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Defense Lawyering and Wrongful Convictions

Ellen Yaroshefsky
Maurice A. Deane School of Law at Hofstra University

Laura Schaefer

Chapter Eight

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Ellen Yaroshefsky, *Benjamin N. Cardozo School of Law, Yeshiva University*
Laura Schaefer, *Postgraduate Fellow, Federal Defenders for the Southern District of New York*

Introduction

Between 1989 and August 2013, 311 people were exonerated based upon DNA evidence that proved them to be innocent of the crimes for which they were convicted (Innocence Project, 2013a). While most were wrongly convicted following a jury trial, 28 of the 311 DNA exonerees actually pled guilty to the charges against them (Innocence Project 2013b). In each case, the verdict was upheld on direct appeal, and the defendant served time in prison for a crime he did not commit (Innocence Project 2013a). These exonerations also have something else in common: each wrongfully convicted defendant was represented by defense counsel.

This chapter focuses upon the defense lawyering in those cases and considers what lessons can be learned to reduce the likelihood of future wrongful convictions. It draws upon the research on DNA and non-DNA wrongful conviction cases as well as research and literature about defense lawyering, primarily in state courts. It surveys the law regarding defense attorneys' obligations to their clients and the existing ethical standards for defense lawyers, and then examines the extent to which criminal justice systems adhere to such standards. Finally, it highlights one contributing factor to wrongful convictions that the research reveals defense attorneys must be prepared to confront more robustly: the State's reliance on forensic evidence to secure a conviction. As we will explain, the research demonstrates that improper or false forensic evidence contributed to wrongful convictions in about 50% of the known wrongful conviction cases currently surveyed. The chapter closes by drawing certain conclusions about what constitutes effective defense lawyering today, in light of the increasing awareness surrounding the causes leading to wrongful convictions.

Stepping Back: Understanding the Problem

Any discussion about defense lawyering and wrongful convictions necessarily has limitations. First, the actual number of individuals who have been wrongfully convicted is impossible to know. According to the National Registry of Exonerations, a joint project between the University of Michigan and Northwestern University law schools, "there is

no way to estimate the overall number of false convictions from these reported exonerations, but it is clear that there are many more false convictions than exonerations" (National Registry of Exonerations, 2012). Exonerations typically are only possible in certain types of cases, such as where dispositive physical evidence is available for testing, or where new information comes to light that persuasively suggests a defendant's innocence.[1] The National Registry of Exonerations notes that numerous convictions are reversed on procedural grounds or due to revelations of misconduct or the discovery of new and potentially exculpatory information.[2] In some cases where defendants were exonerated on procedural grounds, the evidence of the defendant's innocence was also overwhelming, even if the court did not make such a finding (Innocence Project, 2012).

Second, the data set for the examination of ineffective defense lawyering is limited. Research is in the early stages of understanding the interaction among contributing factors to wrongful convictions. Some of the causes of wrongful convictions are better understood than others. The greatest contributing factors to wrongful convictions—faulty eyewitness identification, false confessions, so-called "bad" science, and police and prosecutorial misconduct—have been analyzed to greater and lesser extents, and are the focus of different sorts of reform efforts (Innocence Project, 2013c). Untangling the various factors that contribute to a wrongful conviction is exceptionally difficult, especially because the universe of wrongful convictions is impossible to know. Nevertheless, the currently available data allow us to draw certain conclusions regarding the causes and circumstances common in wrongful conviction cases. Perhaps unsurprisingly, research shows that *multiple* factors –including bad lawyering—typically play a part in an innocent defendant's conviction (Innocence Project, 2013a). Invalid or improper forensic testimony is seen in more than half of known wrongful conviction cases, while eyewitness misidentification contributes to wrongful convictions in more than 70% of cases (*id.*). In many wrongful convictions involving improper or invalid forensic science evidence, therefore, eyewitness misidentification is also likely to have played a role. Twenty-five percent of exoneration cases involve false confessions, and jailhouse snitch testimony played a role in wrongful convictions in 16% of cases (Findley, 2013). The research also shows that government misconduct was at play in 18% of wrongful conviction cases.[3] Most commonly among the government misconduct cases, a failure to disclose exculpatory or impeaching evidence—and in many of those cases "bad lawyering"—is cited as a contributing cause to the conviction (Innocence Project, 2013d, 2013e). In other words, effective lawyering may have prevented some of the

1. For example, George Allen was exonerated after serving 35 years in prison. His conviction was overturned on the basis of exculpatory evidence that was not disclosed to the defense. While the Missouri court that exonerated him did not reach his claim of "actual innocence" in the decision vacating his conviction, the judge who decided his case nevertheless concluded that the withheld evidence strongly suggested his factual innocence (Innocence Project, 2012).

2. The National Registry of Exonerations (2013) has identified 1,196 exonerations between 1989 and August 30, 2013. The National Registry of Exonerations (2012) defines exoneration as the process through which "a person who has been convicted of a crime is officially cleared based on new evidence of innocence." According to the National Registry's statistics, exculpatory DNA test results account for roughly one-third of currently documented exonerations, while new evidence of innocence or state misconduct accounts for the exonerations in the remaining two-thirds of cases (*id.*).

3. One frequently cited phenomenon is "tunnel vision," or the inability of police or prosecutors to properly credit exculpatory information when they already are convinced of a suspect's guilt. It stands to reason that in cases where the wrong person has been arrested, law enforcement may have fumbled various aspects of the investigation or relied on false information or evidence to become convinced of the suspect's guilt (Findley, 2013).

other errors in these cases, such as the failure to bring exculpatory evidence to light. Had the defense attorneys in those cases argued for greater access to discovery, for example, or challenged an eyewitness's identification or a client's confession more robustly, they may have uncovered exculpatory evidence which would have changed the outcome of the trial.[4]

Third, it is also important to acknowledge that wrongful convictions can and do occur in cases where the defense lawyer was competent and may have provided excellent representation in spite of the wrongful result. In some cases, police or prosecuting attorneys intentionally withheld exculpatory evidence despite defense counsel's repeated requests for full access to significant case information. For example, Michael Morton served nearly 25 years in prison for the murder of his wife before being exonerated in 2011 based upon DNA evidence that was in the State's possession, which linked a convicted rapist to the crime. After Morton's exoneration it came to light that in 1987, prosecutor Ken Anderson — who later became a sitting judge — intentionally hid evidence of Morton's innocence and disobeyed a court order requiring him to disclose such evidence. In addition to the dispositive DNA evidence of Morton's innocence, Anderson failed to disclose a transcript of a police interview with exculpatory information, a police report pointing to another man, and notes and documents from the lead detective. Trial counsel was diligent and conscientious in seeking to obtain such information, but was repeatedly informed by the prosecuting attorney that no such exculpatory information existed. In 2013, a Texas Court of Inquiry Commission examined this case and issued arrest warrants for Anderson for tampering with physical evidence, concealing physical evidence, and tampering with a government record. There was little more that Morton's defense lawyer could have done to prove his client's innocence when faced with such egregious conduct by the prosecutor (Innocence Project, 2013f).

The Right to Counsel: A Brief Overview

The overall quality of defense lawyers in state and federal court must certainly frame the discussion of lessons to be learned from the wrongful conviction cases. Sadly, the state of representation of indigent clients in the United States leaves much to be desired.

Fifty years ago in *Gideon v. Wainwright* (1963), the Supreme Court held that the Sixth Amendment guarantees a right to court-appointed counsel to defendants in serious criminal proceedings. While *Gideon* only established the right to counsel in felony cases, the Court extended its ruling in subsequent decisions to include a right to defense counsel in misdemeanor trials that result in incarceration (*Argersinger v. Hamlin*, 1972); juvenile delinquency proceedings (*In re Gault*, 1967); and at arraignments (*Rothgerry v. Gillespie County*, 2008). Today, the constitutional right to counsel is understood to attach as soon as formal charges are filed against the defendant, and this right remains in place until the trial proceedings and any direct appeals of the conviction or sentencing are resolved.[5]

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4. As this chapter will explore in greater depth, while the expectation may be that a competent defense lawyer is able to expose or challenge such errors or misconduct, the current state of criminal prosecutions is such that highly effective lawyering is not always possible. Unfortunately, research on the contribution of "bad lawyering" to wrongful convictions is the least advanced in the analysis of this question so far and warrants further development.

5. While defendants are constitutionally guaranteed counsel through trial and direct appeal, the majority of states do not recognize a constitutional right to counsel for post-conviction proceedings — the stage at which most wrongful convictions are uncovered.

Gideon requires all states to ensure that indigent criminal defendants receive cost-free representation, regardless of the state's resources — or political will — to provide them with counsel.[6] In the five decades since *Gideon*, states have established various initiatives to comply with its mandate. Depending on the jurisdiction, an indigent defendant may obtain a lawyer through a state-run defender program, a court-appointed counsel program, or on an ad hoc basis. In some court-appointed attorney systems, lawyers may also represent private clients while handling indigent defendants' criminal cases (Lefstein, 2010). Understandably, such systems run the risk of affording defendants distracted or insufficiently motivated attorneys.

Despite the letter of the law solemnized in *Gideon*, indigent criminal defense across the country is consistently described as an unfulfilled promise; many agree that it seemingly is in a state of perpetual crisis. Criminal defendants increasingly are indigent and thus unable to procure counsel independently. Until the 2013 "budget sequester," the federal courts generally have provided adequately funded systems of defense representation, as have a few cities and states (Cohen, 2013). By and large, however, representation of indigents is shockingly inadequate. As the American Bar Association (ABA) has long decried: "the disturbing conclusion is that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases, the inclination to provide effective representation" (Bright & Sanneh, 2013, quoting American Bar Association, 2004). As Stephen Bright, President and Senior Counsel of the Southern Center for Human Rights, notes:

> Most states, which are responsible for more than 95% of all criminal prosecutions, have treated the *Gideon* decision as an unfunded mandate to be resisted. They have little incentive to provide competent lawyers to represent the people they are trying to convict, fine, imprison or execute. Many focus on minimizing costs, awarding the defense of poor people to the lowest bidder, compensating lawyers at meager rates and underfunding public defender programs. This facilitates pleas, speeds up cases and heightens the chances of conviction for anyone accused of a crime. (Bright & Sanneh, 2013)

Moreover, the law makes it difficult to reverse a conviction on grounds of constitutionally inadequate defense counsel even where a lawyer has provided little — if any — assistance to the client. Even where the defense lawyer is incompetent by any professional or legal standard, unless the defendant is able to show "prejudice" — that is, a reasonable probability that the outcome of the proceeding would have been different *but for* the defense attorney's deficient performance — the case will not be reversed on appeal. This standard to reverse a conviction was established in *Strickland v. Washington* (1984), where the Supreme Court held that to succeed on a claim of ineffective assistance of counsel the defendant must show that the outcome of the case was "prejudiced" by the defense attorney's performance. Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable" (*Strickland v. Washington*, 1984, p. 687).

As the Court explained further, "the purpose of the effective assistance guarantee of the Sixth Amendment is *not* to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is *simply to ensure*

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6. "Prisoners are not a sympathetic minority; certainly in this country, there are few places where a politician will win votes by standing up for the rights of prisoners. […] Few prisoners have any substantial wealth with which to influence elections or even public policy debates, and their ability to communicate with their fellow citizens, the primary alternative means available to influence public policy, is obviously severely limited" (*Kane v. Winn*, 2004, pp. 175–176).

that criminal defendants receive a fair trial" (*Strickland v. Washington*, 1984, p. 689, emphasis added). The Court defined effective representation as that which does not fall below "an objective standard of reasonableness," noting that reviewing courts must afford significant deference to the judgment of defense attorneys at the time of trial (*Strickland v. Washington,* 1984, p. 688). A number of individuals who were eventually exonerated by DNA testing initially raised claims of ineffective assistance of counsel on direct and collateral appeals and lost (Garrett, 2011). In these cases, courts concluded that significant evidence of guilt precluded a finding of prejudice to the outcome. The sad irony is that a competent defense lawyer might have been able to bring evidence to light challenging the seemingly "overwhelming" evidence of guilt—but precisely because defense counsel was *not* competent in many of these cases, the evidence available to the appellate court upon review appeared to confirm the trial court's verdict.

Thus, the *Strickland* standard, subject to longstanding and extensive criticism, rarely results in reversals of convictions, even in cases where the lawyer slept during trial or otherwise performed abysmally below any accepted understanding of competent counsel (Burns, 2012; Guggenheim, 2012; Hughes, 2013). "*Strickland* tolerat[es] systemic conditions that structurally preclude effective representation" (Dripps, 2013, p. 888). Moreover, the Supreme Court in *Harrington v. Richter* (2011) made it even more difficult to challenge effective assistance of counsel in habeas cases by "doubly deferring" to state court decisions even where the state court did not specify whether it denied the ineffective assistance of claim (O'Brien, 2012). Since most challenges to effective assistance of counsel occur in habeas proceedings and not on direct appeal, reversal is highly unlikely even in instances of egregiously poor lawyering. Scholars' arguments that the Court should adopt a standard that *presumes* prejudice for many ineffective assistance of counsel claims—given that it is nearly impossible to prove what should have been uncovered, but as a result of poor lawyering, was not—have fallen on mostly deaf ears (Parmeter, 2003).

Wrongful Convictions and Defense Practice in Context

Individual instances of defense misconduct. As we have just discussed, many known cases of wrongful convictions involve egregious examples of "bad lawyering." These practices include fundamental failure on the part of defense attorneys to investigate, prepare for, and ultimately defend their clients' cases. The 1984 capital murder trial of Earl Washington, Jr. is well known as one of the most extreme examples of bad lawyering in a wrongful conviction case. According to Brandon Garrett, a leading scholar on the causes and consequences of wrongful convictions, "the entire [Earl Washington, Jr.] defense case occupied only forty minutes" (Garrett, 2011, p. 146). Despite the fact that (well-defended) death-penalty cases typically require months of preparation and involve putting on a multitude of defense witnesses and experts to rebut the State's case, Washington's trial lasted a total of five hours and involved a total of two defense witnesses (Garrett, 2011). Although Washington initially was represented by a public defender, his family subsequently retained private counsel—presumably on the assumption that in so doing, they would receive better representation—but the defense attorney they were able to hire was woefully ill prepared and had never defended a capital case.

In cases like Washington's, it is relatively easy to assess the incompetency of defense counsel, and to identify what a qualified, diligent defense attorney should have done when faced with a similar set of circumstances. At the very least, adequate defense representation in a capital murder trial would have involved following the carefully delineated standards for representation of a client accused of a capital crime (American Bar Association, 2003).

These standards require defense attorneys to take sufficient time to prepare for the case, interview and adequately consult with the defendant, interview and subpoena witnesses, request discovery, file pretrial motions, investigate the physical evidence, anticipate the State's theory of guilt at trial, and diligently prepare mitigation evidence. Washington's defense attorney's representation clearly fell short of these professional standards of practice. Nevertheless, the lawyering in his case withstood scrutiny on review; Washington was exonerated on the basis of his innocence, established in part by DNA evidence, and not due to concerns that his Sixth Amendment right to the effective assistance of counsel may have been violated by his attorney's performance.

Even in stepping back to consider cases as troubling as Washington's, however, there are lessons to be learned regarding the role of defense attorneys and the prevalence of wrongful convictions today. First, the legal standard to reverse a conviction based on ineffective assistance of counsel set forth in *Strickland* shields many defense attorneys from scrutiny. In practice, the prejudice prong of *Strickland* fails to take into account that if defense counsel were, in fact, ineffective, the trial record may suggest the inevitability of a guilty outcome—but only because of the attorney's poor performance. In relying on the trial record to determine whether a defendant was prejudiced by ineffective assistance, appeals courts have no real way of knowing what other information affecting the outcome of the case might have been drawn out by a more diligent and competent attorney.

Oftentimes, even if the defense attorney undertook no considerable effort to investigate or defend his client's case, there is little risk of counsel being found constitutionally ineffective precisely because the prejudice prong of the standard is so difficult to meet. Because *Strickland* mandates that as long as defense counsel went through the cursory motions of attorney practice, and the record on appeal suggests that a guilty verdict was likely on the weight of the prosecution's evidence alone, deficient defense representation, while not encouraged, is at the very least not adequately proscribed by current Sixth Amendment jurisprudence. Because it is so unlikely that an appellate court will find defense attorneys who fail to exert reasonable effort in representing their clients to be ineffective, the professional incentives to avoid such a finding may be diminished. Moreover, even where an appellate court finds ineffective assistance of counsel, incompetent defense attorneys rarely receive censure for their unprofessional performances. While that is not to say that simply disciplining ineffective defense attorneys will reduce wrongful convictions, it nevertheless stands to reason that when the law itself does not require reversal of a conviction for egregiously poor defense practice, competent lawyering is not sufficiently incentivized.

Personal or professional biases also may play a role in diminishing defense attorneys' zeal for representing clients. After years of law practice, some defense attorneys become jaded—skeptical not only of a client's claimed innocence, but also about the likelihood of securing an acquittal. Some attorneys fail to develop a relationship of trust with clients; after years of representing clients accused (and frequently found guilty) of brutal crimes, they may no longer care about the fate of their client, even if they once did. Some have described such defense attorneys as lawyers who might as well "just phone it in." These lawyers are the antithesis of a zealous advocate and unfortunately constitute some portion of the defense bar. There is no firm research to suggest that lawyers with such attitudes were involved or overrepresented in the universe of known wrongful conviction cases, but simply reviewing the trial transcripts of many of these cases suggests that a lawyer's lack of competence and diligence may stem from a lack of motivation.

Nevertheless, there is no doubt that other important factors played a role in those unjust outcomes, as well. Not least among these other considerations are the structural inequities currently in place in our system of indigent defense. To understand the

relationship between defense attorney practice and wrongful convictions, it is crucial to take into account the hurdles faced by public defenders in providing quality representation to their numerous clients.

Structural inequities and wrongful convictions. As much research suggests, the quality of defense lawyering is varied and dependent on a host of factors. This chapter concentrates on cases handled by public defenders—attorneys employed full-time by state or local governments to represent indigent criminal defendants. Roughly seven out of every 10 (70%) of the 311 wrongfully convicted individuals exonerated by DNA through August 2013 were represented by public defenders or court-appointed counsel (Innocence Project, 2013a).

Extensive literature describes overwhelming caseloads and the lack of resources hindering defense attorneys' ability to properly investigate and defend their clients' cases. In an increasingly overburdened criminal justice system, public defenders often lack the time, money, and information needed to "zealously" advocate on behalf of their clients. In a significant work surveying the burdens facing public defender systems, Norman Lefstein described one defense attorney with a caseload of over 300 active cases. Regardless of attorney competence, diligence, or motivation, it would be practically impossible to provide effective counsel to each of those 300 clients (Lefstein, 2011).

As U.S. Attorney General Eric H. Holder Jr. said in marking the 50th anniversary of the historic decision in *Gideon*, "public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads and inadequate oversight." In short, Holder said, "the basic rights guaranteed under *Gideon* have yet to be fully realized" (Walsh, 2013). No doubt, the hurdles faced by public defenders that are rooted in the indigent defense system itself contribute to wrongful convictions.

> The resources of the justice system are often stacked against poor defendants. Matters only become worse when a person is represented by an ineffective, incompetent or overburdened defense lawyer. The failure of overworked lawyers to investigate, call witnesses or prepare for trial has led to the conviction of innocent people. (Walsh, 2013)

It has become increasingly apparent that even ordinarily diligent defense attorneys are unable to defend clients successfully in the face of staggering caseloads, insufficient resources, enhanced prosecutorial discretion, and the use of increasingly complex (and often untested) scientific evidence in courts. Adding a lazy, unethical, or unmotivated attorney to an already overburdened system of indigent defense may all but guarantee a conviction.

Statutory restrictions on discovery often hinder defense attorneys' ability to prepare their cases adequately, as well. While discovery guidelines vary widely from state to state, there are few jurisdictions in which defense attorneys are entitled to review all of the information relevant to their clients' cases prior to trial (Roberts, 2004). In some cases, defense lawyers describe the experience of going into court in jurisdictions with limited access to discovery as "trial by ambush," stating that they are entering into trial "blind." unaware of the key facts and witnesses that the State will present until the very last minute.

And, while prosecutors are constitutionally obligated to provide the defense with material evidence that is either exculpatory or impeaching (*Brady v. Maryland*, 1963), the significance of the failure to disclose such information to the production of wrongful convictions is the subject of ongoing controversy. To date, prosecutorial misconduct—which encompasses both prosecutors' and law enforcement's failure to turn over exculpatory information—has played a part in 18% of the DNA exonerations documented by the Innocence Project (Innocence Project, 2013d). Diligent lawyering through repeated requests

for discovery may result in more disclosure of exculpatory evidence, but it will not help in cases involving intentional misconduct (Uphoff, 2006).

Overwhelming caseloads and lack of resources should not excuse poor or unprofessional defense performance (even if they may help to explain it). And while a lazy, unethical, or unmotivated defense attorney certainly increases an innocent client's chances of being wrongfully convicted, other aspects of defense practice today must also be considered to understand how the unjust outcomes occur in these cases.

The "plea-mill," misdemeanors, and deficient defense resources: factors beyond defense control. There is widespread consensus that one of the greatest barriers to effective defense representation is the fact that the overwhelming majority of cases never go to trial: plea bargains now account for roughly 95% of criminal adjudications (Devers, 2011; Reimer, 2012; Weinstein, 2003). Public defenders face overwhelming caseloads, making it all but impossible for them to resolve the majority of their cases other than through a plea. And while defense attorneys are obligated to advise clients of their rights to reject a plea-deal and proceed to trial, in many cases defense caseloads are too great to pursue this option. Even though public defenders are (or should be) aware that pressuring their clients to accept guilty pleas simply for the sake of expedience is unethical, the fact remains that if the majority of cases are not resolved through pleas, our current system of criminal representation and adjudication would crumble.

Significantly, for most defendants, the perceived costs of going to trial may far outweigh the benefits. Overwhelmingly, criminal defendants are poor, facing misdemeanor charges, and primarily interested in the quick resolution of their cases (Reimer, 2012). For these defendants—who comprise the *vast majority* of defendants in all criminal cases—accepting a plea may be the best option.

Other defendants may enter a guilty plea because their trial lawyer has convinced them to accept the plea offer even though that lawyer has not performed minimal investigation or otherwise provided a competent and diligent defense (Weinstein, 2013). In some (hopefully rare) instances, a prosecutor may intentionally fail to disclose exculpatory evidence and then offer the defendant a significantly reduced prison sentence to obtain a guilty plea—without the exculpatory evidence ever coming to light. Innocent defendants have pled guilty under such circumstances. It is not possible to know the number of innocent people who have pled guilty to crimes to avoid lengthy prison terms, but studies in recent years have established that the phenomenon occurs with greater frequency than once imagined (American Bar Association, 2005).

In Chris Ochoa's case, for example, police went so far as to point to the vein where lethal injection would be administered if Ochoa did not confess to a rape-murder he did not commit, and implicate another man—Richard Danziger—in the crimes as well. After writing and signing a full confession and testifying against Danziger, Ochoa pled guilty to the crimes. He spent more than twenty years in prison before being exonerated when DNA evidence established that another man—already serving a third life sentence—was the perpetrator of the crime. Danziger also was exonerated after serving an equally lengthy prison sentence (Yaroshefsky, 2004).

"[T]he incentives for defendants to plead guilty are greater than at any previous point in the history of our criminal justice system…." Moreover, "the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal" (Dervan, 2012, p. 58). "Taken as whole, deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent of the charges lodged against them" (American Bar Association, 2005).

Defense attorneys as scientists: forensic evidence and its implications for effective defense practice. According to the Innocence Project (2013g), invalidated or improper forensic evidence has contributed to wrongful convictions in just over half of the DNA-based exonerations. As prosecutors are becoming increasingly reliant on forensic science in criminal cases, defense attorneys must now be skilled in the use of forensic science at trial as well. In proceedings where the State's case relies upon forensic evidence and expert testimony, the need for defense attorneys to understand the nature and implications of such evidence cannot be overstated.

The "CSI" effect has become well known. Jurors in criminal cases not only commonly expect forensic evidence, but often are willing to trust such evidence whole cloth without properly understanding its actual implications. Discrediting such evidence or ensuring that its probity is properly contextualized is essential to ensuring a fair trial and outcome. In addition, before achieving greater awareness about the role that faulty forensic evidence and scientific testimony have played in contributing to wrongful convictions, many defense attorneys may have been swayed by the assumed infallibility of forensic evidence, as well. Nevertheless, we now know that much of this evidence cannot be trusted. The research into wrongful convictions shows that in many instances, either the *science relied on by the prosecution is itself* unreliable, or that testimony regarding the *significance of the scientific evidence* has been vastly exaggerated. In either case, the scientific testimony offered by the prosecution in support of guilt constitutes "invalid" forensic evidence.

Suggestions that the roles and responsibilities of defense attorneys must expand and transform in light of the growing awareness about wrongful convictions place a heavy burden on the defense bar, particularly in light of existing funding shortages, heavy caseloads, and other obstacles. Nevertheless, advocating such a transformation may be necessary to ensure just outcomes in criminal cases. In order for a defense attorney to properly litigate a case where forensic evidence is relevant, that defense attorney must be responsible for understanding the science, including the extent to which it can be trusted and the parameters of its accuracy in any given case.

An influential study of the use of forensic science in the trials of 232 defendants later exonerated by DNA testing found that a high percentage of forensic evidence was empirically false or inaccurate (Garrett & Neufeld, 2009). Moreover, flawed forensic testimony was not limited to one area of forensic science or to a single class of experts. Rather, 72 forensic scientists "employed by 52 laboratories, practices, or hospitals from 25 states" presented this invalid and unsupportable testimony (p. 9). Upon analyzing the data, Garrett and Neufeld concluded that the prevalence of invalid forensic testimony admitted at trial was not just the consequence of "a few 'bad apples' " being permitted to testify, but rather reflected an inability of the "adversarial system" to "police this invalid testimony" (pp. 23-24). The shortcomings included the performance of defense attorneys, who either did not develop the necessary expertise in the forensic science at issue at trial, employ a defense expert to validate the State's forensic assertions, challenge the admissibility of the evidence in pre-trial motions, or effectively examine prosecution experts. The rules governing the admissibility of forensic science in the courts no longer constitute an adequate bulwark against the introduction of unreliable or false testimony at trial — indeed, many judges themselves apparently did not know or understand the science behind many experts' testimony. The onus to learn fully about these forensic disciplines now falls on defense attorneys so they can prepare adequately for their clients' defense.

As an initial matter, a defense attorney may not be familiar with the significant difference between so-called "junk science," which refers to forensic evidence that is *inherently* unreliable, and testimony which misstates the significance of the science at issue ("improper" testimony) (Garrett & Neufeld, 2009, p. 12). Although junk science and improper forensic

testimony may overlap, they present separate problems when they arise at trial. They are both invalid forensic testimony.

"Junk science" refers to certain forensic disciplines, such as hair microscopy and bite mark comparison, which the research on wrongful convictions shows to be consistently unreliable. That is, hair microscopy and bite mark comparison evidence is so frequently disproven by DNA evidence that the reliability of these disciplines on the whole is at issue. For example, by examining two hairs under a microscope—hair microscopy—an analyst cannot opine to a scientific certainty that the two hairs "match" without additional evidence, such as mitochondrial DNA. To the extent that the State tries to put on evidence that microscopic hair analysis reveals that hairs from the defendant "match" hairs found on the victim, for example, defense attorneys need to be aware of the limitations of the *discipline as a whole*, and ensure that the jury understands those limitations as well. The problem with "junk science" is that it involves a purportedly "scientific" discipline that has not undergone sufficient research and testing to be trusted by courts and defense attorneys. In every stage of the trial process where the State seeks to introduce bite mark or hair comparison testimony, a defense attorney needs to be prepared to 1) challenge the admissibility of the testimony based on the mounting research showing its unreliability; 2) have the evidence examined and discussed by a defense expert; and 3) cross-examine the State expert not only on her conclusions regarding the evidence, but on the reliability of the discipline upon which those conclusions are based.

Identifying improper forensic testimony, on the other hand, is more difficult for a defense attorney because it involves understanding not only the science at issue, but also the conclusions being drawn from that science and offered as evidence of guilt. In cases where misleading forensic evidence has been identified as a contributor to the wrongful conviction, it is not always the scientific *discipline* that is at issue: rather, it is the assertions that were made *about* that evidence which are erroneous. For example, if a serologist—a blood expert—states that both the perpetrator and the defendant have Type O blood, and Type O blood is only seen in 5% of the Caucasian population (when the real rate is between 35% and 45%), such testimony is not based on junk science but is nonetheless invalid (American Red Cross, 2013). So, while serology itself is not "junk science," it can nevertheless be employed improperly in a trial setting. The wrongful convictions research teaches us that the defense lawyer must know that when the State seeks to introduce forensic testimony, both the science involved and the conclusions drawn based upon that science must be scrutinized carefully.

While not all of the defense attorneys involved in wrongful conviction cases lacked diligence or professionalism, review of the data on DNA exonerations nevertheless suggests that the majority of defense attorneys have been woefully inadequate in challenging the presentation of invalid forensic testimony in court (Garrett, 2011). In significant measure, this is a failing of the adversarial system—and not that of the defense lawyer alone—in keeping flawed science out of the courts.

It is increasingly clear that the use of forensic evidence in criminal cases has evolved faster than defense attorneys' abilities to learn about or contest its use. Our current knowledge about the prevalence of invalid forensic testimony in criminal trials is limited; it is largely based upon DNA testing that conclusively has disproven forensic experts' testimony. Challenges to the admissibility of forensic evidence long accepted in courts—such as bite mark, fingerprint, or ballistics evidence—are fairly new and will be made in a context where the case law governing the admissibility of forensic evidence shows a general trend toward greater inclusion of such testimony (Bizzaro, 2010).

Since 1993, the federal courts and many state courts have admitted forensic evidence once the "trial judge … ensure[s] that any and all scientific testimony or evidence admitted is not only relevant, but reliable" (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993, p.

589).[7] In assessing reliability under the *Daubert* standard, courts consider a range of factors, including whether the scientific theory or technique had been tested, subjected to peer review, has a known or discernible error rate, and whether it is "generally accepted" within the relevant scientific community (*Daubert,* 1993, p. 584). In 2000, the Federal Rules of Evidence were revised to allow the admission of expert testimony if such testimony "a) … will help the trier of fact to understand the evidence or to determine a fact in issue; b) … is based on sufficient facts or data; c) … is the product of reliable principles and methods, and; d) the expert has reliably applied the principles and methods to the facts of the case" (Federal Rules of Evidence, 2013, Rule 702). To contest the admissibility of forensic evidence on the ground that such criteria are not met, the defense lawyer must be knowledgeable about the discipline in question and the standards governing the admissibility of evidence in the jurisdiction.

As the legal standards regarding the admissibility of forensic science have evolved, so too has forensic science itself. For example, DNA evidence was only first admitted in criminal trials in the late 1980s (Barr, 1989). In 2009, the National Academy of Sciences published a comprehensive report on the use of forensic science in criminal cases, largely in response to the growing number of wrongful convictions shown to have relied on improper forensic testimony. This report, *Strengthening Forensic Science in the United States: A Path Forward* (hereinafter "NAS Report") commended advances in DNA science to assist law enforcement in identifying criminals accurately and efficiently (National Academy of Sciences, 2009). It also found that unlike DNA, however, a number of the scientific disciplines frequently relied on in courts did not meet the same standards for accuracy and reliability.

> Over the last two decades, advances in some forensic science disciplines, especially the use of DNA technology, have demonstrated that some areas of forensic science have great additional potential to help law enforcement identify criminals.… Those advances, however, also have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. (National Academy of Sciences, 2009, p. 5)

The report continues: "Imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence" (National Academy of Sciences, 2009, p. 5). Thus, although the legal standards regarding the admissibility of scientific evidence have broadened, and the science in certain areas, such as DNA testing, has advanced, many areas of forensic science nevertheless are not yet sufficiently reliable to offer dispositive evidence of guilt.

Given the extent to which forensic evidence is regarded as particularly convincing evidence of guilt, and keeping in mind the overall deference that juries and judges give "expert" witnesses, defense attorneys' failure to properly grapple with invalid forensic testimony is of particular significance in understanding wrongful convictions. While in some documented wrongful conviction cases the prosecution's forensic expert consciously misled the jury regarding the probity of certain evidence, improper forensic evidence presented by the State oftentimes reflects a misunderstanding that could have been corrected

7. Some jurisdictions adhere to the pre-1993 standard for the admission of expert testimony, governed by the decision in *Frye v. United States* (1923), which determined that scientific evidence cannot be introduced in court unless it is "generally accepted" in the relevant scientific community.

through effective cross-examination or countered through the testimony of a competent defense expert.

> Most of the invalid forensic testimony involved evidence presented as inculpatory. In just 2 of the 82 cases with invalid testimony, the analysts testified that all of the forensic evidence was non-probative or inconclusive; in fact that evidence was exculpatory. The forensic testimony would have played a reduced role in many more of the 82 cases had forensic analysts accurately presented the evidence. (Garrett & Neufeld, 2009, p. 15)

Invalid scientific evidence presented to the jury as proof of the defendant's guilt in the 82 exoneration cases where such evidence was introduced could have been challenged if the defense attorneys had the resources, knowledge, instinct, or willingness to do so. However, only in roughly 30% of the wrongful conviction cases did attorneys introduce expert testimony in their clients' defense (Garrett, n.d.). While funding for experts may be denied defendants by the courts, it is nevertheless incumbent upon a defense attorney to file motions and litigate the necessity of being afforded a defense expert where forensic evidence is crucial to a case.

At the same time, however, it bears repeating that defense attorneys are not to blame for failing to challenge forensic evidence in every case where such evidence contributed to a wrongful conviction. Current research shows that in some wrongful conviction cases, the prosecution offered forensic evidence in support of guilt that at the time was not known to anyone to be faulty or unreliable. In Cameron Todd Willingham's case, for example, the common consensus among forensic experts is that the State relied on forensic evidence that was based on scientific assumptions now known to be false (Grann, 2009). Willingham was convicted of arson and murder in Texas after being accused of setting the house fire that killed his three children. He was sentenced to death and, despite numerous appeals challenging the validity of the evidence used against him, was executed by Texas in 2004 (Innocence Project 2013h). The evidence presented against him continued to unsettle criminal justice advocates as well as members of the scientific community, however, and years after his execution his case was reinvestigated. Following a complete re-investigation of the charges against him, the state investigative committee assigned to review his conviction ultimately determined that the science—arson evidence—used to convict him was unreliable (Innocence Project, 2013).

Research challenging scientific disciplines such as arson investigation has only emerged relatively recently. Thus, courts, attorneys, and forensic analysts themselves may not have been on notice that these areas of forensics could not be trusted at the time they were offered in criminal trials as evidence of guilt. In the case of ballistics analysis, for example, many diligent defense attorneys assumed that forensic experts could be relied on when they reported that they were able to match a bullet fired to a defendant's gun. More recently, however, evidence has come to light disputing the reliability of such analysis. In a detailed exploration of the many problems inherent to such evidence, Adina Schwartz (2005, p. 1) writes, "firearms identification, often improperly referred to as 'ballistics identification,' is part of the forensic science discipline of toolmark identification. Despite widespread faith in 'ballistics fingerprinting' […] because of systemic scientific problems, firearms and toolmark identifications should be inadmissible across-the-board." Because the research about "junk science" has evolved and is now widely available with the exercise of diligent trial preparation, defense attorneys can be expected to know of—and challenge—such assertions. In many wrongful conviction cases relying on misleading scientific testimony, however, defense attorneys could not reasonably have been expected to know that the science was unreliable.

Nevertheless, we also know that in many wrongful conviction cases, forensic testimony was misstated or exaggerated at trial, and could have been challenged had the defense attorney exercised proper diligence in mounting a defense. Garrett and Neufeld's data indicate that in many wrongful conviction cases, forensic experts provided testimony which improperly bolstered the State's case by simply misstating its significance, with no challenge from the defense or the court (Garrett & Neufeld, 2009). This science was not unknown or unknowable at the time, and a diligent defense attorney should have been able to point out the flaws in such testimony. In such cases, a failure to do so can be imputed to the defense attorney.

To emphasize this point, Garrett and Neufeld's study documents a number of cases in which defense attorneys should have been able to dispute serology testimony offered by the prosecution. Expert testimony was false or overstated in 57% of the 100 wrongful conviction cases in which serological evidence was presented (Garrett & Neufeld, 2009). Serology can help determine the blood type of an individual responsible for depositing certain physical evidence in connection with a crime (such as semen, saliva, or skin cells) (Garrett & Neufeld, 2009). Prior to DNA testing, serological evidence frequently was offered to suggest guilt, where the blood type in physical evidence collected at the crime scene matched the blood type of the defendant.

However, a serological "match" without more distinctive DNA markers is never conclusive evidence of guilt. No matter how rare, no blood type is unique to a single individual. A serological "exclusion," on the other hand, can be exculpatory — to the extent that the evidence is uncontaminated and analysis of it was performed correctly, no one can deposit bodily fluids inconsistent with his or her individual blood type. That is to say, in a single perpetrator rape case, where the victim is alive and was conscious at the time of the attack and knows that only one perpetrator was involved, if the defendant's blood type is inconsistent with the blood type of the semen deposited, this inconsistency — known as an "exclusion" — is dispositive proof of innocence. In contrast, if the defendant's blood type is consistent with the blood deposited at a crime scene, this alone is not sufficient to prove guilt. Such evidence would only serve to establish that the defendant — along with everyone else in the population with that particular blood type — could be the source of the blood found at the crime scene and thus might have perpetrated the crime.

Therefore, while serological evidence can be dispositive, it is nevertheless subject to limitations that an effective defense attorney must be prepared to address. In many cases where invalid serology testimony was discovered, experts "failed to accurately provide the relevant statistic regarding the included population. These analysts instead offered invalid, reduced frequencies (a rarer event) that appeared to further inculpate the defendant" (Garrett & Neufeld, 2009, p. 47). This information is available to the diligent and competent defense attorney, who is able to educate him or herself on the relative frequencies of blood type and expose any misleading statements by prosecution experts on cross-examination.

Moving Forward

Defense attorneys unquestionably must be skilled and knowledgeable about forensic science. Case investigation increasingly utilizes various forensic disciplines, and it is therefore incumbent upon an attorney to work competently within the scientific arena. This may be outside of the comfort zone of many defense attorneys, who had little

expectation that criminal defense lawyering would require such a level of engagement with science.

Today, the lawyer must *know* what disciplines are subject to challenge, and be able to properly explain to a court why evidence based on such disciplines may be unreliable or unduly prejudicial to the defendant. An effective defense attorney must be able to recognize when an independent expert should vet forensic evidence and otherwise must be knowledgeable regarding the implications of the science presented. Competent attorneys will diligently file pretrial motions challenging the presentation of forensic evidence that is based on invalid science and will utilize their own experts in pretrial admissibility hearings and during trial for cross examination of the prosecution's expert and other witnesses.

To the extent that the court chooses to admit potentially invalid forensic evidence over defense objection, the defense attorney must be prepared to cross-examine the State's expert on the reliability of the scientific discipline at issue and highlight for the jury the proper weight that such evidence should be assigned. Moreover, it may be necessary to seek introduction of the testimony of a defense expert who can convincingly speak to the problems of reliance upon invalid forensic testimony, even where a court has determined that the evidence is admissible. Defense attorneys also must be on notice that even if the science at issue is "good," the expert's conclusions may be incorrect. In some cases, paying close attention to the statistics offered and the probative weight assigned to such statistics may be sufficient to identify the error in the expert testimony.

Thus, not only must the effective defense lawyer establish a relationship of trust with and effectively counsel the client; thoroughly investigate the case; file necessary pretrial motions; seek to hire necessary investigators and experts; negotiate appropriate disposition with the prosecution; prepare for trial; carefully select a jury; conduct witness examinations; make opening and closing statements and appropriate motions; prepare for and conduct sentencing; and be knowledgeable about collateral consequences of convictions; but the attorney must also pay particular attention to the state of scientific knowledge that may have an impact upon the case. Moreover, the successful defense attorney today must be knowledgeable about the predominant causes of wrongful convictions and be prepared to do what is necessary to avoid future wrongful convictions.

How can the already overburdened indigent criminal justice system ensure that defense lawyers achieve such a level of skill, knowledge, diligence and competence? A multifaceted approach is essential.

First, any viable and respected criminal justice system must cope with longstanding structural impediments. Adequate funding and lowered caseloads are essential if defense lawyers are to be expected to undertake additional responsibilities and be competent in forensic science. Second, when forensic science is involved in a case, courts must authorize expert services for the defense without delay or undue burden on the defense lawyer. The judiciary needs to assist in ensuring that counties or states adequately fund forensic experts. Third, training institutes and programs are essential to ensure that defenders around the country receive adequate instruction and training on all aspects of forensic sciences. The training should begin in law schools where criminal justice courses and concentrations assure that science is part of fundamental preparation for the profession. Law schools could partner with graduate schools to provide interdisciplinary courses for future lawyers and scientists alike.

In addition, a functional system for effective assistance of counsel cannot focus solely on the defense lawyer. Trial and appellate judges and prosecutors need to assume significant responsibility for the flaws that lead to wrongful convictions. The standard for reversal set forth in *Strickland* has ensured that systemic ineffectiveness has little consequence.

The judiciary should closely examine the *Strickland* standard in light of teachings from wrongful conviction cases. What needs to change when courts repeatedly deny ineffective assistance of counsel claims because there was no showing of prejudice and the individual later is proved to be innocent? At the very least, a presumption of prejudice should become the standard where the lawyer's performance is significantly below that of reasonably competent counsel (the first prong of the *Strickland* standard). Certainly, failing to address forensic science adequately in a case, whether through lack of investigation, failing to engage an expert, or effectively challenge invalid forensic testimony, should presumptively be prejudicial. A court's failure to appoint a defense expert when it is reasonably required also should presumptively be prejudicial. Judicial decisions in such a direction could change defense practice significantly.

Conclusion

Cases of wrongful conviction are powerful validation of the need to provide greater resources to public defenders and court-appointed attorneys so the Sixth Amendment's right to effective assistance of counsel can be realized. To the extent that funding and quality services are lacking, indigent defendants, without diligent, competent, zealous defense lawyering, will continue to stand an especially great chance of a wrongful conviction. This fundamental point cannot be overstated.

The task for defense lawyers has become even more complicated and demanding whenever the prosecution's case is based, in whole or in part, upon forensic science. The evolution of scientific knowledge about a range of disciplines — traditionally accepted as valid science in courtrooms throughout the country, but now identified as "junk sciences" — requires defense attorneys to become expert in each of these disciplines so they can persuasively challenge such evidence or, where the science may be valid but nevertheless subject to limitation, so they can effectively cross-examine prosecution experts.

More often than not, however, the only way for a defense attorney to ensure that the State's expert is not offering false or flawed testimony is to enlist an independent expert to review that testimony. To the extent that the science being offered is fairly nuanced or complex, neither the judge, nor the jury, nor the defense attorney can be expected to assess the expert's methods without assistance. This is no small task, especially in financially strapped counties and cities where many judges are loath to expend funds to permit the defense lawyer to employ an independent expert.

Finally, the role of the defense lawyer in wrongful convictions cannot be examined in a vacuum. The roles of the prosecutor and the court must be part of any calculus in deriving lessons from wrongful convictions. A system in which 95% of defendants plead guilty and in which it is not mandatory for prosecutors to disclose potentially exculpatory information to the defense prior to a defendant entering a guilty plea is fraught with the potential to produce wrongful convictions. Similarly, for the small percentage of cases that go to trial, a lack of robust discovery increases the chances of wrongful convictions. The prosecutor, the court, and the defense lawyer each share the responsibility to ensure a process that facilitates the fair exchange of information. Without changes in disclosure policies and practices, an innocent client may still be convicted, even with the most diligent and competent defense lawyer.

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