2d 446 (Conn. 1988) (discussing the same).

63. *See, e.g., Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1136–37 (Conn. 1997) (establishing standard for postconviction claim of actual innocence and affirming habeas court determination of petitioner's actual innocence); *Summerville v. Warden*, 641 A.2d 1356, 1368 (Conn. 1994) (recognizing that claim of actual innocence is cognizable in habeas corpus without "antecedent showing of a constitutional violation that affected the fairness of his criminal trial"); *State v. Hammond*, 604 A.2d 793, 804–05, 807–08 (Conn. 1992) (remanding to trial court for reconsideration of motion to set aside the verdict and motion for additional post-trial DNA testing in light of exculpatory DNA evidence).

64. *See, e.g., State v. Ledbetter*, 881 A.2d 290 (Conn. 2005) (declining to adopt a new test for judging the admissibility of eyewitness identifications that are the product of suggestive procedures, but requiring a jury instruction under the court's supervisory authority when line-up administrators fail to warn the witness that the culprit may not be in the line-up); *State v. Holloway*, 553 A.2d 166, 171–72 (Conn. 1989) (exercising its supervisory authority to require the State to provide a prima facie case response to *Batson* challenges "in all future cases in which the defendant asserts a *Batson* claim").

65. *See, e.g., State v. Santiago*, 715 A.2d 1, 21–22 (Conn. 1998) (reversing and remanding for broader hearing regarding alleged racial slurs by juror); *State v. Brown*, 668 A.2d 1288, 1302 (Conn. 1995) (concluding that the trial court had abused its discretion in failing to *sua sponte* order a hearing to investigate "credible allegations of jury exposure to racially derogatory remarks").

66. *See Dianne L. Martin, Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 849 (2002) (describing criminal convictions as a "social product" which are "constructed from the

If we fail to reflect on possible lessons of his story, we will miss a rare opportunity to gain insight into the criminal appeals and postconviction litigation process.

This Article proceeds in five parts. Part I lays out the two opinions in Mr. Tillman's case, so that their reasoning can serve as a case study. Part II focuses on the factors that Mr. Tillman's case shares with other wrongful convictions. Part III uses Mr. Tillman's story as a vantage point from which to examine the role of appellate courts and types of appellate reasoning that fail to serve as an adequate hedge against wrongful convictions. Part IV questions whether appellate courts really can help to avoid future wrongful convictions. Part V concludes by offering a few reflections about how we can achieve more meaningful appellate litigation.

I. THE OPINIONS IN MR. TILLMAN'S CASE

We begin with the opinions in Mr. Tillman's case. Despite Mr. Tillman's exoneration, these decisions are still binding precedent in Connecticut, publicly available under the captions *State of Connecticut v. James C. Tillman*⁶⁷ and *Tillman v. Commissioner of Correction*.⁶⁸ The Connecticut Supreme Court opinion in Mr. Tillman's case gained some attention in 2008 in the case of another Innocence Project client, Miguel Roman, who was exonerated based on DNA evidence.⁶⁹ *State v. Tillman* was cited in the 1992 opinion affirming Mr. Roman's conviction.⁷⁰

A threshold question worth noting in passing is whether the opinions in the case *should* be available in their current form. In some ways, this question gets to the heart of the role of appellate courts. Does the opinion lose its legitimacy if the outcome is wrong, or does it remain a "correct" statement of abstract legal principles? Does the answer to this question depend on the extent to which the analysis is fact-bound? At a minimum, it seems unfair to link Mr. Tillman's name to an awful crime that he did not commit.⁷¹ One might also question whether advocates

results of a myriad of exercises in discretion as to relevance, reliability, and weight").

67. 600 A.2d 738 (Conn. 1991).

68. 738 A.2d 208 (Conn. App. Ct. 1999).

69. Dave Altamari & David Owens, *DNA: Righting Another Wrong?*, HARTFORD COURANT, Dec. 17, 2008, at A1; Susan Haigh, *Conn. Man Imprisoned for 20 Years Gets New Trial*, ASSOCIATED PRESS, Dec. 19, 2008, available at <http://abcnews.go.com/US/wireStory?id=6495925>; David Owens, "True Freedom" After a Two-Decade Ordeal, HARTFORD COURANT, Apr. 3, 2009, at A5.

70. *State v. Roman*, 224 Conn. 63, 68 (1992) (rejecting claim that Mr. Roman did not have "a sufficient command of the English language to participate knowingly and willingly in his interrogation by police," and citing *Tillman* for the proposition that statements of counsel are not evidence).

71. In a recent opinion, a Connecticut trial court reviewing a decision of the Freedom of

and courts should continue to rely on an opinion based on fundamental factual errors, at least with respect to certain issues.⁷² While one can conceive of an argument that traditional vacatur doctrine might apply,⁷³ legislatures also might consider expanding vacatur to apply to published opinions affirming exonerees' convictions. Alternatively, exonerations might be noted in the published reports, or in the case history.⁷⁴

A. The Direct Appeal

Mr. Tillman was convicted at trial of kidnapping in the first degree, sexual assault in the first degree, robbery in the third degree, assault in the third degree, and larceny in the second degree.⁷⁵ Like many such serious cases, the facts of the crime were brutal. In her opinion for the court, Justice Peters summarized the facts that the jury "could reasonably have found":

On the evening of January 21, 1988, at about 11 p.m., the victim finished her work at an insurance company in Hartford and moved her car from her company's garage to an outside parking lot on Columbus Boulevard so that it would be easier to retrieve later. After having gone to a bar with her supervisor and coworkers, she returned to the car with her supervisor

Information Commission regarding a request by the Associated Press for Mr. Tillman's correctional records acknowledged that "the disclosure of such records would be highly offensive to a reasonable person in Tillman's unique position—that is, to an innocent person who has served a lengthy sentence for a serious crime that he indisputably did not commit." *Tillman v. Freedom of Info. Comm'n*, No. CV074044748S, 2008 WL 4150289, at *12 (Conn. Super. Ct. Aug. 15, 2008).

72. A Westlaw keycite search of May 15, 2009, revealed sixty-seven Connecticut cases citing to the Connecticut Supreme Court's opinion in *State v. Tillman*, including cases involving claims of racial bias in selection of the jury venire and inadequate jury instructions on eyewitness identification. See *State v. Saucier*, 926 A.2d 633, 650 n.1 (Conn. 2007) (Norcott, J., concurring in part, with whom Zarella and Sullivan, Js., joined) (noting the Appellate Court's "misplaced reliance" on *Tillman* in *State v. Gonzalez*, 815 A.2d 1261 (Conn. App. Ct. 2003), *rev'd*, 864 A.2d 847 (Conn. 2005), regarding the proper standard of review for evidentiary issues); *State v. Carrasco*, 791 A.2d 511, 517 (Conn. 2002) (composition of jury venire); *State v. Robinson*, 631 A.2d 288, 293 (Conn. 1993) (composition of jury venire); *State v. Cerilli*, 610 A.2d 1130, 1136 (Conn. 1992) (citing *Tillman* for the proposition that an instruction on eyewitness identification is not constitutionally required, and concluding that although an instruction was "warranted" in this case, failure to give it did not require reversal); *State v. Young*, 618 A.2d 65, 73–74 (Conn. App. Ct. 1992) (jury selection). There were eleven citations to *Tillman* in secondary sources available on Westlaw. For example, *Tillman* is cited in the 2007 edition of 5 DAVID M. BORDEN & LEONARD ORLAND, *CONNECTICUT PRACTICE SERIES: CONNECTICUT CRIMINAL JURY INSTRUCTIONS* § 3.15, at 214 (4th ed. 2007). The Connecticut Appellate Court's opinion in the habeas appeal had been cited by Connecticut courts twenty times, and by secondary sources two times.

73. See *State v. Boyle*, 949 A.2d 460, 467 (Conn. 2008) (describing vacatur as an "equitable . . . extraordinary" remedy); *State v. Singleton*, 876 A.2d 1, 9 (Conn. 2005) (recognizing "general proposition that vacatur is appropriate when it is in the public interest to prevent a judgment, otherwise unreviewable because of mootness, from spawning legal consequences");

74. Thanks to Professors Jack Chin and Keith Findley for suggesting this compromise solution.

75. *Tillman v. State*, 600 A.2d 738 (Conn. 1991).

at about 12:45 a.m. Her supervisor left after observing her start her car and put her car lights on.

In the process of backing the car up, the victim noticed that she did not have her seat belt on and that the driver's side door was not locked. As she stopped to remedy this situation, the defendant opened the driver's side door and attempted to enter her car. When she asked what he was doing, the defendant punched her in the face, then reached in and turned off the ignition. He then hit her again and pushed her over to the passenger side of the car. When she screamed and tried to get out through the passenger door, he reached over, locked the door and hit her several more times.

The defendant, thereafter, started the car, but could not keep it from stalling because he was unfamiliar with a standard transmission. Finally, after fifteen to twenty minutes, he drove out of the parking lot and, a few minutes later, parked in another small outside lot. He took the victim's purse and jewelry, and then sexually assaulted her. After rifling through her briefcase, he drove the car out of the lot. He then stopped the car and ran off with her purse.⁷⁶

The police report, which was reprinted by the clerk's office as part of the court's "Record" states that the victim was "bleeding profusely from her face and appeared to have been beaten severely."⁷⁷

On direct appeal, Mr. Tillman raised a number of claims challenging his conviction. He alleged racial discrimination in the selection of the jury pool. He faulted trial court instructions on eyewitness identification, consciousness of guilt, and the use of prior inconsistent statements. Finally, he appealed the trial court's exclusion of a police social worker's field notes regarding statements made by a detective about the investigation.⁷⁸ Pursuant to a Connecticut procedural rule that permits the Connecticut Supreme Court to transfer cases of first impression directly to itself,⁷⁹ the appeals were transferred from the Connecticut Appellate Court to the Connecticut Supreme Court, skipping the intermediate appeal.⁸⁰

1. The Jury Selection Claim

Mr. Tillman's claim of racial discrimination in the selection of the

76. *Id.* at 740.

77. Record at 3, *Tillman*, 600 A.2d 738 (No. 14805).

78. *Tillman*, 600 A.2d at 740.

79. JUDICIAL BRANCH, STATE OF CONNECTICUT, CONNECTICUT PRACTICE BOOK § 65-1 (2008). See Wesley W. Horton & Kenneth J. Bartschi, 2007 *Connecticut Appellate Review*, 82 CONN. B.J. 14 (2008) ("The transfer rule set forth in Practice Book section 65-1 allows the Supreme Court to cherry-pick many of the issues of first impression that first appear on the Appellate Court's docket.").

80. *Tillman*, 600 A.2d at 740.

jury array received the most extensive analysis by the Connecticut Supreme Court. The facts underlying this claim arose during jury selection. After six jurors were chosen, a second jury panel was called to select the alternates.⁸¹ At that point, Mr. Tillman, an African-American man, pointed out that the jury panels contained no black men and only one resident of Hartford, the city where Mr. Tillman lived and where the crime had occurred.⁸² He noted the increased publicity surrounding the Daniel Webb case, and asked for a more representative jury panel.⁸³

Defense counsel read a statement by Mr. Tillman:

Your Honor, I object to the jury array. I do not feel that this is a jury of my own peer[s] and therefore it will be impossible for me to have a fair trial. Especially considering the facts of the Danny Webb case which has been in all the news and newspapers. And the fact that his case alleges that he [attacked] a middle class white woman from one of the suburban towns, which in fact is what my jury panel was made of. There were only two blacks from the entire panels in which I had to choose from. I'm sure that this [doesn't] comply with the statistical percentage of blacks for this geographical area. Therefore, this cannot be a jury of my peer[s] and [it] will be impossible for me to have a fair trial. I therefore state for the record at this time, I would like to challenge the jury array and ask the court to order whatever [is] necessary for me to do this.⁸⁴

... The trial court ruled that the motion would not be granted unless the defendant could present evidence of discriminatory selection methods. Defense counsel represented that he would inquire with the jury clerk.⁸⁵

A number of days later, defense counsel reported back to the trial court what he had learned. The jury clerk had said that she excused jurors for economic hardship if they could demonstrate that their employers would not pay the difference between their daily juror pay of \$10 and their normal wages.⁸⁶ The jury clerk acknowledged that this custom could result in the excusal of a "disproportionate number of minorities."⁸⁷ Despite this representation, the trial court rejected the defendant's challenge to the jury array.⁸⁸

After the verdict, Mr. Tillman moved for a new trial on the same

81. *Id.*

82. *Id.* In fact, the habeas court opinion from the trial level states that the jury was composed of five whites and one Hispanic. *Tillman v. Warden*, No. 90844, 1997 WL 374961 at *3 (Conn. Super. Ct. 1997), *aff'd sub nom.* *Tillman v. Comm'r of Corr.*, 738 A.2d 208 (Conn. App. Ct. 1999).

83. *Tillman*, 600 A.2d at 751-52 (Berdon, J., dissenting).

84. *Id.*

85. *Id.* at 740 (majority opinion).

86. *Id.*

87. *Id.* at 741.

88. *Id.*

grounds; the trial court also denied that motion.⁸⁹ In this motion, which was reproduced in the Record on appeal, defense counsel wrote:

This trial was conducted in the shadow of the events surrounding the arrest and arraignment of a black man, one Daniel Webb (State v. Webb, Hartford/New Britain Judicial District Docket No. 55802) for capital murder, kidnapping and possible sexual assault in the city of Hartford of a white, female, downtown Hartford office worker. The alleged victim in this case is also a white, female downtown Hartford office worker, and the defendant is a black male. Virtually every venireperson voir dired for this trial allowed that he or she was aware of the Webb case, and that he or she would not be able to afford the presumption of innocence to Mr. Webb of the twenty-four venirepersons impaneled, only two—both female—were black. Only one, a black woman peremptorily excused by the state, was a Hartford resident. There were no black males in the panels. The six jurors and two alternates ultimately chosen in this case were all white residents of towns suburban to Hartford. This court cannot ignore the similarity of the charges, locale of the incidents and race and gender similarities of the victims and defendants in the Webb case and in the instant case.⁹⁰

In analyzing Mr. Tillman's claim, the Connecticut Supreme Court applied both U.S. Supreme Court precedent, *Duren v. Missouri*,⁹¹ and a Connecticut case, *State v. Nims*,⁹² which provide alternative means of demonstrating racially discriminatory composition of the jury array. *Duren* required a defendant to demonstrate "systematic exclusion" of a "distinctive group in the community . . ."⁹³ *Nims*, on the other hand, did not require a showing of underrepresentation of any distinctive group—only that "unconstitutional criteria" were used in selecting the members of the jury array.⁹⁴

The court rejected Mr. Tillman's challenge to his jury array. It concluded that the defendant had failed to offer sufficient evidence in support of his challenge.⁹⁵ It reasoned:

The defendant bears the burden of making an adequate record to support a challenge to a jury array. All that this defendant ever offered to the court in support of his request for a new supplemental panel was his counsel's hearsay representations of a conversation he had had with the clerk. The

89. *Id.*

90. Record, *supra* note 77, at 27–28 (quoting paragraph 6 of Tillman's Motion for New Trial filed Oct. 20, 1989).

91. 439 U.S. 357 (1979).

92. 430 A.2d 1306 (Conn. 1980).

93. *Tillman*, 600 A.2d at 741 (quoting *Duren*, 439 U.S. at 364).

94. *Id.*

95. *Id.* at 742.

defendant did not offer the clerk's own testimony or any other testimony. He did not request an evidentiary hearing to support his claims, or a continuance in order to gather probative evidence. A challenge to a jury array will fail if the defendant presents no evidence to the court. A representation by counsel does not meet this evidentiary requirement.⁹⁶

Under the *Duren* test, the court concluded, the defendant had failed to demonstrate systematic exclusion. "While the procedure that counsel described to the court did involve a systematic exclusion and might well have exceeded the clerk's statutory authority," the court wrote, "no proof was offered that that procedure was in fact followed."⁹⁷ Similarly, under *Nims*, the court reasoned, the defendant had failed to offer evidence that a suspect classification was used as a method of jury selection. "[T]he defendant in this case offered no supporting evidence of any kind to establish his claim of unconstitutional discrimination," the court concluded in rejecting Mr. Tillman's claim.⁹⁸

As we shall see, at the habeas hearing, the court clerk testified and confirmed that the method she had described to defense counsel was in fact the method that the clerk's office used to excuse jurors. She believed that "many more minorities than others were excused from service" on this basis.⁹⁹ However, this claim failed in habeas too, in part because no evidence was offered to support the clerk's hypothesis about the racial impact of the practice.¹⁰⁰

2. The Eyewitness Identification Instruction

Mr. Tillman also raised several claims regarding the jury instructions at his trial. The first, and most significant, was a claim challenging the trial court's denial of a requested instruction on eyewitness identification. At trial, defense counsel had asked the trial judge to instruct the jury that, in assessing the credibility of eyewitness testimony, it could "consider . . . whether the witness was physically impaired or under stress when observing the perpetrator."¹⁰¹

The trial court declined to give the requested instruction, but instead gave an instruction on eyewitness identification that overlapped somewhat with the *Manson v. Brathwaite*¹⁰² factors that are used to

96. *Id.* at 742–43 (citations omitted).

97. *Id.* at 743–44.

98. *Id.* at 744.

99. *Tillman v. Warden*, No. 90844, 1997 WL 374961, at *6 (Conn. Super. Ct. June 25, 1997), *aff'd sub nom.* *Tillman v. Comm'r of Corr.*, 738 A.2d 208 (Conn. App. Ct. 1999).

100. *Id.* at *6–*8.

101. *Tillman*, 600 A.2d at 744.

102. 432 U.S. 98 (1977).

judge the reliability of an identification that is the subject of a due process challenge. The trial court's instruction was as follows:

You have had evidence from a witness making an identification . . . of the defendant in this case. The factors to consider in making your judgment of the reliability of such witness in making that identification are: first, her opportunity to observe the person, how close, the amount of time, the lighting conditions, the degree of attention, and the degree of stress; second, her verbal description of the defendant as to consistencies or inconsistencies to the defendant; third the time which passed between the incident and the identification made of the photographs in this case and the in court identification made by her of the defendant; fourth, any incidents of suggestion as to which photo to select; and fifth, the certainty with which the witness identified the person in the photographs marked as state's exhibits C and D, and identif[ied] the person here in court.¹⁰³

The Connecticut Supreme Court acknowledged that the jury "might reasonably have found" the victim's "capacity for accurate observation . . . to have been somewhat impaired at the time of the incident."¹⁰⁴ The court summarized the victim's injuries that could have affected her capacity to observe:

[B]efore the attack, the victim had been drinking. As a result of the attack, she received a cut on her left eyebrow that bled and later required seven stitches. Her left eye began to swell during the attack, and later closed completely. The entire left side of her face was swollen after the attack. Her right eye eventually became black and blue. Because she was hit in the nose, she suffered a nosebleed.¹⁰⁵

In light of this "evidentiary foundation," the court said that "[t]he trial court might appropriately have given the requested instruction."¹⁰⁶ Nonetheless, it concluded that the instructions given by the trial judge had "adequately alerted the jury to the factors that it had to assess in determining the reliability of the victim's testimony."¹⁰⁷

Even if the trial court's instructions "were less informative on the risks of misidentification than they might have been," the court continued, a new trial would not be warranted unless "the defendant could establish that it was reasonably probable that the jury was

103. Brief of the Defendant-Appellant at app. F-4, *State v. Tillman*, 600 A.2d 738 (Conn. 1991) (No. 14085) (quoting excerpt of transcript regarding instructions to the jury during Tillman's trial).

104. *Tillman*, 600 A.2d at 744. Indeed, there is some evidence that witnesses with higher blood alcohol levels are more likely to make mistaken identifications from "target-absent" line-ups. Wells, Memon, & Penrod, *supra* note 33, at 54.

105. *Tillman*, 600 A.2d at 744-45 (alteration in original).

106. *Id.* at 745.

107. *Id.*

misled.”¹⁰⁸

The court then marshaled the evidence of the victim’s opportunity to observe her assailant at the time of the assault:

The victim testified that she could see out of both eyes, and she never said that she had any difficulty viewing her attacker. During much of the fifty minutes that she was with him, they were in well-lighted areas. There were street lights on Columbus Boulevard, where the car was parked when the attacker entered it, and there were floodlights on an adjacent building. When the attacker forced the victim back into her car, his face was directly in front of hers and she was able to get a good look at his face. During the entire fifteen to twenty minutes that the attacker was having difficulty starting the car, the victim observed the right side of his face. She tried to look at him as much as possible as the car passed under the street lights of Columbus Boulevard. Because her left eye had been hurt, she held her right arm against her right eye to protect it. Because the area where the car stopped was well lit, the victim was able to view her attacker. She testified that she “was trying to focus on his eyes, nose, the shape of his face, things that I could remember, things that I would be able to use to identify him by.” His nose was particularly distinctive, “[k]ind of like a hook nose.” The street he drove the car onto after the sexual assault was also well lit.¹⁰⁹

The court went on to summarize the evidence that the victim was able to make an accurate identification of the suspect from a photo array assembled by police:

After the attacker fled, the victim could not see very well out of her left eye, but her right eye was unaffected. When the police arrived she told them that she was certain she could identify her attacker, and she readily picked the defendant’s photograph from a properly assembled array. When she was shown the first mug shot of the defendant, she correctly noted that he seemed younger in the photograph. She testified that there was no doubt in her mind that the defendant was the man who had attacked her.¹¹⁰

In light of this “positive identification testimony,” the court concluded, “it is not reasonably probable that the jury was misled by the court’s refusal to charge in the specific language that the defendant had requested.”¹¹¹

108. *Id.* (citing *State v. Shifflett*, 508 A.2d 748, 766 (Conn. 1986)).

109. *Id.*

110. *Id.*

111. *Id.* This language from the court’s opinion tracked very closely language from the State’s brief on appeal. The State had argued in its brief:

[T]he victim’s identification testimony was strong and certain at all times. She was with [the assailant] for approximately fifty minutes and made a conscious effort to view her

The court did not mention that the victim had given at least two descriptions of her attacker to police. She told the officer at the scene that the assailant was “a black male in his twenties, approximately a hundred and fifty pounds. Height was unknown. Medium complexion. Fairly short afro, with long sideburns. Light colored clothes and a white Kangol hat.”¹¹² Three days later, at the police station, the victim told investigators that her assailant was “a black male, estimated height of five foot six inches to five foot ten inches, medium build, glassy eyes, wearing a baseball cap and a rust-colored jacket.”¹¹³ The Defendant’s brief pointed out that Mr. Tillman was five foot five inches tall, and that the victim had not recalled the content of either of these descriptions at the time of trial.¹¹⁴

3. The Consciousness of Guilt Instruction

Mr. Tillman also challenged the trial court’s instruction to the jury on consciousness of guilt. The trial court had instructed the jury:

There is a legal principle of law known as consciousness of guilt, and it applies when a defendant says or does an act which one can infer that he had attempted to avoid detection or to avoid facts which would lead to his conviction. Here again, this principle would apply to the defendant’s statements to Detective Kumnick when questioned how he got the lacerations which were healing on the major knuckles of his hand.¹¹⁵

The evidence at trial was that, when Detective Kumnick asked Mr. Tillman how he had received the lacerations on his hands, he first said that he was not sure and then said he had got them working at a car wash.¹¹⁶ According to the detective, Mr. Tillman then said, “I didn’t get those from punching no girl.”¹¹⁷ The State’s theory was that the

assailant and remember his features. She correctly noted that he seemed younger in the first mugshot that she was shown. Based on this positive identification testimony evidence and the charge that was given, it is not reasonable to conclude that the jury was misled because of the court’s refusal to charge in the specific language requested.

Brief of the State of Connecticut-Appellee at 23, *State v. Tillman*, 600 A.2d 738 (Conn. 1991) (No. 14085). Indeed, the State referred to the victim’s “strong and certain” or “positive” eyewitness identification testimony at least four times in its brief, in support of harm-type arguments. *Id.* at 23, 27, 30, 35.

112. Brief of the Defendant-Appellant, *supra* note 103, at 1–2 (quoting testimony of Officer Wood in Trial Transcript, *supra* note 4, at 149).

113. *Id.* at 2.

114. *Id.*

115. *Tillman*, 600 A.2d at 746.

116. *Id.*

117. *Id.*

statement reflected consciousness of guilt, because, the prosecution asserted, at that time no one had told Mr. Tillman that the victim of the assault had been beaten.¹¹⁸ Mr. Tillman testified that he had not made that statement, and also maintained that he had been shown a picture of the victim's bruised face.¹¹⁹

On appeal, Mr. Tillman challenged the language "this principle would apply," asserting that it forbade the jury to consider an innocent motive for the remark.¹²⁰ The court concluded that this claim was not preserved, because trial counsel had failed to object.¹²¹ It declined to review the claim under Connecticut doctrine permitting review of unpreserved constitutional error, reasoning that "[a]n instruction about consciousness of guilt is not so directly related to an essential element of the crime as to warrant plenary discussion of whether the 'claim is of constitutional magnitude alleging a violation of a fundamental right.'"¹²²

4. The Prior Inconsistent Statement Instruction

In his third instructional claim, Mr. Tillman argued that the trial court's instruction on prior inconsistent statements may have misled the jury into giving substantive weight to out of court statements that his alibi witness, Gwendolyn Wilson, gave to police.¹²³ Ms. Wilson, a childhood friend of Mr. Tillman's, testified that he had spent the night of the incident at the home she shared with her boyfriend, who was also a long-time friend of Mr. Tillman's.¹²⁴ The trial court had instructed the jury that, if it found that the witness had said something that contradicted her testimony in an earlier statement to Detective Kumnick, and the prior statement was "not in writing or recorded on tape, it may only be used to test the witness's credit and may not be substituted for her testimony."¹²⁵

On cross-examination, the prosecutor had attempted to refresh Ms. Wilson's recollection using Detective Kumnick's report.¹²⁶ The Detective's report stated that Kumnick had interviewed Ms. Wilson six days after the crime, and that she had denied that Mr. Tillman had been

118. *Id.*

119. *Id.*

120. *Id.* (emphasis omitted).

121. *Id.*

122. *Id.* at 746 (citing *State v. Golding*, 567 A.2d 823, 827 (Conn. 1989)).

123. *Id.*

124. Trial Transcript, *supra* note 4, at 422–25.

125. *Tillman*, 600 A.2d at 747.

126. *Id.* at 746 n.10.

at her house on the night of the incident.¹²⁷ Mr. Tillman claimed that the court's instruction on prior inconsistent statements may have misled the jury into giving Ms. Wilson's statements to the detective—used only in an unsuccessful attempt to refresh her recollection—substantive weight.¹²⁸

The court concluded that this claim was not preserved, declining to apply Connecticut doctrine that permits review of unpreserved constitutional error.¹²⁹ The court also rejected Mr. Tillman's claim that "because these instructions concerned the essential element of identity and were related to the portions of testimony that were most damaging to him, taken together they deprived him of a fair trial."¹³⁰ Because each of these claims alone had been found not to be constitutional error, the court reasoned, it would not aggregate them to find a constitutional error.¹³¹

5. The Exclusion of Field Notes Regarding Fingerprints

Finally, the Connecticut Supreme Court considered Mr. Tillman's claim that the trial court had improperly excluded the field notes of a police social worker that, he argued, could have supported his claim of misidentification, or at least demonstrated faulty police investigation. The social worker's field notes recorded a conversation with Detective Kumnick "to the effect that fingerprints had been found on the driver's side of the victim's car, but that they did not belong to the defendant."¹³²

At trial, the detective confirmed that the fingerprints found on the car were not Mr. Tillman's, but he said that the fingerprints were located on the passenger side of the car.¹³³ That difference in location was important, because the victim said that the assailant had used only the driver's side of her car.¹³⁴

Defense counsel attempted to offer the police social worker's field notes as a business record, but the trial court sustained the State's hearsay objection and refused to admit them.¹³⁵ On appeal, Mr. Tillman

127. *Id.*

128. *Id.* at 747.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* The defense moved to compare these unknown prints to those in the state's database. Record, *supra* note 77, at 22. This motion was granted, but no match was found. Brief of the Defendant-Appellant, *supra* note 103, at 10.

134. *Tillman*, 600 A.2d at 747.

135. *Id.*

also argued in the alternative that the statement at least should have been admitted as a prior inconsistent statement to impeach the detective.¹³⁶ The Connecticut Supreme Court rejected both these arguments: it limited its review to the business record claim because the prior inconsistent argument had not been made at trial.¹³⁷ It then concluded that the “defendant made no attempt to lay a proper foundation” to admit the notes as a business record.¹³⁸

Mr. Tillman’s conviction was affirmed. Of the five issues raised on appeal, four were rejected due to a failure to object or to make a proper evidentiary record. The remaining issue—the eyewitness identification instruction—was rejected in large part because, in the court’s view, the victim’s identification was strong enough that the jury was not misled by any error.

As we shall see in Part II, the claims raised in Mr. Tillman’s appeal touch on some of the recurring issues of the DNA exonerations—including mistaken eyewitness identification, particularly cross-racial misidentification. In 1991, of course, these factors were not as well-documented as they are today. At that time, however, one Justice of the Connecticut Supreme Court dissented from the majority’s opinion, because he believed that Connecticut courts should look more closely at claims like Mr. Tillman’s that undermined public confidence in the fairness of the system.¹³⁹

6. Justice Berdon’s Dissent

Justice Berdon dissented from the majority’s rejection of Mr. Tillman’s challenge to the jury array.¹⁴⁰ The dissent disagreed with the majority’s conclusion that defense counsel’s representation to the court failed to lay a sufficient evidentiary foundation for Mr. Tillman’s jury array claim. Justice Berdon wrote that he viewed the attorney’s statement as an “offer of proof,” by which an attorney represents to the court that he could prove certain facts if granted an evidentiary hearing. “Although counsel for the defendant did not articulate that he was presenting an ‘offer of proof,’” wrote Justice Berdon, “it is apparent from the record that the trial court understood it to be such an offer when it rejected the challenge to the jury array on the grounds that six jurors

136. *Id.*

137. *Id.*

138. *Id.* at 748.

139. *Id.* at 752 (Berdon, J., dissenting).

140. *Id.* at 748 (Berdon, J., dissenting).

have already been selected”¹⁴¹ The trial court ruled that “it was too late to make the claim.”¹⁴²

Justice Berdon wrote that, in light of this offer of proof, “the defendant’s constitutional challenge to the array must be reviewed as if these allegations of the defendant could have been proven at an evidentiary hearing.”¹⁴³ He concluded that he “would find, on the basis of the offer of proof made by the defendant, that he was entitled to an evidentiary hearing to attempt to make a prima facie showing that the jury array was derived in an unconstitutional manner”¹⁴⁴ Accordingly, Justice Berdon would have reversed and granted Mr. Tillman a new trial.¹⁴⁵

Justice Berdon criticized the majority opinion as undermining the perception of fairness in a trial in which an African-American man was accused of the sexual assault of a white woman.¹⁴⁶ “There is a need to preserve public confidence in the fairness of a jury,” he wrote.¹⁴⁷ “[T]hat perception dissipates when the court, through its clerk, employs selection practices for the array that undermines the defendant’s constitutional right to select a jury from a fair cross-section of the community.”¹⁴⁸

B. The Habeas Proceedings

Mr. Tillman’s second appearance in the Connecticut courts came in state habeas proceedings.¹⁴⁹ Mr. Tillman alleged ineffective assistance of both trial and appellate counsel.¹⁵⁰ The habeas court rejected both claims,¹⁵¹ and the Appellate Court of Connecticut affirmed.¹⁵²

1. Habeas Court Memorandum of Decision

The Superior Court judge sitting in habeas court issued a

141. *Id.* at 750.

142. *Id.*

143. *Id.*

144. *Id.* at 748.

145. *Id.*

146. *Id.* at 752.

147. *Id.*

148. *Id.*

149. See *Tillman v. Warden*, No. 90844, 1997 WL 374961, at *1 (Conn. Super. Ct. June 25, 1997), *aff’d sub nom. Tillman v. Comm’r of Corr.*, 738 A.2d 208 (Conn. App. Ct. 1999).

150. *Id.*

151. *Id.* at *10.

152. See *Tillman v. Comm’r of Corr.*, 738 A.2d 208 (Conn. App. Ct. 1999).

Memorandum of Decision.¹⁵³ In it, the habeas court first described the ineffective assistance of counsel standard, describing it as “highly deferential,” and “indulg[ing] a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”¹⁵⁴

The habeas court acknowledged that “prior to the petitioner’s trial there had been considerable newspaper coverage of an assault on August 24, 1989 by an African-American male, Daniel Webb, upon a white female resulting in her death. . . . Broad news coverage of the details of the Webb assault heightened the petitioner’s concerns in regard to the racial composition of the jury panel available to serve as the petit jury in his case.”¹⁵⁵

The habeas court then outlined the jury selection procedure, noting that trial counsel had challenged the racial composition of the jury venire, but had failed to request a hearing on the issue.¹⁵⁶ It related that the jury clerk had testified at the habeas hearing and “proffered an opinion . . . that many more minorities than others were excused from service,”¹⁵⁷ but that this belief was “based on her assumption alone.”¹⁵⁸ Accordingly, it declined to make any factual finding about the racial identities of the excused jurors,¹⁵⁹ and concluded that even if a hearing on this issue had been held, it would not have changed jury selection procedures in Mr. Tillman’s case.¹⁶⁰ The habeas court noted approvingly that trial counsel had “met his professional obligation” of raising Mr. Tillman’s concern, while “candidly providing the court with information contrary to his main assertion”—specifically, that there were African-American jurors in the venire next door.¹⁶¹

The habeas court also rejected the claim that Mr. Tillman’s appellate counsel had been ineffective for failing to argue that the trial court should have ordered a hearing regarding the jury selection procedures *sua sponte*.¹⁶² It reasoned that the factual predicate presented was

153. *Tillman*, No. 90844, at *1.

154. *Id.* at *2 (quoting *Strickland v. Washington*, 466 U.S. 689–90 (1984)).

155. *Id.* at *3 (internal citation omitted). The *Hartford Courant* reported on the killing of Diane Gellenbeck and arrest and arraignment of Daniel Webb five times between August 25, 1989, and September 6, 1989. Mr. Tillman’s trial started on September 11, 1989.

156. *Id.* at *3–4.

157. *Id.* at *6.

158. *Id.*

159. *Id.*

160. *Id.* at *6–7. The habeas court also rejected a claim by Mr. Tillman that the jury clerks exceeded their statutory authority in excusing jurors without judicial authorization. *Id.* at *7.

161. *Id.*

162. *Id.* at *9.

insufficient to “trigger [this] obligation.”¹⁶³

2. Appellate Court Opinion

On appeal to the Appellate Court, Mr. Tillman pressed his claim that his trial counsel had been ineffective by failing to make an “adequate offer of proof, or to request an evidentiary hearing or a continuance to gather proof of unconstitutional jury selection methods.”¹⁶⁴ The court noted that the only basis for the jury clerk’s statement that members of racial minorities would be disproportionately excused under the economic hardship policy was the clerk’s “speculation and assumption.”¹⁶⁵

Trial counsel testified at the habeas hearing that he had questioned the jury clerk, and that he had learned that there was a murder trial going on next door to Mr. Tillman’s trial in which there “appeared to be a substantial number of black jury panel members . . . who would have come from the same array . . .”¹⁶⁶ Based on this observation, the Appellate court concluded that the trial attorney “investigated, considered the issue and ultimately decided not to pursue it.”¹⁶⁷ The court concluded that trial counsel’s performance was not deficient, or even if it was deficient, that Mr. Tillman had not suffered any prejudice.¹⁶⁸

The Appellate Court also rejected Mr. Tillman’s claim of ineffective assistance of appellate counsel. It concluded that experienced advocates commonly pick and choose among potential appellate issues, and that it is reasonable professional judgment not to raise every possible issue on appeal.¹⁶⁹

Thus, while the Connecticut Supreme Court had rejected Mr. Tillman’s jury array challenge on direct appeal for lack of an evidentiary record, the Appellate Court affirmed the denial of habeas relief by deferring to trial counsel’s decision not to make that record. This

163. *Id.*

164. *Tillman v. Comm’r of Corr.*, 738 A.2d 208, 212 (Conn. App. Ct. 1999).

165. *Id.* at 211.

166. *Id.* at 212.

167. *Id.* at 212–13.

168. *Id.* at 212–14. The Appellate Court declined to consider Mr. Tillman’s claim that the alleged jury selection method violated due process because it permitted jurors to be excused by the clerk without court participation. *Id.* at 213. Consistent with the theme of preservation, the Appellate Court concluded that the claim was not raised at trial or on direct appeal, and that Mr. Tillman had failed to meet the cause and prejudice standard, which would have permitted to him to raise the defaulted claim. *Id.* at 213–14.

169. *Id.* at 214.

somewhat counter-intuitive result is common in postconviction litigation.¹⁷⁰ The case appeared closed, until Mr. Tillman's exoneration seven years later.

II. LINKS TO CAUSES OF WRONGFUL CONVICTIONS

Mr. Tillman's case—viewed through the prism of the issues raised on appeal—illustrates a number of recurring themes in wrongful convictions. Most salient, it is “yet another” wrongful conviction based on a mistaken eyewitness identification.¹⁷¹ It is a cross-racial identification case involving allegations of a sexual assault leveled by a white woman against an African-American man. Finally, there are hints of potential problems with the police investigation and forensic analysis.

A. Mistaken Eyewitness Identification

The appeal is first noteworthy for what it does *not* claim about the identification procedure. The identification procedure conducted in Mr. Tillman's case was challenged at trial in a motion to suppress, which was denied.¹⁷² Like most exonerees whose wrongful convictions were based on faulty eyewitness testimony, however, Mr. Tillman did not challenge the identification procedure itself on appeal.¹⁷³

The identification procedure was described in the State's brief:

The victim wanted to make an identification of her assailant, and met with Janette Getz a social worker with the Hartford Police Crisis Unit, and Detective Kumnick of the Hartford Police Department on January 25, 1988. At headquarters, Detective Kumnick first brought her a set of

170. Garrett, *Judging Innocence*, *supra* note 22, at 126.

171. Posting of Mark Godsey to CrimProf blog, *Faulty Photo Id Practice Was the Cause of Yet Another Wrongful Conviction*, http://lawprofessors.typepad.com/crimprof_blog/2008/04/faulty-phot-id.html (Apr. 17, 2008). See, e.g., Steve McGonigle & Jennifer Emily, *DNA Evidence Clears Another Dallas County Inmate*, DALLAS MORNING NEWS, Apr. 15, 2008, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/041608dnmetdna.68a4e9ef.html> (describing how Clifford McGowan, Jr., falsely accused of rape based on a mistaken eyewitness identification, was freed after 23 years. Mr. McGowan was the 16th Dallas County prisoner to be exonerated.).

172. Record, *supra* note 77, at 18–21. In his ruling from the bench denying Mr. Tillman's Motion to Suppress the victim's identification, the trial court referred six times to the victim's “certainty” or to the fact that she was “positive.” Transcript on Hearing to the Motion to Suppress Identification at 132–36, *State v. Tillman*, 600 A.2d 738 (Conn. 1991) (No. 53889).

173. Garrett, *Judging Innocence*, *supra* note 22, at 76 (noting that in only 28% (29) of the 104 cases (with written decisions) supported by eyewitness identification, DNA exonerees whose convictions were supported by faulty eyewitness testimony raised due process claims challenging eyewitness identifications. 45% (47) raised some kind of claim challenging an eyewitness identification. Mr. Tillman counts among those who *did* raise some kind of claim challenging the eyewitness identification, because he raised the jury instruction issue).

Polaroid pictures of black men, but the victim did not recognize any of the individuals.

Detective Kumnick then handed her a book of police photographs. He left the victim with Getz, and, shortly thereafter, the victim recognized a picture of her attacker, which caused her to shake and cry. She told Getz that she recognized her attacker but that he looked younger in the picture. Detective Kumnick came back in and said he would try to get a more recent photo. The first picture was dated April, 1983. Detective Kumnick returned with another picture of the defendant taken in June, 1987. The victim identified this picture and had no doubt that it was the man who had attacked her. At trial the victim identified the defendant as her assailant and stated that there was no question in her mind as to his identity.¹⁷⁴

Indeed, the trial transcript reveals that the victim testified (at both the hearing on the motion to suppress and before the jury) that the first photo of Mr. Tillman that she picked “looked a little different” or “looked different” from her assailant.¹⁷⁵ The trial transcript also reveals that, before showing the victim the photographs, the Detective instructed her that “people can shave, they can grow beards,” and that she should point out a photograph even if “she saw someone that was not perfect—[that] had similar features.”¹⁷⁶

This account of the identification procedures suggests some potential “red flags” based on today’s social science. Current “best practices” caution against conducting multiple identification procedures with the same suspect.¹⁷⁷ The detective’s remarks may also be cause for concern. A recent study of a similar “appearance change” instruction revealed that “the rate of mistaken identifications of an innocent suspect was

174. Brief of the State of Connecticut-Appellee, *supra* note 111, at 5 (internal citations omitted).

175. Transcript on Hearing of the Motion to Suppress Identification, *supra* note 172, at 43, 44; Trial Transcript, *supra* note 4, at 97.

176. The Detective testified about his instructions to the victim, prior to showing her suspects’ photographs:

I told her that I was going to show her photographs of black males. And I asked her to study the photographs, remembering that people can shave, they can grow beards, we may not have a photograph of the person exactly as he appeared. So I just told her to study the faces. If she saw the person, tell us. If she saw someone that was not perfect—had similar features, point those out so we know what we’re looking for.

Trial Transcript, *supra* note 4, at 193. Current research counsels that victims should be cautioned that the true culprit may not appear in the photo array or lineup. Wells, *supra* note 33, at 625.

177. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 8 (2009) (“Witnesses who encountered an innocent person’s photo in an initial identification procedure were more likely to misidentify a different photo of him in a second procedure even if they did not misidentify him in the first procedure, but the effect is especially strong if they also misidentified the person in the first procedure.”).

inflated by over 50%” when witnesses were given the instruction.¹⁷⁸ Also troubling is the victim’s initial statement that, in the first photograph, Mr. Tillman “looked younger in the picture” or “looked a little different.”¹⁷⁹ Were the victim’s expressions of confidence, particularly her statements of certainty at trial, inflated by suggestive or successive identification procedures, or by the trial process itself?¹⁸⁰

In the twenty years since Mr. Tillman’s trial, social scientists have learned a great deal about eyewitness evidence, and in particular the relationship between confidence and accuracy. Professor Gary L. Wells and others have demonstrated that the correlation between accuracy and confidence is “not a reliable indicator of accuracy,”¹⁸¹ or as Professor Wells and his co-author Deah Quinlivan recently wrote, that certainty is of “limited utility” in judging the reliability of an identification.¹⁸² Even more important, social scientists have learned that an eyewitness’s assessment of certainty is “highly malleable” and can be “inflated” by suggestive identification procedures,¹⁸³ or even by more innocuous influences like encouraging post-identification “feedback” or repeated

178. Steve D. Charman & Gary L. Wells, *Eyewitness Lineups: Is the Appearance-Change Instruction a Good Idea?*, 31 LAW & HUM. BEHAV. 3, 18 (2007). Professors Charman and Wells suggest that this might be because the instruction inappropriately encourages witnesses who have a “poor memory of the criminal” to make a pick anyway. *Id.*

179. See Transcript on Hearing of the Motion to Suppress Identification, *supra* note 172, at 43, 44; Trial Transcript, *supra* note 4, at 97.

180. *Id.* Alternatively, the victim’s remarks might hint at a relative judgment effect: a psychological process by which a witness selects “the member of the lineup [or photo array] who most resembles the eyewitness’s memory of the culprit relative to the other members of the lineup,” even if the real culprit is absent. Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL’Y & L. 765, 768–69 (1995). The detective in the Tillman case testified that he told the victim to alert the police to any photos that “look similar” or possess “similar features” to the suspect, so that the police could develop a description. Trial Transcript, *supra* note 4, at 193, 194. Could the victim have “settled” for the suspect who looked most like her assailant?

181. See Gary L. Wells, Elizabeth A. Olson & Steve D. Charman, *The Confidence of Eyewitnesses in Their Identifications from Lineups*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 151, 151 (2002). Professor Wells and his co-authors explain that “the confidence-accuracy correlation might be as high as +.40 when the analysis is restricted to individuals who make an identification.” *Id.* at 152. They analogize this relationship to the “correlation between a person’s height and a person’s gender,” reasoning that, “we would expect to encounter a highly confident mistaken eyewitness . . . about as often as we would encounter a tall female (or a short male).” *Id.* See also Neil Brewer, Amber Keast & Amanda Rishworth, *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. EXPERIMENTAL PSYCHOL. 44 (2002); Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243, 253 (1980); Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL’Y & L. 817 (1995).

182. Wells & Quinlivan, *supra* note 177, at 12.

183. *Id.* at 9.

questioning.¹⁸⁴ Thus, certainty statements made by a victim at trial are of less value than statements made at the time of the identification, because the victim's subjective level of certainty may be tainted by factors "such as the witness' beliefs about other evidence against the accused or their beliefs about what others believe."¹⁸⁵

In Mr. Tillman's case, an eyewitness who initially said that the suspect "looked different" or "younger" in the first photograph,¹⁸⁶ identified him from a second, more recent photograph, described her level of certainty as "positive,"¹⁸⁷ and, at trial, expressed no doubt that Mr. Tillman was her assailant.¹⁸⁸ This sequence of events—involving multiple photographs of Mr. Tillman, an "appearance change" instruction, and reliance on the victim's subjective statements of certainty, which became more definitive with successive identification procedures—may reflect in part the "malleability" of eyewitness certainty described by Professor Wells.¹⁸⁹ Alternatively, it may simply demonstrate the weak correlation between certainty and accuracy.¹⁹⁰ At a minimum, it suggests a need to reexamine procedures for interacting with eyewitnesses,¹⁹¹ a process that has been initiated in Connecticut,¹⁹²

184. See Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 360 (1998). See also Amy L. Bradfield, Gary L. Wells, & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002); Steven Penrod & Brian Cutler, *Witness Confidence & Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 827 (1995); Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334 (2004).

185. Wells & Quinlivan, *supra* note 177, at 18.

186. Transcript on Hearing of the Motion to Suppress Identification, *supra* note 172, at 43, 44; Trial Transcript, *supra* note 4, at 97.

187. *Id.* See also Trial Transcript, *supra* note 4, at 195 (Detective Kumnick testified that, "[s]he said she was positive it was him, although in the photograph he looked younger than he actually was.").

188. *Tillman v. State*, 600 A.2d 738, 745 (Conn. 1991).

189. Wells & Quinlivan, *supra* note 177, at 12.

190. See sources cited *supra* note 184. See also Wells, Memon & Penrod, *supra* note 33, at 65.

191. See Wells, Memon & Penrod, *supra* note 33, at 68 (counseling, *inter alia*, that lineup administrators "obtain[] a confidence statement from the eyewitness before external factors can influence the person's confidence"); see also Wells, *supra* note 33.

192. In the *State v. Ledbetter* case in 2005 the Connecticut Supreme Court mandated that "unless there is no significant risk of misidentification," in cases in which the victim was not advised by police that a suspect may or may not be in a line-up or photo array, trial courts should instruct the jury that:

Psychological studies have shown that indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not present.

881 A.2d 290, 318 (Conn. 2005). At around the same time, law enforcement authorities adopted form instructions for police officers to use in administering identification procedures. Alex Woods, *New Rules*

but not yet brought to complete fruition.¹⁹³

On appeal, Mr. Tillman did not press his due process challenge to the eyewitness identification procedure itself. However, he raised an issue relating to the identification—a challenge to the jury instruction about factors that the jurors could consider in evaluating the victim's identification. In rejecting this claim, the opinion in *State v. Tillman* relies heavily on the victim's subjective assessment of her opportunity to view her assailant. The Court says that the victim “was able to get a good look at [her attacker's] face,” and that “[d]uring the entire fifteen to twenty minutes that the attacker was having difficulty starting the car, the victim observed the right side of his face.”¹⁹⁴ The opinion quotes the victim's testimony that she “was trying to focus on his eyes, nose, the shape of his face, things that I could remember, things that I would be able to use to identify him by.”¹⁹⁵

The opinion also focuses on the victim's subjective statements of certainty about her identification. It says that she “was certain she could identify her attacker” from the photo array, and that the victim testified at trial that there was “no doubt in her mind that the defendant was the man who had attacked her.”¹⁹⁶

Unfortunately, despite the social science research, this type of reliance on the victim's subjective statements of certainty still forms the basis of important legal standards relating to eyewitness identification procedures. The 1977 U.S. Supreme Court decision establishing the standard for due process challenges to identification procedures, *Manson v. Brathwaite*,¹⁹⁷ instructs courts to admit even identifications that are

Being Drawn for Eyewitness Identification, JOURNAL-INQUIRER, Sept. 23, 2005, available at http://www.nacdl.org/sl_docs.nsf/freeform/EyewitnessID017.

193. A comprehensive eyewitness identification bill that would have mandated reforms including sequential double-blind procedures was introduced into the General Assembly in early 2008, but was not adopted. An Act Concerning Eyewitness Identification, H.R. 5832, 2008 Gen. Assem., Reg. Sess. (Conn. 2008). Another eyewitness identification reform bill was introduced in 2009, but at the time this Article was being finalized, it had not advanced beyond a public hearing. An Act Concerning Eyewitness Identification, S.B. 357, 2009 Gen. Assem., Reg. Sess. (Conn. 2009). See also *State v. Marquez*, 967 A.2d 56, 84 (Conn. 2009) (declining to exercise supervisory authority to implement reforms to eyewitness identification procedures).

194. *Tillman v. State*, 600 A.2d 738, 745 (Conn. 1991).

195. *Id.*

196. *Id.* The police report reprinted in the Record on Appeal contains even more such statements from the victim, including a statement “that she would never forget the face of the black male who raped and robbed her.” Record, *supra* note 77, at 7. At trial, the victim's mistaken identification was compounded by the fact that then-existing Connecticut precedent permitted other witnesses to repeat her version of events: the victim's advocate and the Detective both essentially repeated her account of the rape. Trial Transcript, *supra* note 4, at 129–31, 190. Five years after the opinion in Mr. Tillman's case, the Connecticut Supreme Court limited such constancy testimony to the fact that the victim had reported the assault to the witness. *State v. Troupe*, 237 Conn. 284, 304 (1996).

197. 432 U.S. 98 (1977).

the product of suggestive procedures if they are nonetheless reliable.¹⁹⁸ Reliability is to be judged by five factors: “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.”¹⁹⁹

The *Manson* standard has been criticized.²⁰⁰ In a recent article, Gary Wells and Deah Quinlivan explain that “the most serious problem is that three of the five [*Manson*] criteria (certainty, view, and attention) are self-reports by the eyewitnesses.”²⁰¹ They further caution that these “self-reports” might be artificially enhanced “products of suggestive procedures.”²⁰² Wells and Quinlivan conclude that these three *Manson* factors actually might be better “indicators of the power of the suggestive procedure” than indicators of the ultimate reliability of the identification.²⁰³ Despite such criticism, the U.S. Supreme Court has not yet abandoned *Manson*, and the Connecticut Supreme Court has declined to adopt a different standard under the state constitution.²⁰⁴

The instruction on eyewitness identification given by the trial court at Mr. Tillman’s trial told the jury to consider some of the same factors that make up the reliability prong of *Manson*, including the criticized factors that are based on the witness’ subjective assessment of their accuracy.²⁰⁵ Mr. Tillman’s requested instruction would have told the jury that it could have considered whether the victim was “physically impaired or under stress when she observed the perpetrator” in evaluating the reliability of her identification.²⁰⁶

It is hard to say whether Mr. Tillman’s proposed instruction would have focused the jury more keenly on the potential for mistaken eyewitness identification, although admittedly it seems unlikely.²⁰⁷

198. *Id.* at 114.

199. *Id.*

200. See Wells & Quinlivan, *supra* note 177; see also O’Toole & Shay, *supra* note 33.

201. Wells & Quinlivan, *supra* note 177, at 16.

202. *Id.*

203. *Id.* at 17.

204. *State v. Ledbetter*, 881 A.2d 290, 308–14 (Conn. 2005). See Lisa J. Steele, *Trying Cases of Mistaken Identity: Advice to Connecticut Counsel Following State v. Ledbetter*, 25 QUINNIPIAC L. REV. 799, 802 (2007).

205. Specifically, jurors were instructed to consider “opportunity to observe” and “certainty,” as well as less-controversial factors including the time between the incident and the identification, and the level of consistency between the description and the defendant’s appearance. Brief of the Defendant-Appellant, *supra* note 103, at app. F-4.

206. *Tillman v. State*, 600 A.2d 738, 744 (Conn. 1991).

207. See Wells & Quinlivan, *supra* note 177, at 20 (arguing that jury instructions that are “tailored

Commentators have noted that it is nearly impossible to expose the flaws in an identification when the mistaken witness—often a crime victim who has undergone a horrible ordeal—is so certain of her pick.²⁰⁸ In addition, studies demonstrate that jurors are persuaded by an apparently certain witness.²⁰⁹

We do know that Mr. Tillman's jury was focused on the issue of the identification, because it asked for the victim's two descriptions of her assailant to be read back to them during deliberations.²¹⁰ Similar instructional issues were being litigated in other cases around the time of Mr. Tillman's trial,²¹¹ and continue to be litigated in Connecticut,²¹² sometimes in cases involving questionable identification practices.

Most significant here, the opinion in Mr. Tillman's appeal demonstrates over-reliance on the victim's subjective expressions of certainty (particularly those made at trial), as well as her own assessment

to the specific case," for example letting the jury know that it can consider a specific suggestive factor that was present in the identification procedure, might be effective). *But see* Penrod & Cutler, *supra* note 181, at 834 (arguing that there is "little evidence that judges' instructions concerning the reliability of eyewitness identification improve juror decision making").

208. Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 772 (2007) (explaining why cross-examination is relatively ineffectual in uncovering truly mistaken eyewitness identifications); Wells & Quinlivan, *supra* note 177, at 17 ("[C]areful questioning at the Manson hearing is not likely to get around this problem."). *See* Steele, *supra* note 204, at 802 ("No amount of skillful cross-examination was going to shake the witness' story because, as far as they were concerned, it was true. The witness will come across as sympathetic, honest, and persuasive despite having made a dreadful error.").

209. Penrod & Cutler, *supra* note 181, at 822 ("Jurors appear to overestimate the accuracy of identifications . . . do not distinguish accurate from inaccurate eyewitnesses, and are generally insensitive to factors that influence eyewitness identification accuracy."). *See also* JAMES M. DOYLE, TRUE WITNESS 44 (2005) ("Research indicates that . . . mock jurors believe a confident but mistaken eyewitness at exactly the same rate as a confident and correct one when viewing conditions are in the same general range."); Epstein, *supra* note 208, at 773.

210. Brief of the Defendant-Appellant, *supra* note 103, at 15.

211. Only a few months before issuing its opinion in Mr. Tillman's case, the court rejected a challenge to the adequacy of an instruction in a case in which two witnesses identified the defendant in the context of a probable cause hearing, after having first picked another man from a photo array. *See* State v. Tatum, 595 A.2d 322 (Conn. 1991). While conceding in a footnote that "it is true that a trial court's refusal to give *any* special instruction whatsoever on the dangers inherent in eyewitness identification constitutes reversible error where 'the conviction of the defendant [turns] upon the testimony of eyewitness who were uncertain, unclear or inconsistent,'" the court concluded that the instruction that was given—which like the instruction in Mr. Tillman's case told the jury to focus in part on certainty and opportunity to observe—was adequate. *Id.* at 329 & n.18, 330–31 (citing, *inter alia*, State v. Harden, 398 A.2d 1169, 1173 (Conn. 1978)). At least one commentator has noted that, under this standard, "if the trial court finds the identification to be reliable at the motion to suppress stage and the witness's testimony is moderately strong, then a specific jury instruction is not required." Steele, *supra* note 204, at 844.

212. Steele, *supra* note 204, at 849 & n.238. Steele writes that the Connecticut court "has consistently upheld trial courts' denials of requested jury instructions focusing on specific weaknesses in eyewitness identification." *Id.* at 849 (relying on the case notes collected in BORDEN & ORLAND, *supra* note 72, §§ 3.14–15).

of her opportunity to view the culprit.²¹³ While the most important changes relating to eyewitness identification must happen at the investigative level,²¹⁴ courts also should reduce reliance on confidence as a proxy for accuracy.

B. Cross-Racial Identification and Racial Disparity

The statements of the victim in *State v. Tillman* eerily echo those of the victim in another rape case resulting in a wrongful conviction, the case of Ronald Cotton. In that case, the victim, Jennifer Thompson, has spoken publicly and written about how she made every effort to remember her rapist's features so that she could identify him.²¹⁵ She was shocked to learn 11 years later that she had been mistaken when she had identified Mr. Cotton, who was exonerated by DNA.²¹⁶

Like *Tillman*, the Cotton case was a cross-racial mistaken identification in a sexual assault in which a white woman accused an African-American man of rape.²¹⁷ Cross-racial identifications like those in the *Tillman* and Cotton cases are even more prone to error than other kinds of eyewitness identifications. Almost half of the DNA exonerations involved a cross-racial identification.²¹⁸ Social scientists debate the causes of "own-race bias" in identification of faces but describe the effect as "robust."²¹⁹ The effect has been described as an "unconscious and automatic" psychological process.²²⁰ Commentators have urged courts to adopt special instructions on cross-racial eyewitness identification,²²¹ but so far Connecticut, like most

213. *Tillman v. State*, 600 A.2d 738, 745 (Conn. 1991).

214. See *supra* note 33. But see *State v. Marquez*, 967 A.2d 56, 84 (Conn. 2009) (declining to implement eyewitness identification procedure reforms under the court's supervisory authority).

215. Jennifer Thompson, 'I Was Certain, but I Was Wrong', N.Y. TIMES, June 18, 2000. At Mr. Tillman's trial, the victim advocate who testified for the State said that the victim had told her that she had made a "conscious effort" to look at her attacker so that she could identify him. Trial Transcript, *supra* note 4, at 131. The prosecutor then emphasized in closing that the victim had repeatedly focused on looking at the attacker. *Id.* at 486-87. See also JENNIFER THOMPSON-CANNINO & RONALD COTTON WITH ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE & REDEMPTION 213, 237-38 (2009).

216. Thompson, *supra* note 215.

217. *Id.*

218. Garrett, *Judging Innocence*, *supra* note 22, at 79.

219. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 3 (2001). See also Aaronson, *supra* note 43; Wells, Mermon & Penrod, *supra* note 33, at 52.

220. Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 124 (2006).

221. See Aaronson, *supra* note 43 (proposing a model jury instruction on cross-racial eyewitness identification). The American Bar Association House of Delegates recently passed a resolution urging

jurisdictions,²²² has declined to mandate such an instruction.²²³

In general, members of racial minorities are disproportionately represented among the wrongfully convicted.²²⁴ The disproportionate racial impact of wrongful convictions parallels other racial disparities in our criminal justice system—uneven arrest and charging rates, disparate sentences, and racial disproportion in incarceration rates.²²⁵ In a study of exonerations between 1989 and 2003, almost half involved an African-American man wrongly accused of raping a white woman.²²⁶

Again, commentators debate the reasons,²²⁷ just as they debate the causes of other kinds of racial inequity in our criminal justice system.²²⁸ Factors contributing to the disparity in wrongful convictions could include racially-discriminatory jury selection methods, selective prosecution, unconscious racism by actors in the criminal justice system, racially-biased interrogation techniques—in addition to the potential for

jurisdictions to make available adequate funding for expert testimony on cross-racial identification, and to create model jury instructions for such cases. See Stephen J. Saltzburg, *Report to House of Delegates*, 2008 A.B.A. SEC. CRIM. JUST. L. REP. 1, available at <http://www.abanet.org/crimjust/policy/am08104.d.pdf>.

222. The ABA report accompanying its recommendation stated that the jurisdictions that currently “require or authorize a cross-racial identification jury instruction” are California, Utah, New Jersey, and Massachusetts. *Id.* at 12. It also concluded that “[m]ost state appellate courts have yet to address this issue.” *Id.*

223. See *State v. Porter*, 698 A.2d 739, 779 n.80 (Conn. 1997) (“This court has specifically rejected the notion of special treatment for defendants in cross-racial identification situations . . .”); *State v. Wiggins*, 813 A.2d 1056, 1058–59 (Conn. App. Ct. 2003) (no abuse of discretion in refusing to give requested instruction on cross-racial identification). See also BORDEN & ORLAND, *supra* note 72, § 3.14, at 204. The year after the Connecticut Supreme Court’s opinion in *Mr. Tillman’s case*, Justice Berdon dissented in another cross-racial eyewitness identification case in which the court cited its opinion in *Tillman*. He argued that “[a] miscarriage of justice could result if we allow the jury to use eyewitness identification evidence without proper guidance from the trial court’s instructions alerting the jury to the factors to consider in its evaluation.” *State v. Cerilli*, 610 A.2d 1130, 1147 (Conn. 1992) (Berdon, J., dissenting).

224. Garrett, *Judging Innocence*, *supra* note 22, at 66–67.

225. Karen F. Parker, Mari A. Dewees & Michael L. Radelet, *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE*, *supra* note 45, at 115–16.

226. Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 547–48 (2005). See also Garrett, *Judging Innocence*, *supra* note 22, at 67 (“73% of innocent rape convicts were Black or Hispanic, while one study indicates that only 37% of all rape convicts are minorities”).

227. See generally Taslitz, *supra* note 220. See also Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. L. REV. 1091 (2008).

228. See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1970, 1970 (2008) (observing in the abstract that racial inequality appears to be a “core feature of American criminal justice,” but that its “causes remain obscure.”); Andrew E. Taslitz, *Foreword: The Political Geography of Race Data in the Criminal Justice System*, 66 LAW & CONTEMP. PROBS. 1, 2–3 (Summer 2003) (recounting debate among criminal law professors about the cases of racial disparity, positing causes ranging from “fair application of neutral legal principles” resulting in disparate impact to “subconscious racial stereotyping or systemic forces.”).

error in cross-racial eyewitness identification.²²⁹ In Mr. Tillman's case an erroneous cross-racial identification occurred,²³⁰ and racially-biased jury selection was alleged.

Commentators have noted the potential for multiple forms of racial bias to interact and exacerbate (or at least fail to correct) one another.²³¹ An accuser could mistakenly identify a defendant, and her mistake may be attributable in part to unintentional "own-race bias."²³² The victim's initial mistake may be compounded by unconscious racism in the investigation and prosecution;²³³ at trial;²³⁴ or even on appeal or in postconviction proceedings.²³⁵ Of course, it is impossible to say whether and to what extent unconscious stereotyping may have played a role in Mr. Tillman's wrongful conviction, but his case challenges us to consider these questions.²³⁶

C. Faulty Investigation and Forensic Analysis

Lurking between the lines of the published opinions in Mr. Tillman's case are questions about the police investigation in his case.²³⁷ The hearsay issue raised on appeal pertained to a police social worker's notes

229. Taslitz, *supra* note 220, at 122, 130.

230. Racial issues can also produce more overt suggestivity. At trial, defense counsel asked the victim, who had just identified Mr. Tillman as her assailant, "Do you see any other black men in this courtroom?" Trial Transcript, *supra* note 4, at 119.

231. Taslitz, *supra* note 220, at 131–33 (noting that "multi-stage dynamics [of racial bias] may be reinforcing").

232. See Meissner & Brigham, *supra* note 219. The photos of Mr. Tillman used in the identification procedure were police photos. Trial Transcript, *supra* note 4, at 194. Another question that merits inquiry is whether, in light of the fact that African-American men may be subjected to more interactions with police than other groups, see Taslitz, *supra* note 220, at 127–28, the use of resulting arrest photos in such identification procedures exposes them to a heightened risk of wrongful conviction.

233. Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 203 (2007) (arguing that "[u]nwarranted racial disparities cannot be eliminated without the active participation of prosecutors").

234. Taslitz, *supra* note 220, at 126–28. See also Sherri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 949 (1984) (arguing based on social science research that "when the evidence is sparse, jurors are more likely to attribute guilt to defendants of a different race").

235. Cf. Taslitz, *supra* note 220, at 133 ("There is no reason to think that similar [racially biased] dynamics will have any less force at other steps in the process.").

236. Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 3 (2007) (using the term "racial blindsight" to describe that "much of America is consciously blind to the harmful effect of racial biases on our individual and collective psychologies, yet is at some subconscious level quite aware of their presence . . . [and] . . . that this blindsight is caused by trauma").

237. Mr. Tillman's story also illustrates the potential for false confession. Mr. Tillman testified at trial that the police told him (falsely) that they had his fingerprints and that they urged him to confess—a suggestion that he resisted. Trial Transcript, *supra* note 4, at 446.

of a conversation with a detective that placed certain key fingerprints—which did not match Mr. Tillman—on the driver's side of the car.²³⁸ At trial, the officer testified that those fingerprints were on the passenger side, which was never used by the rapist.²³⁹ The defense was not permitted to introduce the police social worker's notes as a business record to support its claim that Mr. Tillman was not the real perpetrator, or that the police investigation was faulty.²⁴⁰

The phenomenon of “tunnel vision” can cause investigators and prosecutors to discount evidence that does not fit their hypothesis of guilt.²⁴¹ “Tunnel vision” has been described as the interaction of cognitive processes including “confirmation bias,” “hindsight bias,” and “outcome bias.”²⁴² Professor Keith Findley has suggested that the same cognitive processes that produce tunnel vision in police and prosecutors are also at work in the appellate process, encouraging appellate courts to deem errors “harmless” because they are convinced of a defendant's guilt.²⁴³

Another “dog that did not bark” in Mr. Tillman's case was that no challenge was brought to the forensic science evidence introduced at trial—specifically the serology evidence. A review of the transcripts of exonerees whose convictions were supported by forensic evidence, conducted by Professor Garrett and Peter Neufeld, demonstrates that, at the majority of these trials, the testimony of the prosecution's forensic analysts was improper.²⁴⁴ Professor Garrett has pointed out that the forensic analyst who testified at Mr. Tillman's trial inaccurately characterized the blood evidence.²⁴⁵ Like most exonerees whose convictions were based on faulty forensic evidence, Mr. Tillman did not challenge the forensic evidence on appeal or in postconviction

238. *State v. Tillman*, 600 A.2d 738, 747 (Conn. 1991).

239. *Id.*

240. *Id.*

241. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 308–22 (2006). See also Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512 (2007); Martin, *supra* note 66; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 147–50 (2004).

242. Findley & Scott, *supra* note 241, at 324–25.

243. *Id.* at 349–50.

244. Garrett & Neufeld, *supra* note 28.

245. The forensic analyst maintained that the stain on the victim's pantyhose could have been left by only 20% of the population, and failed to acknowledge the possibility that the testing could have been inconclusive due to degradation of the sample or insufficient material to test (the likely reality). See Emails from Brandon Garrett to author (May 22, 2008 & July 2, 2008) (on file with author); see also Trial Transcript, *supra* note 4, at 317–27.

proceedings.²⁴⁶

III. *STATE V. TILLMAN* AS A CASE STUDY OF APPEALS PROCESS

Now that Mr. Tillman's wrongful conviction has come to light, we are left with two published opinions that tell a story that is not true, and affirm a result that was a miscarriage of justice. Yet these opinions are still "good law" in Connecticut, and even have been cited in an opinion rejecting the appeal of another Connecticut prisoner who subsequently was exonerated based on DNA.²⁴⁷ This situation provides an occasion to consider the role of appellate courts and the nature of appellate reasoning.

It is a commonplace observation that appeals are not really about guilt and innocence.²⁴⁸ Professor Findley has noted that this realization often produces surprise among lay people.²⁴⁹ Appellate courts' role is not to second-guess the factual determinations of juries and trial judges, the standard line goes.²⁵⁰ Appeals courts lack the "institutional competence" to make factual determinations: they do not observe the witnesses and the courtroom dynamics.²⁵¹ The role of appellate courts, according to conventional wisdom, is to announce legal principles and consider whether trial procedures complied with them, not to second-guess the accuracy of factual determinations.²⁵² Of course, another more "instrumentalist" goal of our adjudicative system as a whole, as described by Professor Charles Nesson, might be simply "authoritative resolution . . . with ascertainment of the truth but a useful means to that

246. Garrett, *Judging Innocence*, *supra* note 22, at 76 (none of the 77 exonerees whose cases (with written opinions) were based on faulty forensic evidence brought a direct constitutional challenge to that evidence; 25 (32%) brought some type of claim challenging that evidence, but only 6 of these won relief).

247. *See supra* notes 69–70.

248. Findley & Scott, *supra* note 241, at 348.

249. *Id.*

250. *Id.* *See also* State v. Rivera, 810 A.2d 824, 831 (Conn. 2002) ("[I]t is beyond question that the trier of fact, here, the jury, is the arbiter of credibility. This court does not sit as an additional juror to reconsider the evidence or the credibility of the witnesses."). *See also* Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 438–39 (2004) ("Among the pieties of our legal system is the notion that appellate courts do not engage in factual evaluation. . . . Simply put, we believe that appellate courts are not very good at fact finding.").

251. Findley & Scott, *supra* note 241, at 366. Recently, for example, the Connecticut Appellate Court remarked, "[a]lthough we do recognize the inconsistencies in Henry's testimony and how it differs from the testimony of Ware, it is not within the scope of our authority to assess for ourselves the credibility of the witnesses." State v. McCarthy, 939 A.2d 1195, 1204 (Conn. 2008).

252. Findley & Scott, *supra* note 241, at 348–49, 366. *See also* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L. L. REV. 1241, 1272 (2001) ("the scope of review in [American appellate] courts is limited to legal as opposed to factual errors").

end.”²⁵³

In the wake of the DNA exonerations, some have called for a rethinking of appellate and postconviction courts' role. Professor Findley, building on the work of Professor Chad Oldfather,²⁵⁴ has argued that appellate courts are not really so poorly-situated to make some types of factual determinations, and that they should not necessarily defer to trial courts.²⁵⁵ Professor Garrett has called for more avenues for review of postconviction innocence claims, free of the procedural obstacles that limit much of postconviction litigation in the name of “finality.”²⁵⁶ Still others have gone further and questioned the utility of an adversary system of litigation.²⁵⁷

My proposals are more modest, but I also consider the DNA exonerations to be an opportunity to reflect on appellate courts' mission. I submit that it is not only lay people who feel a sense of cognitive dissonance when confronted with the *Tillman* opinions. Certainly, despite all of the shared understanding of appellate courts' limited role, the opinions in Mr. Tillman's case produce a feeling that something in the appellate process has misfired. *State v. Tillman* can hardly be described as a good outcome.

The *Tillman* opinions call into question the nature of the conversation between appellate lawyers and judges in state court systems. Appellate advocates carefully craft alternative narratives about cases—why an

253. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1194–95 (1979).

254. Oldfather, *supra* note 250, at 463–67.

255. Findley & Scott, *supra* note 241, at 366–67. Writing for the Connecticut Supreme Court in *State v. Hammond*, Justice Peters noted commentary arguing that “the trial court's superior ability to view the trial and assess the witnesses' credibility can be given excessive weight on review.” 604 A.2d 793, 796 n.2 (citing Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 217–18 (1989)). I thank Professor Timothy Everett for this note and many other reflections on Connecticut precedent.

256. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) [hereinafter Garrett, *Claiming Innocence*]. The proper role of federal courts reviewing state criminal convictions in federal habeas corpus proceedings (not an issue in Mr. Tillman's case) is discussed extensively in scholarly commentary. See Lasch, *The Future of Teague Retroactivity*, *supra* note 59 (discussing the debate sparked by Professor Paul Bator regarding whether federal habeas proceedings should focus on ensuring fair process or determining truth) (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)).

257. See, e.g., Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1587 (2005) (describing the emergence of a “new model for criminal justice” that depends “less on adversarial process” and “more on practices akin to those found in administrative and inquisitorial settings”); Daniel Givelber, *The Adversary System and Historical Accuracy: Can We Do Better?*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE*, *supra* note 45, at 253; Griffin, *supra* note 252, at 1303 (calling for the creation of an independent commission, like that in the United Kingdom, to review “credible new evidence of innocence” after other appeals have concluded).

error was harmful, what evidence made a difference, what concerned the jury. Appeals courts, based on briefs, transcript, and record, develop views about which errors made a difference, and in what circumstances it is worthwhile to reaffirm or announce a legal principle. Mr. Tillman's case challenges us to ask whether this conversation between appellate advocates and judges bears any relationship to facts in the world. Is it truly divorced from questions of guilt or innocence? If so, is it, as Professor Kamin has suggested, no more than an "argu[ment] over the plot of a good novel"?²⁵⁸ Are appellate courts' opinions—with their conclusions about the reliability of verdicts—"no better than science fiction"?²⁵⁹

The notion that appellate courts exist to elucidate abstract principles of law does not describe the totality of the work of the state appellate courts. State court opinions apply tests that focus heavily on various kinds of harm and prejudice.²⁶⁰ They often wade into the factual details of a case. And state supreme courts rightly view themselves as possessing supervisory authority over a criminal justice system,²⁶¹ an authority that the Connecticut courts have used over the years.²⁶²

Nonetheless, the Tillman case illustrates some dynamics that can hinder appellate courts from fulfilling their role in leading a state's criminal process. While different decisions might not have changed the result in the Tillman trial, reexamining certain features of appellate practice might reduce the likelihood of wrongful conviction over the long-term. These aspects of appellate judging include heavy reliance on preservation rules and on harm- and prejudice-type analyses.²⁶³ Overuse of these tools can signal to players in the criminal justice system that they can gloss over certain issues with little risk of reversal—courting disaster.

A. "The Lawyer Failed": Preservation and Making an Adequate Record

The issue that was the primary focus of Mr. Tillman's appeal was his claim of racial discrimination in the composition of the jury pool. The Connecticut Supreme Court majority concluded that counsel had failed

258. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 21 (2002).

259. *Id.*

260. Garrett, *Harmless Error*, *supra* note 49.

261. See MEADOR ET AL., *supra* note 61 (identifying the three roles of appellate courts as error correction, harmonization of the law, and supervision of trial courts in the jurisdiction).

262. See *supra* notes 64 and 65.

263. Which harm standard is used (and more generally which standard of review is employed) has an impact on the rigor of appellate review, but I focus here on two very general observations inspired by the *Tillman* opinions.

to create an adequate evidentiary record in support of this claim.²⁶⁴ In dissent, Justice Berdon argued that counsel's representation regarding the jury clerk's comments should have been treated as an offer of proof; that the trial court should have held an evidentiary hearing; and that the Connecticut Supreme Court should have ordered a new trial.²⁶⁵ Nonetheless, counsel was not found ineffective for failing to make an adequate record.²⁶⁶

It is common for state appeals courts to dispose of claims for lack of preservation or failure to make an adequate record. There are a number of different issues at stake—failure to object or make a legal argument, failure to ensure sufficient memorialization of what transpired at trial, and failure to make an adequate “offer of proof” or request an evidentiary hearing.²⁶⁷ The opinion in Mr. Tillman's case focuses on counsel's failings, not on problems with the evidence itself.²⁶⁸ In this section, when I use the term “preservation rules,” I am referring loosely to situations in which the court rejects an appellate claim because counsel has failed to *do* something—to offer evidence, to object, or to raise an issue.

Connecticut does permit review of unpreserved constitutional claims on direct appeal; however, the four-part test used for unpreserved constitutional error requires that the record be adequate for review (which as we have seen may provide an “out”), and incorporates a harm standard (which as discussed below may undercut searching review).²⁶⁹ Plain error review is available, but rarely accorded: many appeals continue to founder based on inadequate preservation.²⁷⁰ Indeed, particularly at the intermediate Appellate Court level, litigants frequently have been denied appellate review for failing to seek

264. *State v. Tillman*, 600 A.2d 738, 742 (Conn. 1991). To be fair, the Connecticut Supreme Court did reject a threshold procedural claim by the government that the defendant had failed to comply with a Practice Book provision requiring that challenges to the jury array be made within five days of notification of the hearing date, reasoning that the rule was not a “procedural roadblock” when good cause could be shown for the delay. *Id.* at 742.

265. *Id.* at 748 (Berdon, J., dissenting).

266. *Tillman v. Comm'r of Corr.*, 738 A.2d 208, 213 (Conn. App. Ct. 1999).

267. See ALAN D. HORNSTEIN, *APPELLATE ADVOCACY IN A NUTSHELL* § 3-3 (1998); JONATHAN M. PURVER & LAWRENCE E. TAYLOR, *HANDLING CRIMINAL APPEALS* §§ 35-42 (1980).

268. See *Tillman*, 600 A.2d at 742-43 (“The defendant bears the burden of making an adequate record to support a challenge to a jury array.”); *id.* at 748 (“The defendant made no attempt to lay a proper foundation for the admission of the notes, even after the trial court pointed out this requirement.”).

269. *State v. Golding*, 567 A.2d 823, 827 (Conn. 1989).

270. See Wesley W. Horton & Kenneth J. Bartschi, 2007 *Connecticut Appellate Review*, 82 CONN. B.J. 29 (2008) (“Preservation of issues is a persistent problem in criminal matters.”).

“articulation” from trial courts regarding the bases of their rulings.²⁷¹

The reasons for requiring litigants to preserve claims and to create adequate records are routinely recounted in appellate opinions—to provide the fullest exposition of the issues to appellate courts; to avoid “ambushing” trial courts and litigants.²⁷² Such rules promote finality.²⁷³ Docket management concerns also play a role. Appeals courts are able to dispose of many cases on these grounds, particularly cases that they believe (based on their impressions) do not present any interesting or important legal or factual issues.²⁷⁴

Certainly, some may argue that strict preservation rules create an incentive for counsel to zealously litigate issues at trial, or face the prospect that they will be deemed waived. In other words, the argument goes, loose preservation requirements might encourage sandbagging.²⁷⁵ However, as others—perhaps most notably Justice Brennan—have argued, an attorney’s failure to raise a claim may reflect mere negligence or error as much as canny strategy.²⁷⁶

In cases like Mr. Tillman’s, in which an issue was brought to the trial court’s attention, a refusal to resolve a claim conclusively based on a lawyer’s failure to create an adequate record really only acts as tacit acceptance of lawyering lapses. The incentives that are created are not

271. See Wesley W. Horton & Kenneth J. Bartschi, *2003 Connecticut Appellate Review*, 77 CONN. B.J. 47, 51 (2003) (writing that authors had previously “complained about the Appellate Court’s tendency to duck issues by blaming appellants for not filing what we thought were unnecessary motions for articulation,” but noting that the Connecticut Supreme Court had reversed the Appellate Court for one such decision that year).

272. As the Connecticut courts often explain: “These [preservation] requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court’s evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush.” *State v. Calabrese*, 902 A.2d 1044, 1054 n.18 (Conn. 2006) (quoting *State v. Cabral*, 881 A.2d 247, 257, *cert. denied*, 546 U.S. 1048 (2005)) (internal quotation marks omitted).

273. John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1188–89 (2005) (in discussing preservation and procedural default rules, noting that “the fact that an error impacting reliability wasn’t raised on direct appeal or state collateral appeal does not dissolve its reliability-impacting character: although interests in finality weigh against its tardy adjudication, its real-world impact on the reliability of the verdict remains”).

274. Wesley W. Horton & Kenneth J. Bartschi, *2001 Connecticut Appellate Review*, 75 CONN. B.J. 261, 283–85 (2001) (arguing that Connecticut Appellate Court was using motion for articulation as a tool for dealing with high caseload).

275. *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977) (warning in the habeas context that failure to adopt a procedural default rule in the habeas corpus context “may encourage ‘sandbagging’ on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off”).

276. *Id.* at 104 (Brennan, J., dissenting) (“the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel”).

for lawyers, but for trial courts—reassuring them that they need not investigate further. To borrow Professor Nesson's lexicon, disposing of cases in this manner provides "authoritative resolution," without "ascertainment of the truth."²⁷⁷

As argued in Justice Berdon's dissent, Mr. Tillman's case provides a reason to back away from over-reliance on rules that penalize defendants for lawyers' imperfect litigation. Justice Berdon argued that the nature of the claims in Mr. Tillman's case—claimed systematic exclusion of minorities from the jury pool—called into question the integrity of the system.²⁷⁸ Allegations of racial bias in the selection of jury venires were made in numerous cases in Connecticut around the time of Mr. Tillman's case, suggesting that this was not an isolated incident.²⁷⁹ Cases like Mr. Tillman's may provide a reason to strike a different balance between finality and searching oversight.²⁸⁰

Justice Berdon would have granted Mr. Tillman a new trial.²⁸¹ In this situation, in which Mr. Tillman turned out to be factually innocent, a new trial would at least have afforded him another chance to test the State's evidence. Of course, new trials entail significant expenditure of resources,²⁸² and so adopting rules that afford them more frequently could be costly. Another solution might address some of the same systemic problems without the all-or-nothing effects of choosing between affirmance or a new trial—use of a remand for more detailed fact-finding on issues that appear potentially meritorious, or troubling,

277. Nesson, *supra* note 253, at 1194–95.

278. *State v. Tillman*, 600 A.2d 738, 752 (Conn. 1991) (Berdon, J., dissenting).

279. *See, e.g.*, *State v. Ellis*, 621 A.2d 250, 252 (Conn. 1993) (defendant claimed that black venirepersons were directed away from his trial to the Daniel Webb trial "to boost minority representation on the jury panels in the *Webb* case"); *State v. Henderson*, 706 A.2d 480, 482–83 (Conn. App. Ct. 1998) (at a pretrial hearing in 1995, the jury administrator for the state and the jury clerk that testified in Mr. Tillman's case testified that the State kept no records of the racial demographics of the jurors called for service). Indeed, in April, 1991, five months before the decision in Mr. Tillman's case, and shortly after Mr. Tillman's case was argued, the Connecticut Supreme Court rejected the consolidated appeal of thirty-one habeas petitioners challenging their convictions based on the use of a "town quota" system for selecting jury venires that had remained in effect until 1982, creating disproportionately white juries. Habeas relief was denied the petitioners in *Johnson* based on "procedural default"—another technical doctrine used to dispense with claims. *Johnson v. Comm'r of Corr.*, 589 A.2d 1214 (Conn. 1991). In the context of a federal habeas, the Second Circuit had held Connecticut's "town quota" system to violate federal equal protection guarantees. *Alston v. Manson*, 791 F.2d 255 (2d Cir. 1986). The Connecticut Supreme Court previously had rejected this claim on direct appeal in the same case. *See State v. Haskins*, 450 A.2d 828 (Conn. 1982).

280. In 1996, the Connecticut General Assembly passed a statute requiring collection of information regarding the racial identity of those called for jury service. CONN. GEN. STAT. § 51-232 (c) (2008).

281. *Tillman*, 600 A.2d at 748 (Berdon, J., dissenting).

282. Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated*, 70 N.Y.U. L. REV. 1167, 1169 (1995).

but about which the lawyer has failed to create an adequate record.²⁸³

It is possible that not even a remand for detailed fact-finding about the practices of the Hartford Superior Court jury clerk would have resulted in a new trial for Mr. Tillman; it is also possible that he would have been convicted on retrial based on a certain but mistaken eyewitness (as was the case with DNA exoneree Ronald Cotton).²⁸⁴ However, as Justice Berdon suggested,²⁸⁵ reversing the conviction would have demonstrated the court's concern about evidence of racial discrimination in the Connecticut criminal justice system. It would have signaled to lower courts and to lawyers and court personnel that Connecticut's judicial leadership took very seriously allegations of racial bias in jury selection. Over time, ordering hearings to investigate potential exclusion of minorities from jury selection might have resulted in a more racially representative jury pool, lessening the potential for the types of cumulative unconscious bias mistakes. Finally, a reversal or remand would have avoided the dissonance of a published opinion declining to examine claimed racial discrimination, in the case of an African-American man proven to have been falsely accused of the sexual assault of a white woman. Thus, in Professor Nesson's terms, more rigorous review of this issue might have enhanced both perception of "authoritative resolution" and "determin[ation] of the truth."²⁸⁶

B. "But It Didn't Matter Anyway": Harm and Prejudice-Type Analyses

The factual error that contributed most significantly to Mr. Tillman's wrongful conviction was a mistaken eyewitness identification. While Mr. Tillman did not challenge the eyewitness identification procedure itself on appeal, he did challenge the adequacy of the instruction on factors that the jury could consider in evaluating the victim's opportunity to observe.²⁸⁷

The Connecticut Supreme Court said that the trial court could have given the requested instruction, but that the instruction that it gave was adequate.²⁸⁸ It then went on to apply a standard that is employed in jury instruction issues: whether "the defendant could establish that it was

283. Connecticut's current Rules of Appellate Procedure appear to allow for such a mechanism. CONN. PRAC. BOOK § 60-2 (2007) (an appellate court "may, on its own motion or upon motion of any party . . . remand any pending matter to the trial court for the resolution of factual issues where necessary").

284. Thompson, *supra* note 215.

285. 600 A.2d at 751 (Berdon, J., dissenting).

286. Nesson, *supra* note 253, at 1194.

287. *Tillman*, 600 A.2d at 744-45.

288. *Id.* at 745.

reasonably probable that the jury was misled.”²⁸⁹ The court summarized the victim’s subjective assessment of her opportunity to view her assailant, as well as her subjective statement of certainty and concluded that, “[g]iven this positive identification testimony, and the instruction that was given, we conclude that it is not reasonably probable that the jury was misled by the court’s refusal to charge in the specific language that the defendant had requested.”²⁹⁰

Although not formally a harmful error analysis, the standard applied to the jury instruction claim shares much in common with harm analysis. In making this assertion, I am not relying on formal doctrines and categories of harm analysis,²⁹¹ but rather on a functional analysis—not how the court describes what it is doing, but how its reasoning actually operates. At base, the Connecticut Supreme Court’s analysis of the eyewitness identification instruction issue rested on a judgment about whether the error, if one existed, mattered. And the way that the court conducted that analysis rested fundamentally on a judgment about the ultimate issue in the case: whether the victim was “positive” in her identification, and, thus, whether Mr. Tillman was guilty.²⁹²

The danger of harm and prejudice type analyses is that their application rests, all too often, on the appellate court’s instinct about the defendant’s guilt or innocence, which in turn can be shaped by psychological and institutional influences. For this reason, among others, harmless error doctrine has been criticized.²⁹³ Writing about harm analysis and wrongful convictions, for example, Professor Garrett warns that harm-type analyses often excuse violations of defendants’ rights “based on a discretionary, flexible, and broad examination of all of the evidence before the jury, taking account of any general perception of the guilt of the defendant.”²⁹⁴ He argues that appeals court judges

289. *Id.* (citing *State v. Shiflett*, 508 A.2d 748, 766 (Conn. 1986)).

290. *Id.*

291. In his article, Judge Edwards outlines the history of harm analysis, describing the evolution of various harm standards, including the harm standard for evidentiary trial errors, *Kotteakos v. United States*, 328 U.S. 750 (1946), and the more rigorous harm standard for constitutional violations, *Chapman v. California*, 386 U.S. 18 (1967). See Edwards, *supra* note 282, at 1173–83.

292. Professor Garrett has pointed out that the *Manson* reliability factors applied to due process challenges to eyewitness identification procedures (similar to the factors considered by the court in Mr. Tillman’s jury instruction claim) also function as a kind of harmless error test. Garrett, *Harmless Error*, *supra* note 49, at 83.

293. Garrett, *Harmless Error*, *supra* note 49, at 61; Edwards, *supra* note 282, at 1171 (drawing distinction between “guilt-based” and “effect-on-the-verdict” harm analysis). See also Blume & Seeds, *supra* note 273 (arguing for a cumulative approach to various types of harm and prejudice analysis under *Brady* and *Strickland*, to promote the reliability of verdicts); Kamin, *supra* note 258, at 71 (noting that harmless error “doctrine’s malleability makes it an ideal instrument for the den[ial] of relief to a wide group of litigants”); Otero, *supra* note 59.

294. Garrett, *Harmless Error*, *supra* note 49, at 61. By contrast, a Note recently has argued that

should be loath to label error as “harmless” when a case bears “the indicia of wrongful convictions”²⁹⁵ or involves a claimed violation linked to wrongful convictions.²⁹⁶

Judge Harry Edwards has criticized harm analysis that takes a “guilt-based” approach rather than an “effect-on-the-verdict” approach.²⁹⁷ “The problem with harmless error arises when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant’s guilt,” he writes.²⁹⁸ Relying on a seminal book by Judge Roger Traynor,²⁹⁹ Judge Edwards argues that the “role of an appellate judge should be limited to a determination of whether the error influenced the jury”³⁰⁰ Judge Edwards acknowledged that, “[i]t is often a very hard assignment to distinguish between the effect of an error on the verdict and the effect of an error on one’s intuition about factual guilt.”³⁰¹ He particularly warned about the dangers of “guilt-based” harm analysis that is based on eyewitness identification testimony.³⁰²

Professor Garrett argues that harm-type analysis is used not only in formal harmless error review, but also in a number of standards applied by appellate courts. He notes a number of doctrines that employ what he (and others) describe as a “guilt-based approach,” which operate as a “second set” or “additional layer” of harmless error rules.³⁰³ As examples, Professor Garrett points to ineffective assistance of counsel and due process challenges to suggestive eyewitness identifications.³⁰⁴

The Connecticut standard for evaluating instructional error applied in Mr. Tillman’s case operated functionally like a “guilt-based” harm analysis.³⁰⁵ It assessed the effects of any possible instructional error against the quality of the victim’s identification (which was the foundation of the prosecution’s case).³⁰⁶ Although framed as a

automatic reversal of structural error actually contributes to the narrowing of rights, arguing that courts will restrict the right rather than reverse the conviction. Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1186–90 (2008).

295. Garrett, *Harmless Error*, *supra* note 49, at 113.

296. *Id.* at 41.

297. Edwards, *supra* note 282, at 1171.

298. *Id.* at 1170.

299. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 18–24 (1970).

300. Edwards, *supra* note 282, at 1171.

301. *Id.* at 1205 (emphasis omitted).

302. *Id.* at 1169.

303. Garrett, *Harmless Error*, *supra* note 49, at 62.

304. *Id.* at 62 & n.134.

305. *See id.* at 58–59; Edwards, *supra* note 282, at 1187 (noting “the tendency of judges to apply the [harmless error] doctrine by assessing whether the evidence adduced at trial, or the untainted evidence in the case of an evidentiary error, appears sufficient to support a guilty verdict”).

306. *State v. Tillman*, 600 A.2d 738, 745 (Conn. 1991).

determination of whether it was “reasonably probable that the jury was misled,” the court’s analysis hinged on the eyewitness’s “positive identification testimony.”³⁰⁷

Of course, it is possible that either a “guilt-based” or an “effect-on-the-verdict” analysis would have produced affirmance in Mr. Tillman’s appeal, given the nature of the instructional error. What is particularly important to focus on here is that the court’s focus on the certainty of the witness’s identification was problematic. Unbeknownst to the court at the time of its 1991 opinion, its harm-type analysis was based on subjective indicators that social science has subsequently debunked.³⁰⁸ Professor Oldfather has argued that, if an appellate court is educated about recent psychological research on eyewitness identification, its evaluation of this evidence actually might be better than a jury’s assessment.³⁰⁹ In this case, however, the court relied (as did the jury) on the victim’s “positive identification,”³¹⁰ which proved flawed.

C. “*The Lawyer Wasn’t That Bad and It Didn’t Matter*”: Ineffective Assistance of Counsel

The Appellate Court opinion in Mr. Tillman’s habeas appeal illustrates another variety of the “second layer of harmless error rules” described by Professor Garrett—the standard for judging ineffective assistance of counsel.³¹¹ Mr. Tillman had alleged ineffective assistance of trial counsel for failing to make an adequate record regarding his jury selection claims, and ineffective assistance of appellate counsel for failing to argue that the trial court should have *sua sponte* ordered an evidentiary hearing regarding the claim.³¹² The Appellate Court rejected these claims, accepting the trial attorney’s “investigation” of and rejection of the jury selection claim; reasoning that the outcome of the trial would not have been different; and deferring to appellate counsel’s decision not to raise the claim.³¹³

307. *Id.*

308. See *supra* notes 180–84 and accompanying text. See also Garrett, *Harmless Error*, *supra* note 49, at 80–87.

309. Oldfather, *supra* note 250, at 462 (“There is, in short, a good deal of judicial experience with [eyewitness identification]. Jurors, even though instructed on the evaluation of eyewitness testimony, lack the broader suspicion of this evidence necessary to engage in a consistent or sophisticated evaluation of it.”).

310. *Tillman*, 600 A.2d at 745. The court’s analysis of this issue did not weigh or even mention Mr. Tillman’s denial, or his alibi witness.

311. Garrett, *Harmless Error*, *supra* note 49, at 62.

312. *Tillman v. Comm’r of Corr.*, 738 A.2d 208, 211–14 (Conn. App. Ct. 1999).

313. *Id.* at 212–14.

The deferential ineffective assistance of counsel standard of *Strickland v. Washington* creates what Professor Garrett has described as a “camouflaged harmless error doctrine” which he says “creates a higher, often prohibitively difficult, outcome-determinative standard.”³¹⁴ The prejudice prong of *Strickland*, in particular, has been criticized by commentators as essentially undermining the constitutional guarantee of the right to effective counsel.³¹⁵ Commentators have noted that even lawyering that fails to meet minimum professional standards has been excused because of lack of “prejudice.”³¹⁶

In a series of cases in recent years—*Williams v. Taylor*,³¹⁷ *Wiggins v. Smith*,³¹⁸ and *Rompilla v. Beard*³¹⁹—the United States Supreme Court has signaled a need for more rigorous review of claimed ineffective assistance of counsel in investigation of death penalty cases.³²⁰ Some commentators have described this shift as a direct reaction to the DNA exonerations.³²¹ The *Williams-Wiggins-Rompilla* trilogy illustrates the type of standard-setting that can reverse the slump of “second layer of harmless error rules,”³²² and make Sixth Amendment analysis more meaningful.

314. Garrett, *Harmless Error*, *supra* note 49, at 62.

315. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1862 (1994) (“Together, the lax standard of *Strickland* and the strict procedural default doctrines reward the provision of deficient representation.”); Brown, *supra* note 27, at 1603 (“The court is rigorous about protecting the formal right to counsel but barely regulates the quality of counsel. *Strickland v. Washington*, in which the Court defined the standard for ineffective assistance of counsel, broadly protects defense lawyer discretion and gives wide leeway for poor but routine lawyering judgments . . .”) (internal footnotes omitted). The Connecticut Supreme Court recently has adopted a new standard for reviewing claims of ineffective assistance of appellate counsel, making clear that habeas petitioners must only demonstrate a reasonable probability that the result of their direct appeal would have been different, *not* that the outcome of their trial would have been different—thus ensuring that they receive the benefit of the more favorable harm standard for reviewing claimed constitutional error on direct appeal. However, in *Small*, the Court also concluded that the petitioner in that case had failed to demonstrate a reasonable probability that he would have prevailed on appeal, illustrating that the standard is still rigorous. *Small v. Comm’r of Corr.*, 946 A.2d 1203 (Conn. 2008).

316. Bright, *supra* note 315, at 1857–62; Griffin, *supra* note 252, at 1274 (“The *Strickland* standard has not been effective in eliminating the effects of even the most egregious defense lawyering conduct.”).

317. 529 U.S. 362 (2000).

318. 539 U.S. 510 (2003).

319. 545 U.S. 374 (2005).

320. See Elizabeth Gale & Tyler Green, *Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years After Strickland*, 17 GEO. J. LEGAL ETHICS 755, 760 (2004); Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 85–98 (2007).

321. See Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, 18 CRIM. JUST. 37 (2003).

322. See Garrett, *Harmless Error*, *supra* note 49, at 62.

In Mr. Tillman's case, however, the Connecticut habeas court and the Appellate Court both deferred to counsel's decision to cut short investigation.³²³ The investigation accepted by the Appellate Court was a conversation with the jury clerk and the observation that there were African-American jurors sitting in the murder trial next door.³²⁴ This is not an especially high hurdle for the Sixth Amendment standard, particularly in a case in which the claim was rejected on direct appeal for failure to request an evidentiary hearing or produce sufficient evidence.

Why do state appellate courts employ harm and prejudice doctrines that undercut procedural rights, or impose technical preservation requirements that allow potentially meritorious claims to evade review? In part, courts act in recognition of their limited institutional capacities and out of respect for other players in the local criminal justice system. They may want to avoid the expenditure of resources involved in a second trial for someone whom they believe to be guilty of a heinous crime.³²⁵ They may see real value in ensuring finality.³²⁶ Courts use these doctrines as tools for caseload management, and for issue avoidance.³²⁷ State supreme courts also may not want to be perceived as

323. *Tillman v. Comm'r of Corr.*, 738 A.2d 208, 212–13 (Conn. App. Ct. 1999).

324. The entire analysis consisted of six sentences:

[The trial attorney] investigated the jury selection system by questioning [the jury clerk]. According to him, she described the method through which potential jurors could be excused, but she offered nothing except her opinion of the disproportionate impact on minorities to suggest that there was any sort of exclusion of black jurors. At the habeas hearing, he testified that he also had learned "that there was a murder trial going on next door, which did have—it appeared to be a substantial number of black jury panel members—panel members, who would have come from the same array as we drew from. So, again, [he] did not find any evidence of any systematic exclusion [or] any funneling away from our panels to benefit or . . . to influence other panels." [The trial attorney] investigated, considered the issue and ultimately decided not to pursue it. We cannot conclude that this conduct fell below the sixth amendment standard.

Id. (alterations in original and added).

325. *Edwards*, *supra* note 282, at 1169 ("If the conviction is reversed, the government and the trial court will be forced to undergo the time and expense of retrying a case in which there appears to be little doubt of the defendant's guilt.").

326. *Johnson v. Comm'r of Corr.*, 589 A.2d 1214, 1221 (Conn. 1991) (In explaining its adoption of the rigorous federal procedural default standard in state habeas proceedings, the same year as Mr. Tillman's trial, the Connecticut Supreme Court said, "[w]e are persuaded that habeas review of constitutional claims never raised in the trial court, in violation of our rules of practice, would thrust too great a burden on our criminal justice system.").

327. *Horton & Bartschi*, *supra* note 274. *See also* William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 181 (2001) (developing an economic model of the harmless error rule and observing that appellate judges may employ harmless error analysis because it "reduces the number of appeals by reducing the number of retrials . . . [and] may well also reduce the average cost of an appeal by enabling the court to 'duck' difficult issues").

“activist” or as ruling by judicial fiat.³²⁸ Without minimizing these concerns, I argue that cases like Mr. Tillman’s provide an occasion to reassess courts’ reliance on doctrines that avoid merits review or excuse error. By deciding what claims they will review and which errors they will countenance, state appeals courts signal to criminal justice actors where resources and attention should be focused. Mr. Tillman’s exoneration is a moment to acknowledge this signaling role, and to consider whether the court’s emphasis should be different.

IV. THE ROLE OF APPELLATE COURTS

One story that can be told about Mr. Tillman’s case is that appellate courts are simply not well-situated to guard against miscarriages of justice. They make legal rulings based on a record; they do not know facts outside the record; and they rely largely on the functioning of the adversary process in the lower courts to flesh out possible factual errors. According to this narrative, if the jurors were convinced by a certain but mistaken eyewitness, there is little that reviewing courts can do to avert tragedy. In short, it is simply a harsh reality that in some cases there is factual error, but no legal error.³²⁹

The lessons of Mr. Tillman’s case, however, are not just about whether a specific error in his case could have been identified. And the question that I pose is not “which part of the system is most in need of reform—trial or appeals?” It is beyond dispute that the DNA exonerations have demonstrated a need for reform in the trial and investigative processes. Nonetheless, there are also important lessons for appeals courts, and more muscular appellate review might have an effect on a criminal justice system over the long-term.

Appellate courts are not simply left holding the bag after other players have botched investigations, prosecutions, trials, and appeals. They are also leaders in local criminal justice systems; they are institutions that set a tone and that can, through their formulation and application of standards, and through their attention alone, create certain incentives.

At the risk of characterizing a contested proposition in a conclusory manner, I submit that, in certain ways, appellate and postconviction decrees drive a system. To be sure, commentators question whether constitutional criminal procedure rules announced by courts make much

328. See The Honorable Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to the Wisconsin Supreme Court’s Critics*, 91 MARQ. L. REV. 425, 426 (2007) (describing criticism of the Wisconsin Supreme Court as “activist”).

329. Thanks to Professors Everett, Garrett, and Lasch for focusing my attention on this issue.

difference.³³⁰ The academic literature is full of articles about whether *Miranda*,³³¹ *Brady*,³³² and *Manson*,³³³ to name a few, have changed the behavior of police and prosecutors.³³⁴ Scholars also have questioned whether certain constitutional rights regularly litigated on appeal (e.g., confrontation rights) actually affect the accuracy of judgments.³³⁵ In addition, it can be difficult to parse whether criminal procedure rules produce less-than-expected impact because such rules are ineffectual agents of change, or simply because they are not enforced rigorously.³³⁶

If one accepts, however, that at least certain procedural rights enhance fundamental fairness and have some effect on overall accuracy, then under-enforcement of these rights over the long term can produce holes in the “safety net.”³³⁷ This may be particularly true for rights designed to guard against racial discrimination if, as the growing literature on wrongful convictions suggests, the potential for error is heightened by the cumulative effects of bias at each stage of the proceedings.³³⁸

Some of the issues in Mr. Tillman's case—treatment of the eyewitness identification and racial composition of the jury—are linked (whether directly or indirectly) to the causes of wrongful convictions. And Mr. Tillman's case contains some factors that commonly are found in wrongful convictions (e.g., cross-racial identification). The question remains whether the legal claims presented—demands for a different jury instruction or an evidentiary hearing about jury selection processes—would have averted Mr. Tillman's wrongful conviction, even with the most searching appellate review imaginable. Viewed in

330. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 52 (1997) (“[T]he law of criminal procedure is part of a larger system in which a variety of actors have a great deal of freedom of movement. Those actors respond to the law; they also respond to other forces outside the law, to crime rates and caseloads and funding levels. The combined effect of these forces is complicated.”).

331. See Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519 (2008), available at <http://ssrn.com/abstract=1095620>.

332. See Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685 (2006).

333. See Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237 (2006).

334. These three standards are rules that are supposed to affect reliability of confessions, of identifications, and of adjudication. There is even more scholarly debate about whether rules designed to deter police misconduct, like the exclusionary rule, actually accomplish their purpose or are worth the costs. See Stuntz, *supra* note 330, at 3. Compare William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J. L. & PUB. POL'Y 443 (1997), with Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J. L. & PUB. POL'Y 457 (1997).

335. Brown, *Decline of Defense Counsel*, *supra* note 27, at 1606 (arguing that some constitutional criminal procedural rules are “fairly weak guardians of accuracy” because they “apply only at trial and thus only to a small number of cases”).

336. See Gershman *supra* note 332, at 708–15 (explaining how *Brady* was eroded by later precedents).

337. Otero, *supra* note 59, at 119 (arguing that harmless error analysis erodes the “safety net”).

338. Taslitz, *supra* note 220, at 133.

isolation, a different decision on these issues may not have changed the verdict.

However, the opinions announced in these cases cannot be viewed in isolation. If courts look with particular rigor at cases that “bear the indicia” of wrongful convictions,³³⁹ then wrongful convictions may be averted.³⁴⁰ If jurors are educated about the problems of eyewitness identification; if prosecutors and trial judges are warned to pay attention to jury selection techniques with potential racial bias, then some of the problems that have produced wrongful convictions may be addressed over time, and the potential for mistakes is lessened.

At the state habeas level, the decision of the Appellate Court is in one sense even more closely linked to the systemic causes of wrongful conviction, because it relates to defense investigation. As the United States Supreme Court recently has reaffirmed in *Williams-Wiggins-Rompilla*, investigation is critical to reliable and fair results.³⁴¹ Commentators studying wrongful convictions have called for improved investigation and more merits litigation.³⁴² Yet in *Tillman* the Appellate Court largely deferred to trial counsel’s decision to short-circuit investigation of racial bias in jury selection.³⁴³ Deference is even more routinely accorded decisions to cut-short “street” investigation of crimes.³⁴⁴

Appellate decisions affect the focus of actors in the criminal justice system, and influence the allocation of resources, albeit imperfectly.³⁴⁵ If the Connecticut Supreme Court interprets a Connecticut statute to provide appointed counsel in various postconviction proceedings, those proceedings will be litigated more vigorously.³⁴⁶ If Connecticut courts grant new trials when counsel fails to present evidence of a plausible defense, trial attorneys will consider defense evidence more carefully

339. Garrett, *Harmless Error*, *supra* note 49, at 113.

340. I thank Professor Timothy Everett in particular for his thoughts about why *State v. Tillman* is not, as he puts it, a “failure of leadership” case.

341. *See supra* notes 317–19.

342. Garrett, *Judging Innocence*, *supra* note 22, at 123–27; Stuntz, *supra* note 330, at 70–74.

343. *Tillman v. Comm’r of Corr.*, 738 A.2d 208, 212–13 (Conn. App. Ct. 1999).

344. Brown, *supra* note 27, at 1603 (“Lax investigation rarely fails the *Strickland* standard even though it can change case outcomes.”).

345. Connecticut courts have demonstrated on numerous occasions that they are sensitive to this responsibility. *See supra* notes 64–65. *See also* NAT’L RIGHT TO COUNSEL COMM. OF THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://tcpjusticedenied.org/> (describing inadequate resources available for indigent defenses) [hereinafter JUSTICE DENIED].

346. *See State v. Casiano*, 922 A.2d 1065 (Conn. 2007); *Gipson v. Comm’r of Corr.*, 778 A.2d 121 (Conn. 2001).

and investigate more thoroughly.³⁴⁷ Similarly, if appellate courts defer to any offered explanation for counsel's ostensibly strategic decisions, and if they excuse lawyering lapses for lack of "prejudice," ineffective assistance of counsel doctrine will be less of a check.³⁴⁸ On the other hand, if they follow the lead of the U.S. Supreme Court in *Williams-Wiggins-Rompilla*, and conduct a more searching inquiry, ineffective assistance of counsel doctrine will help to police the system.

Even more significant, a statement from the highest appellate court in a criminal justice system disseminates a normative message.³⁴⁹ *Gideon v. Wainwright* did not solve the indigent defense problem in the nation (far from it),³⁵⁰ but it did raise expectations, and make a start. This is what we refer to as the "promise" or "dream" of *Gideon*.³⁵¹ After all, most of us would prefer to have the unrealized dream of *Gideon* than a message from the U.S. Supreme Court that it is indifferent to the provision of counsel. The normative message opens the door to further litigation, and it provides leverage for seeking additional resources from the legislature. It also sets a tone for actors in the criminal justice system, and influences the culture of the courthouses in which prosecutors, defenders, and trial judges work.

Justice Berdon anticipated some of these points in his dissent in *State v. Tillman*. At a time when the Connecticut media and public was focused on high-profile cross-racial sexual assault cases, most notably the arraignment of Daniel Webb, Justice Berdon saw value in demonstrating sensitivity to allegations of racial bias. He was concerned with the historical resonance of such cases, and with the legitimacy of the system. His concern has proved prescient.

347. *Bryant v. Comm'r of Corr.*, 964 A.2d 1186 (Conn. 2009).

348. Bright, *supra* note 315, at 1858–66.

349. Edwards, *supra* note 282, at 1198–99 ("We send a message through our criminal justice system each time we reverse or remand a conviction on the ground that the police or prosecutors have violated a defendant's individual rights. Upon receiving such a message, the criminal justice process corrects itself accordingly."). I focus on the potential for wrongful convictions because this article examines Mr. Tillman's case, but as Professor Charles Ogletree has pointed out, there are other societal values besides accuracy that are at stake in criminal appeals. Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 168–69 (1991).

350. Bright, *supra* note 315, at 1837 ("More than . . . thirty years after *Gideon*, this task remains uncompleted, the dream unrealized."); Stuntz, *supra* note 330, at 70 (arguing that because defense investigation is "[i]nsufficient . . . *Gideon*, while not trivial, means vastly less than it seems"). See also STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, A.B.A. GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (Dec. 2004), available at <http://www.abanet.org/legal-services/sclaid/defender/brokenpromise/fullreport.pdf>.

351. Bright, *supra* note 315, at 1836–37.

CONCLUSION

In 2009, we are in no position to criticize the *Tillman* courts. We now have the benefit of social science research, collective experience, and hindsight that were not available to the courts that decided the *Tillman* cases. However, we can learn some lessons from the *Tillman* decisions now that we know the truth.

Appellate courts are removed from the trial process; they play a limited role; and they often face significant caseload pressures. However, customary methods of coping with these realities can produce dangers in appellate opinions. Disposing of cases too often based on lawyering missteps or prejudice- or harm-type analyses can render appellate opinions ineffective enforcers of important rights—both trial rights and rights that affect investigative practices. It can signal to lawyers and trial judges that some amount of slippage will be tolerated.

Appellate courts should push back on the institutional pressures that burden them. Rather than using threshold issues as a means of docket management, or undercutting procedural rights by relying on harm analysis to avoid granting relief, courts should send a message that they demand high quality work from other system actors, earlier in the process. When courts order evidentiary hearings; grant discovery; or set standards that require investigation or funding, they reinforce the rigor of the criminal justice system and reduce the likelihood of wrongful convictions.

Critics will surely counter that new hearings, remands, and retrials all demand resources. Are these resources available, they will ask, and, if so, wouldn't they be better spent at the front-end, investigating cases, since so many of the errors present in the wrongful conviction cases could have been discovered through better investigation?³⁵² It is certainly true that there are many needs in the criminal justice system. However, the effects of rigorous appellate review extend beyond an individual litigant's case, reverberating throughout a system, whenever a lawyer reads a slip opinion or cites a precedent. As those who have practiced in a local court system will understand, the work of state appeals courts affects the norms of practice in the jurisdiction, leveraging the resources expended in any one reversal.

Averting wrongful convictions benefits others besides the innocent accused. It ensures that the search for the real culprit continues, which safeguards the public. And it protects the victim from having to relive a

352. See Brown, *supra* note 27, at 1644 (recommending reforms to improve factual investigation "because we distrust adjudication's capacity to detect factual errors"). See JUSTICE DENIED, *supra* note 345.

terrible experience years later, when the case resurfaces.³⁵³

Even if confronting difficult issues does not produce an immediate effect on reliability in an individual case, it can enhance the legitimacy of the system, as Justice Berdon argued in his dissent in Mr. Tillman's case.³⁵⁴ A court's efforts to address possible racial bias can buffer the system from crisis when controversies that expose differing perceptions arise,³⁵⁵ or, as in Mr. Tillman's case, when a grave mistake is uncovered.

State courts today operate largely without even the interstitial back-up of federal habeas, possessing nearly ultimate responsibility for oversight of their criminal justice systems.³⁵⁶ For this reason, appellate decisions must create incentives for the initial investigation and trial of criminal cases to be meaningful and effective. This requires expenditure of resources, but it is well worth the effort. We owe it to Mr. Tillman, and to the others affected by wrongful convictions whose names we may never know.

353. See, e.g., Thompson, *supra* note 215. Rape victim Jennifer Thompson describes her re-traumatization in realizing what her mistaken identification of exoneree Ronald Cotton had cost him. *Id.* See THOMPSON-CANNINO ET AL., *supra* note 215.

354. *State v. Tillman*, 600 A.2d 738, 752 (Conn. 1991) (Berdon, J., dissenting).

355. Cf. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2008) (demonstrating that human beings tend to resolve disputed factual issues in ways that are protective of their group identities, and arguing that courts should avoid "culturally partisan" forms of analysis that fail to acknowledge competing perceptions).

356. See *supra* note 56 and accompanying text.

