

2012

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Recommended Citation

Leon Friedman, *The Problem of Convicting Innocent Persons: How Often Does it Occur and How Can it be Prevented?*, 56 N.Y.L. Sch. L. Rev. 1053 (2012)

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LEON FRIEDMAN

The Problem of Convicting Innocent Persons: How Often Does It Occur and How Can It Be Prevented?

ABOUT THE AUTHOR: Graduated from Harvard College in 1954, spent one year at the Harvard Graduate School of Arts and Sciences from 1954 to 1955 and received his J.D. from Harvard in 1960. He is the Joseph Kushner Professor of Civil Liberties Law at Hofstra Law School. He was one of the lawyers for Rubin "Hurricane" Carter (a well-known middleweight fighter) who was convicted of murder in New Jersey in 1967 and then convicted again in a retrial in 1976. Carter's conviction was overturned in 1985 by a federal court on habeas corpus, and the indictment was then dismissed. *See* Carter v. Rafferty, 621 F. Supp. 533 (D.N.J. 1985), *aff'd*, 826 F.2d 1299 (3d Cir. 1987). The case was the subject of a major Hollywood movie, "The Hurricane," in which Denzel Washington played the part of Rubin Carter. Professor Friedman was also successful in overturning other wrongful convictions. *See, e.g.*, Turner v. Schriver, 327 F. Supp. 2d 174 (E.D.N.Y. 2004); Harris v. Artuz, 100 F. App'x 56 (2d Cir. 2004).

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In order to determine the number of innocent persons convicted and the severity of the problem that exists, it is necessary to examine the statistics. As indicated below, an often-quoted figure representing the number of wrongly persons convicted is about 0.5% of all criminal cases, or 30,000, which is not an insignificant number. Some modest changes in the system, particularly furnishing defendants with more exculpatory evidence at the outset, might make a significant change in that number.

I. WHAT THE CRIMINAL STATISTICS ILLUSTRATE

The Justice Department annually publishes the *Sourcebook of Criminal Justice Statistics*, noting statistics on all phases of the criminal justice system. How many serious crimes were committed in the United States in 2009? These are the so-called “index crimes”—murder, rape, robbery, and various larceny crimes—that the FBI covers and reports. The answer is 10,639,369 serious index crimes were committed in that year, of which 1,318,398 were violent crimes and 9,320,971 were property crimes.¹ The FBI collects these figures from police reports around the country. In addition, there are the less serious crimes such as forgery, fraud, embezzlement, vandalism, drug offenses, and drunk driving. These represented another approximately 10 to 15 million crimes that are below the index crime line. They are not systematically accounted for by the FBI, but are based upon surveys of victims made by the National Crime Victimization Survey.²

Therefore, according to 2009 data, there were a total of approximately 20 to 25 million index and non-index crimes committed, 10 million of which were more serious than the others. The violent crimes (murder, rape, robbery, and aggravated assault) constituted the smallest category, totaling only 1,318,398 of all offenses in 2009.³ The statistics reveal that crime has decreased over the last twenty years. In 1991, there were 24,703 murders in the United States. In 2009, that number was down to 15,241.⁴

Out of the 10 million index crimes, how many arrests were there? The answer is 1,827,949 arrests,⁵ which is an arrest rate of a little over 10%. For the more serious

1. See THE HINDELANG CRIMINAL JUSTICE RESEARCH CENTER, STATE UNIVERSITY OF NEW YORK AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.3.107.2009 (2009) [hereinafter SOURCEBOOK], <http://www.albany.edu/sourcebook/pdf/t31072009.pdf>

2. The National Crime Victimization Survey interviews about 70,000 individuals twice a year to determine the number of crimes against persons more than twelve years old. They estimated that there were 4.3 million violent crimes in 2009, 15.6 million property crimes, and 133,000 personal thefts. See Jennifer L. Truman & Michael R. Rand, *Criminal Victimization, 2009*, BUREAU OF JUST. STAT. BULL. 1 (Oct. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf>. Surveys from earlier years had higher estimates of more than 25 million total crimes. See Callie Marie Rennison, *Criminal Victimization 2000: Changes 1999–2000 with Trends 1993–2000*, BUREAU OF JUST. STAT. BULL. 1 (June 2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv00.pdf>.

3. See SOURCEBOOK, *supra* note 1.

4. *Id.*

5. See SOURCEBOOK, *supra* note 1, at tbl.4.7.2009, <http://www.albany.edu/sourcebook/pdf/t472009.pdf>. This figure was calculated by combining the total number of violent crimes (458,291) with the total number of property crimes (1,369,958).

violent crimes, a higher percentage of individuals were arrested or “cleared by arrest.” For example, for murder, the arrest rate was over 64%, with 9775 arrests for the 15,241 murders that occurred in 2009.⁶ For property crimes, the “cleared by arrest” or “clearance rate” was much less. Although there were 9,320,971 property crimes (burglary, larceny-theft, and motor vehicle theft), there were only 1,360,149 arrests in that category, which amounts to a “clearance rate” of about only 14.6%.⁷ In addition there were 8,913,208 arrests for the less serious, non-index crimes.⁸

Based on these statistics, a grand total of 10,741,067 million arrests were fed into the criminal justice system in 2009.⁹ The conviction rate for all felonies is approximately 45%–50% of those arrested.¹⁰ That means that an estimated 4,940,890 persons (46% of 10,741,067) are convicted each year, and many of them go to prison. Those convicted of the less serious property crimes may just pay fines, may not be incarcerated, or may serve their time in local jails.

How many people are currently in prison? There were 2.3 million people in prison as of July 2010,¹¹ and that number has increased over the years. Although crimes have gone down, the number of people in prison has gone up. The U.S. prison rate is five times the incarceration rate of England, nine times the incarceration rate of Germany, and twelve times the incarceration rate in Japan.¹² Even though crime has gone down, we send more people to jail for longer periods than in other countries.¹³

6. See *id.* (9775 arrests for murder and nonnegligent manslaughter); *id.* at tbl.3.107.2009, <http://www.albany.edu/sourcebook/pdf/t31072009.pdf> (15,241 murders).

7. See *id.* at tbl.3.107.2009, <http://www.albany.edu/sourcebook/pdf/t31072009.pdf> (9,320,971 property crimes); *id.* at tbl.4.7.2009, <http://www.albany.edu/sourcebook/pdf/t472009.pdf> (1,369,658 property crimes).

8. See *id.* at tbl.4.7.2009, <http://www.albany.edu/sourcebook/pdf/t472009.pdf> (this number includes arrests for less-serious index crimes from “other assaults” through “runaways”).

9. This figure comes from adding the 1,827,959 index crime arrests and the 8,913,108 non-index crime arrests described in the previous paragraph.

10. According to the *Sourcebook of Criminal Justice Statistics*, of 1,100,210 felony arrests for state crimes during 2004, there were 466,480 convictions, a rate of 42%. *Id.* at tbl.50.002.2005, <http://albany.edu/sourcebook/pdf/t500022004.pdf>. That is the most recent year when such statistics were available. In the federal system, the rate of conviction is much higher. During fiscal year 2010, the total number of criminal defendants in the federal system was 98,311, of which 89,741 were convicted, a rate of 91%. *Id.* at tbl.5.25.2010, <http://albany.edu/sourcebook/pdf/t5252010.pdf> (89,741 total criminal defendants sentenced); *id.* at tbl.5.24.2010, <http://albany.edu/sourcebook/pdf/t5242010.pdf> (98,311 total defendants). If we combined the two numbers, even though they involve different years, the conviction rate goes up to 46%. Assuming that the same rate applies to misdemeanor convictions as well, the rate mentioned in the text applies to all crimes.

11. *Rough Justice*, THE ECONOMIST (July 22, 2010), <http://www.economist.com/node/16640389>.

12. See *id.*

13. See *id.*; see SOURCEBOOK, *supra* note 1, at tbl.3.106.2009 (showing a reduction in the U.S. murder rate between 1991 and 2009).

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II. WHAT THE STATISTICS REVEAL ABOUT THE INNOCENCE RATE

How many of those people arrested, convicted, and in jail are innocent? What is the magnitude of the problem of convicting innocent persons? There have been two fairly complete studies in recent years. One, written in 1995 by C. Ronald Huff, Arye Rattner, and Edward Sagarin, studied innocence rates in Ohio.¹⁴ They surveyed 188 judges, prosecuting attorneys, public defenders, sheriffs, and police in Ohio, as well as 41 attorneys general throughout the United States, to conclude that 0.5% of those convicted of index crimes (the more serious offenses noted above) were innocent. A more recent study, written by Marvin Zalman, Brad Smith, and Angie Kiger, focused on innocence rates in Michigan, concluded that the innocence rate in that state is a little less than 1% as of 2008.¹⁵

Peter Neufeld, Barry Scheck, and Jim Dwyer demonstrate in their book, *Actual Innocence*, that a higher rate of innocent persons are convicted and then “cleared” when DNA evidence is involved.¹⁶ For homicide convictions, this author believes the rate of convictions of innocent persons is probably much higher simply because the penalties are so much more severe, and more resources are put into trying to clear those convicted. In addition, DNA evidence is often present in those cases.

Applying the lowest innocence rate estimate (0.5%) to the total estimated number of convictions (4,940,890), results in a rough approximation of 24,704 cases of innocent people who are convicted each year. This is not an insignificant number.

14. C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 57–61 (1996).

15. Marvin Zalman et al., *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72, 94 (2008).

16. See Roger Roots, *How Often Does the Criminal System Get it Wrong*, CAUGHT.NET (Feb. 5, 2001), <http://caught.net/innoc.htm>, where he reported:

Last year's best-seller *Actual Innocence* by Barry Scheck, Peter Neufeld, and Jim Dwyer suggested the true rate of wrongful convictions may be closer to ten percent than to one-half of one percent. DNA tests used before trial have exonerated at least 5000 prime suspects out of the first 18,000 DNA suspect samples at the FBI and other crime labs—suggesting a pre-trial error rate of more than 25 percent. Since 1977, some 553 people have been executed in the United States while another eighty death row inmates have been released after they were found innocent. For every seven executed, one innocent person is freed—an “error rate” of more than twelve (12) percent. In the State of Illinois, 12 people have been executed since 1977 while 13 have been released after proving their innocence—an error rate of 52 percent. Last year the Governor of Illinois—who supports the death penalty—finally called a moratorium on the use of the death penalty until all of the quirks in the process are ironed out.

Id. As of the end of 2010, the total number of executions since the resumption of the death penalty in 1976 was 1234. *Death Penalty 101*, ACLU (Oct. 3, 2011), <http://www.aclu.org/capital-punishment/death-penalty-101>. There have been 275 DNA exoneration cases in U.S. history. *Know the Cases: Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Nov. 6, 2011). For a discussion of why so many innocent defendants are convicted, see Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT (Aug. 2010), http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf.

III. THE FACTORS INFLUENCING INNOCENT CONVICTIONS

Now why are innocent people convicted? How does it happen? If we have a better understanding of why it happens, we may find a better way to deal with the problem. One reason why it happens is that people make decisions too quickly. What do I mean? The more serious the crime, the more pressure there is to solve it. Because there is tremendous pressure on police officials to solve notorious crimes, the investigation process suffers and innocent persons may be convicted.

For example, consider the Alfred Dreyfus case, which I believe involved the most serious incident in which an innocent person was convicted, with the greatest historical implications. It was a very serious crime—French military secrets had been given to the Germans. The investigating authorities discovered a *bordereau* (memorandum) containing detailed military secrets about the activities and weapons of the French army that was signed “D.” The investigators examined a list of possible suspects and concluded that the offender had to have come from someone in the general staff—a questionable assumption to begin with. Unfortunately, anti-Semitism “had reached an intensity never before experienced in France,” and the only Jewish person whose name that started with a “D” and who served on the general staff was Alfred Dreyfus.¹⁷ Dreyfus was immediately singled out, arrested, and convicted on the very dubious testimony of alleged handwriting experts who examined the *bordereau*. Although a new investigation eventually showed Dreyfus did not write the incriminating memorandum containing the military information, the army refused to consider the new evidence because it would implicate high-level army officials in a botched investigation. It took many years of investigations and protests from outside the military justice system before Dreyfus’s innocence was established and he was exonerated.

Another example is the Hurricane Carter case that Lewis Steel and I worked on, in which three people were killed in Paterson, New Jersey. There were not many murders in Paterson. Moreover, not only were three people killed, but two black men killed three white persons. That made matters even worse. The authorities had to do something quickly—they had to clear this offense as quickly as possible, by arresting someone who they could quickly blame and convict. Thus, the minute that a possible witness was willing to identify a suspect, the police acted, even though the witness was a criminal trying to make a better deal for himself and his testimony was contradicted by other evidence in the case.¹⁸

There are other serious cases of injustice in our history. One of the most serious was the case of Tom Mooney in 1916. During a Preparedness Day parade in San Francisco—urging U.S. support for the English and French fighting in World War I at the time—a bomb went off, killing six people immediately, with another two or

17. LOUIS BEGLEY, *WHY THE DREYFUS AFFAIR MATTERS* 6 (2009).

18. See Judge Sarokin’s analysis of the evidence in *Carter v. Rafferty*, 621 F. Supp. 533, 540 (D.N.J. 1985), *aff’d*, 826 F.2d 1299 (3d Cir. 1987). For a thorough discussion of the Hurricane Carter case, see JAMES S. HIRSCH, *HURRICANE: THE MIRACULOUS JOURNEY OF RUBIN CARTER* (2000).

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three dying later from their injuries.¹⁹ The historical background to the crime was that during this time, there was major labor unrest in the region. Many labor anarchists had bombed the power lines of the Pacific Gas and Electric Company. The police concluded that it must be one of the labor anarchists, since the labor movement was viewed as being against the United States' involvement in World War I. Two labor union activists, Tom Mooney and William Billings, were immediately picked up and later convicted on the very dubious testimony of a single witness who lied about his ability to identify the perpetrators.²⁰ Eventually, over twenty years later, an important Supreme Court decision was handed down on the need to produce exculpatory evidence and Mooney was eventually freed.²¹ The attitude in the case once again was, "Let's solve this serious crime as quickly as possible."

Various psychological tests reveal that people often make decisions too early,²² a factor that often contributes to the conviction of innocent persons. The studies show that if you make up your mind about what is in a picture too early, you will stick to that conclusion long after it is clear that the picture does not portray your initial guess.²³

Similarly, the police often concoct a picture of the perpetrator immediately after the crime occurred and then seek out someone who fits that picture. For example, in the Dreyfus case, a Jew must have given the secret plans to the Germans because Jews are not reliable citizens of France. Similarly, in the Mooney case, a labor activist must have planted the bomb at the Preparedness Day Parade, and so the effort focuses on finding a labor union official to arrest.

In the criminal justice system, there is a "war room" in each police station and prosecutor's office. There are approximately 25 million crimes a year, 10 million of which are serious crimes, and the police and prosecutors are out to get the perpetrators.²⁴ It costs approximately \$204 billion to maintain the criminal justice system each year, including justice, law and order, police, and corrections.²⁵ That is a lot of money. The police costs are \$94 billion, judicial and legal costs are \$44 billion, and corrections are \$65 billion.²⁶

19. See generally CURT GENTRY, *FRAME-UP: THE INCREDIBLE CASE OF TOM MOONEY AND WARREN BILLINGS* (1967).

20. *Id.*

21. See *Mooney v. Holohan*, 294 U.S. 103 (1935); see also GENTRY, *supra* note 19.

22. See, e.g., ROBERT EHRLICH, *EIGHT PREPOSTEROUS PROPOSITIONS: FROM THE GENETICS OF HOMOSEXUALITY TO THE BENEFITS OF GLOBAL WARMING* 4 (2003) ("If you decide too quickly, you could fall into the trap of filtering all evidence through your preconceived view and not giving contrary evidence sufficient weight—which we all do far too frequently. That trap is the very essence of prejudice.").

23. See *id.*

24. See discussion *supra* Part I.

25. See SOURCEBOOK, *supra* note 1, at tbl.1.4.2005, <http://www.albany.edu/sourcebook/pdf/t142005/pdf>.

26. See *id.*

Now, some of the other participants in this symposium²⁷ have talked about the allocation of resources, and have expressed the hope that more money can be spent to protect the innocent. The problem is that all of these resources are being stretched very thin—particularly at this time—and the idea that the government is going to allocate even a small amount of money in order to make sure that the 0.5% that are innocent are cleared before trial does not seem feasible. There are not many legislators in this country who say that it is better for a hundred people to go free than to have one innocent person found guilty.²⁸ It is not something that is going to win you an election, as much as we may think it ourselves.

IV. FINDING A MODEST SOLUTION

So what can we do in the face of all this? There have been many studies about why innocent people are convicted. The reasons include contaminated confessions, eyewitness misidentification, flawed forensics, and jailhouse informants trying to make deals for themselves.²⁹ Each of these problems requires different solutions. To avoid contaminated confessions, we might require all police-suspect interrogations to be videotaped so that any improper police pressure will be recorded. To avoid eyewitness misidentification, we might insist on fairer line-ups, including an initial “blind” line-up where the suspect is not included. To deal with flawed forensics, we might insist on better credentials for those working in police laboratories. To address the issue of jailhouse informants, we might insist on prosecutors having to convince a judge about the informant’s reliability before he or she is allowed to testify at trial.

There is no one solution to a problem that has many faces. There is, however, one small bright spot that must be mentioned. Early in 2010, the U.S. Deputy Attorney General, David W. Ogden, sent out a memorandum to the entire Justice Department on the topic of discovery, entitled “Guidance for Prosecutors Concerning Criminal Discovery.”³⁰ The memorandum sets forth a whole procedure that federal officers are supposed to follow for unearthing *all* of the discovery in a case, and making evidence available to the prosecutor and, potentially, the defense. The memorandum specifies eight distinct categories³¹ of information to which the prosecutor should have access.

27. Symposium, *Exonerating the Innocent: Pre-Trial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 855 (2011–12).

28. See Justice Harlan’s concurring opinion in *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

29. For a discussion of each of these issues, see BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011).

30. See Memorandum from David W. Ogden, Deputy U.S. Att’y Gen., U.S. Dep’t of Justice, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010) [hereinafter Ogden Memorandum], <http://www.justice.gov/dag/discovery-guidance.pdf>.

31. The eight categories addressed in the Ogden Memorandum are as follows:

(1) *The Investigative Agency’s Files*: The prosecutor should be granted access to the substantive case file and anything that may contain discoverable information.

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Moreover, the memorandum specifies that prosecutors “are encouraged to provide discovery broader and more comprehensive than the discovery obligations”³² and “may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.”³³

This is a real effort to deal with the problem of discovery and disclosing evidence to the defense. I have spoken to U.S. attorneys who say that the Justice Department really means this and that the Department of Justice has never had anything like this before. In some cases, the memorandum would allow other U.S. attorneys, not just the defense counsel, to have access to the discovery material with the purpose of reviewing it to see whether the material casts doubt on the official version of what happened.

There is a certain virtue in reviewing the strength of one’s case and looking at it from the perspective of both sides. In fact, something similar is done in England, where Queen’s Counsel defend *and* prosecute people. Although it may not be practical to have mini trials before prosecuting someone, it makes sense to at least get someone within the prosecutor’s office to look at all the discovery material—not with the view of using the evidence to prosecute a defendant, but rather with the view of examining whether there is evidence of some doubt that can be cast on this case.

I think we all agree that waiting until the trial is over and then appealing a conviction is not the best solution. Once a case is over, the police and prosecutors

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- (2) *Confidential Informant/Witness/Human Source/Source Files*: The prosecutor should be granted the names of and contact information for each testifying witness.
 - (3) *Evidence and Information Gathered During the Investigation*: This includes all information gathered during the investigation, including anything obtained during searches or via subpoenas.
 - (4) *Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations*
 - (5) *Substantive Case-Related Communications*: This amounts to all of the communications between everybody connected with the case.
 - (6) *Potential Giglio Information Relating to Law Enforcement Witnesses*: This includes any information that may tend to impeach the character or testimony of any potential government witness, such as prior inconsistent statements, or any other information obtained in interviews that may affect a witness’s credibility. The information provided includes a list of all possible witnesses, what is known about each witness, and a summary of evidence that is proposed for use at trial.
 - (7) *Potential Giglio Information Relating to Non-Law Enforcement Witnesses and Fed. R. Evid. 806 Declarants*: This information includes but is not limited to: prior inconsistent statements, statements or reports reflecting witness statement variations, benefits provided to witnesses, conditions that could affect witness bias, prior acts, prior convictions, and known substance abuse or mental health issues.
 - (8) *Information Obtained in Witness Interviews*: This portion of the memo states that although it is not required by law, witness interviews should be memorialized by the agent.

See id. at 4–7.

32. *Id.* at 9.

33. *Id.* at 5 (emphasis added).

want to go on to the next case. They do not want to admit they made a mistake because it reflects badly on their integrity and their reputation. Also, appellate courts do not like to re-examine issues that seem final.

In addition, there are various legal rules that make it difficult to review cases. Judge Nina Gershon, a district court judge in the Eastern District of New York, appointed me to represent someone in a habeas corpus petition. The defendant was a bad guy; he was a drug dealer. And one of his clients did not like some of the drugs that he had been sold, so the client then came up with the story that the drug dealer had robbed him. There was just one witness against this particular defendant, and he was then convicted on the sole basis of the client's testimony.

The client later recanted his testimony and admitted that no crime had occurred. But what did the state courts do in response to this recantation? They refused to overturn his conviction on the basis of the client's recanted testimony. The state courts have this magic formula that if someone recants his testimony, the recantation is not reliable.³⁴ Why is a recantation of earlier testimony unreliable? If you lie on the stand when you say this person did it, why is it unreliable later on when you swear that he did not do it? It seems to me that a recantation undermines the original testimony. Why should the recanting testimony be considered unreliable? That is simply the rule. Eventually, we secured a writ of habeas corpus based on the failure of the state to present exculpatory testimony, fifteen years after the defendant had been convicted.³⁵

Today, the Anti-terrorism and Effective Death Penalty Act of 1996, the new restrictive habeas corpus statute, makes it more difficult to overturn innocent convictions. If you lose in the state system, the chance of getting a federal judge to overturn an improper conviction on a petition for habeas corpus is very slim, except in death penalty cases where the reversal rate is up to 40%. But in most other cases, the chances of reversal are very small because of procedural rules, statute of limitations problems, deference to state fact-finding, and because the law provides that state court decisions cannot be overturned unless there was an unreasonable application of clearly established law. It is a very difficult standard to meet.

Because these procedural obstacles make overturning convictions so difficult, any correction really must be done at the start of the process. It must be done in the investigative stage. The most modest suggestion that I have is something that follows the Ogden memorandum: putting all the discovery together in one place and having someone else look at it with a view to see if it casts some doubt on the official version.

34. See *People v. Turner*, 628 N.Y.S.2d 122 (2d Dep't 1995) ("It is well settled that '[t]here is no form of proof so unreliable as recanting testimony.'" (quoting *People v. Shilitano*, 218 N.Y. 161, 170 (1916))).

35. See *Turner v. Schriver*, 327 F. Supp. 2d 174 (E.D.N.Y. 2004).

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