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## False Justice and the “True” Prosecutor: A Memoir, Tribute, and Commentary

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***FALSE JUSTICE AND THE “TRUE”***  
**PROSECUTOR: A MEMOIR, TRIBUTE, AND**  
**COMMENTARY**

MARK A. GODSEY\*

INTRODUCTION

This article is a review of *False Justice: Eight Myths that Convict the Innocent* by Jim and Nancy Petro. But this article is also a memoir, in that I tell the story, from my own perspective as Director of the Ohio Innocence Project, of how I have watched Jim Petro go from prosecutor and elected Attorney General of Ohio to a leading champion of the wrongfully convicted across the nation. The article is also a commentary in that, along the way, I address what makes Jim Petro so different from many prosecutors in this country. In this respect, I discuss problems in our criminal justice system that unfortunately lead some prosecutors, in far too many instances, to contest post-conviction claims of innocence in ways that I believe are contrary to our profession’s ethical standards. In the end, I offer Jim Petro as the true prosecutor. By “true,” I mean one who fully embodies fairness, justice, and the highest ethical standards of our profession. With this article, I hold out Jim Petro as a national model—an example that all other prosecutors should strive to emulate.<sup>1</sup>

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\* Daniel P. and Judith L. Carmichael Professor of Law, University of Cincinnati College of Law; Director, Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project; Director, Center for the Global Study of Wrongful Conviction. E-mail: markgodsey@gmail.com. This article is dedicated to my parents, Maurice and Christine Godsey, for instilling in me a sense of justice.

<sup>1</sup> I have come to believe that poor criminal defense work and defense ethics contribute just as much to wrongful convictions, if not more so, than does anything done by police or prosecutors. By

## CHAPTER 1: DNA TESTING FOR INMATES

My first interaction with Jim Petro occurred in 2003, shortly after he took office as the Attorney General (AG) of Ohio. Petro had been elected Attorney General following a long and distinguished legal and political career, which included service in the positions of Auditor of Ohio, state representative, county commissioner, city director, and many years as a felony trial prosecutor.<sup>2</sup> I, too, was new to my job when Petro and I first met. At that time, I had recently taken a position as a criminal law professor at the University of Cincinnati (UC), following a practice career that, like Petro, involved extensive service as a prosecutor.<sup>3</sup> My main goal in 2003, however, was to nurse to health the fledgling Ohio Innocence Project (OIP)<sup>4</sup> that I had recently co-founded at the law school with local political official John Cranley<sup>5</sup> and others.

Immediately upon arriving at UC and launching the OIP in early 2003, I learned that a bill had recently been introduced in the Ohio legislature to give Ohio inmates the right to prove their innocence through post-conviction DNA testing (“SB11”). As this fell squarely within the OIP’s bailiwick, I immediately inserted myself into the deliberative process in the legislature to make sure the final version of the bill ended up as helpful to our cause as possible.

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focusing on problems on the prosecutorial side of the adversarial structure in this essay, I do not mean to suggest that all the fault lies with prosecutors and police officers. Rather, the book *FALSE JUSTICE* naturally lends itself to a discussion of prosecutorial ethics, and thus, that is the subject matter that I have developed herein. JIM PETRO & NANCY PETRO, *FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT* (Kaplan Press 2010).

<sup>2</sup> Petro’s legal and political career are discussed throughout *FALSE JUSTICE*. A summary is available here: [http://en.wikipedia.org/wiki/Jim\\_Petro](http://en.wikipedia.org/wiki/Jim_Petro)

<sup>3</sup> I served as a federal prosecutor in the Southern District of New York from 1995 through 2001. I handled felony cases from investigation through trial and appeal, including cases involving organized crime, public corruption, narcotics, white-collar crime, and extortion and murder.

<sup>4</sup> To read about the Ohio Innocence Project, see *THE OHIO INNOCENCE PROJECT*, <http://www.law.uc.edu/institutes-centers/ohio-innocence-project> (last visited November 21, 2011).

<sup>5</sup> John Cranley’s background is summarized at [http://en.wikipedia.org/wiki/John\\_Cranley](http://en.wikipedia.org/wiki/John_Cranley)

One day in about April of 2003, a conference call was scheduled to take place between me and several representatives from police and prosecutor associations, including the AG's Office, to try to hammer out some of the remaining differences in the bill. Generally speaking, the prosecutor and police organizations wanted to make SB11 as narrow as possible (or kill the bill altogether) for fear that the law would open the floodgates to DNA requests from tens of thousands of Ohio inmates, clogging the courts and costing taxpayers a fortune. I was interested in ensuring a more expansive right to post-conviction DNA testing along the lines of what had been enacted in many other states at the time and believed the "floodgates" argument was a red herring because it had not happened in other states with similar laws.

About an hour before the conference call was to begin, I received a call from Jim Canepa, Petro's top assistant at the AG's office. I had never spoken to Canepa before. After he introduced himself, he said something to the effect of, "I've been instructed by Petro to strategize with you before the conference call, so we can get our ducks in a row and make sure we get a bill that will actually get some meaningful DNA testing for inmates claiming innocence. We think the 'floodgates argument' the prosecutors are floating is nonsense." Canepa knew, like I did, that other states that had enacted expansive DNA testing laws had not experienced the "floodgates" phenomenon (and Canepa turned out to be correct with his observation about Ohio, as Ohio did not experience the feared floodgates once the law was eventually enacted). And for the next hour, that is exactly what Canepa and I did—strategize on how to counter the prosecutors' various objections to SB11.

Needless to say, I was surprised to have received this call. I had expected the AG's office to side with the prosecutors, as AG's offices invariably do in other states and imagined that the AG would be another obstacle to the more expansive bill I sought. But as the process on the bill continued to unfold during 2003, I eventually had a few personal interactions with Petro himself that confirmed what

the call from Canepa had foreshadowed—that Petro was a prosecutor who was interested in justice first and foremost, above politics or anything else. He had a sincere interest in making sure the system was fair and was not afraid to take on county prosecutors or police associations to ensure such fairness. Throughout the SB11 process, Petro and Canepa acted as reasonable mediators between the police, prosecutors, and myself, and frequently took my side on specific issues. By the end, I saw Petro and Canepa as collaborators rather than opponents. It was clear that we were a team with similar interests in mind.

SB11 eventually passed with Canepa and Petro’s help, and then was amended and expanded at least two additional times while Petro was in office. My experiences with Petro and Canepa were the same each time the bill was expanded. Petro was interested in making sure that DNA technology was widely available not only to convict the guilty, but to free the innocent. And he was never afraid to take on powerful institutions like the police and prosecutors’ associations to get it done. Ultimately, many inmates were proven innocent and freed by DNA testing pursuant to the bill and its iterations that followed, including the OIP clients Raymond Towler (twenty-nine years in prison for a rape he did not commit); Robert McClendon (eighteen years in prison for a rape he did not commit); and Clarence Elkins (seven and a half years in prison for a murder and rapes he did not commit), among others.

## CHAPTER 2: THE CLARENCE ELKINS CASE

My next encounter with Petro occurred not long after the SB11 process wrapped up in the late summer of 2005, in connection with a case that Petro recounts in detail in *False Justice*. The Clarence Elkins case out of Summit County, Ohio was a murder and rape case that I had worked on for the OIP since January of 2004. There were two victims in the case: Judy Johnson, an elderly woman who had been brutally raped and murdered by a middle-of-the-night

intruder in her home, and Brooke Sutton, Johnson's six-year-old granddaughter who had been spending the night with her grandmother the night of the attack. After breaking in and raping and murdering Johnson, the perpetrator raped and assaulted Brooke and left her for dead. Brooke fortunately regained consciousness in the morning and ultimately survived. The six-year-old identified Clarence Elkins, her uncle and the son-in-law of Johnson, as the perpetrator. In 1998, Elkins was convicted based on his niece's eyewitness testimony and sentenced to life. Elkins had maintained his innocence from day one, and still maintained his innocence from prison when I took over the case in 2004.

By early 2005, after having a lab in Texas perform extensive DNA testing on various items from the crime scene, we had discovered a male DNA profile on swabs from Johnson's vaginal cavity taken by the local coroner after her rape and murder. This finding was significant because the DNA profile did not match Clarence Elkins, and the evidence strongly suggested that Judy Johnson, a widower, was not sexually active at the time. Thus, the male DNA in her vaginal cavity had to have come from the perpetrator. Even more powerful, however, was the fact that DNA testing revealed the same unknown man's DNA profile on the underwear of Brooke had been wearing when she was attacked. Again, this DNA profile belonged to an unknown man, and this man was not Elkins.<sup>6</sup>

As I argued to the trial court in our motion for a new trial hearing held in Summit County in March of 2005, only one man's DNA could be in both of these very intimate locations on the night of the attack. That man would be the perpetrator of these horrific crimes. Because Elkins was excluded as the source of this DNA on both victims, he must be innocent and should be exonerated and released.

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<sup>6</sup> The testing used at the time could not determine in what form the male DNA took, whether semen, saliva, skin cells, etc. But it was clear that male DNA that did not belong to Elkins and appeared to be from the same man whose DNA was found on Johnson's vaginal swab and Brooke's underwear.

Despite the obvious logical appeal of this argument, the prosecutors in Summit County opposed our attempts to exonerate Elkins. The prosecutors argued contamination, asserting that the male DNA profile found on the evidence could have been placed there not at the time of the crime, but, perhaps, by a juror at trial. But not only was there was no evidence to support this assertion, the argument was flatly refuted by the trial record. It was clear that the envelope containing Johnson's vaginal swabs had not been opened between the time the coroner sealed it in 1998 and the Texas DNA lab opened it in 2004. And why would a male juror open up the plastic bag and touch Brooke's bloody underwear thereby putting his DNA on it? And even if some juror engaged in this bizarre behavior, did that same male juror work in the coroner's office months earlier and touch Johnson's vaginal swabs? How could this same juror have gotten his DNA on the swabs when the envelope remained sealed during the trial? The prosecution's argument made no sense. As a former prosecutor, I could not understand why they were contesting Elkins' freedom with such ridiculous arguments.

In July of 2005, the trial court denied our motion, meaning that Elkins would have to spend the rest of his life in prison for a crime that I knew he did not commit. The trial court essentially adopted the arguments put forth by the prosecution. This defeat was hard to fathom and more difficult to take. I could not comprehend the judge's decision. I knew something else must have been at work here that I did not yet understand.<sup>7</sup>

Shortly after this defeat, however, while I was preparing the appellate brief, something quite amazing happened. Elkins' wife, Melinda Elkins, who was also the daughter of Johnson and aunt of Brooke, had for years been attempting to find the person who committed these crimes against her family members and caused

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<sup>7</sup> The judge who wrote this opinion was still on the bench when Elkins was later proven innocent and exonerated, and in fact, signed the order that exonerated Elkins. This same judge later granted DNA testing to an OIP client in a powerfully written opinion that reflected a deep understanding of DNA testing and the way it can be used to both convict the guilty and exonerate the innocent. It is my personal opinion that this judge, to his/her credit, was open to learning something from the Elkins case.

her husband to be wrongfully convicted. She eventually narrowed her investigation to a convicted pedophile named Earl Mann, who her investigation showed had been living near Johnson's home at the time the crimes occurred. She also discovered that by 2005, Mann was in prison for raping young girls. Out of thirty-three prisons in Ohio, Mann was coincidentally serving time in the same prison as Elkins. Ms. Elkins alerted Elkins to Mann's presence.

After attempting for two months to collect Mann's DNA on the sly, Elkins was finally able to do so in June of 2005 when he saw Mann put his cigarette out in a clean ashtray and walk from the prison room. Elkins took out a clean tissue he had been carrying in his pocket in case such an opportunity ever arose, and he picked up the cigarette butt. He then mailed it from the prison to the DNA lab that had done the earlier DNA tests in his case.

I will never forget the call I received from the lab in early September of 2005 telling me that the DNA found on Johnson's vaginal swab and Brooke's underwear matched the DNA on the cigarette butt Elkins had collected from Mann. When I got that call, I was obviously ecstatic at first, but this elation soon turned to concern. During the hearing in March of 2005, the Summit County prosecutors I had litigated against when trying to free Elkins had, in my opinion, been so close-minded and arrogant in their beliefs that Elkins was guilty that I sensed they would never change their minds no matter what type of evidence we produced.<sup>8</sup>

The prosecutors who had handled the March 2005 hearing were the same prosecutors who had tried Elkins' case before the jury many years earlier. The Elkins conviction had been a trophy of sorts for them, it seemed, and they appeared personally invested in making sure the case was not overturned. Even though, in my opinion, the evidence was clear in March of 2005 that Elkins was innocent, the prosecutors during the hearing continued to dramatically refer to him in the packed

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<sup>8</sup> In fact, one of the two prosecutors handling the March 2005 hearing stated to the media in my presence that he was 100% certain that Clarence Elkins was guilty. The March 2005 hearing was handled by two assistant Summit County prosecutors. When I refer to "the prosecution" or "the prosecutors" when discussing the Elkins case, I refer only to those two prosecutors, and not the elected county prosecutor or others employed by that office unless otherwise indicated.



courtroom as “Clarence Elkins the Murderer” and “Clarence Elkins the Rapist” throughout the three-day hearing, in front of Elkins’ children and family who were in the audience. How Elkins sat there in his chair and stayed calm while the prosecutors repeatedly pointed at him and loudly called him a murderer and rapist, I could not imagine. I could barely sit still myself.

In addition, the Summit County assistant prosecutors on the case were apparently so personally offended that I would dare attempt to undo their hard work in convicting Elkins years earlier that during the three-day hearing in March of 2005, they would not say hello to me or even acknowledge my existence, other than to make occasional eye-rolls or sighs of sarcastic exasperation when I gave my opening and closing statements or questioned witnesses. When I started off each morning with a “Hello,” it echoed off the courtroom walls with no response, reaction, or even eye contact. In years of litigating hotly contested cases in court, I had always tried to not take things personally and get along with opposing counsel. I had never experienced such a response from the opposing side.

Thus, by the time in September of 2005 when I received the results showing that the DNA from the crime scene matched Mann, I was adamant that this information remain secret. I told Elkins’ immediate family, but urged them to keep it under their hats. My concern was simple. After the behavior I had witnessed in March, I had no confidence in the prosecutors’ ability to be fair and objective. I believed there was a reasonable chance that if the prosecutors from the March, 2005 hearing got wind that the DNA from the crime scene matched Mann, they would approach Mann in prison and say, in essence: “We’ve got your DNA at the crime scene, you’re facing the death penalty for murdering Judy Johnson, and you can save your life if you tell us exactly how you and Clarence Elkins committed these crimes together.” In that way, they could explain away the new DNA results while maintaining their conviction against Elkins.

I did not believe the prosecutors would do this to intentionally frame an innocent man. Rather, I believed that they were so convinced that Elkins was

guilty—and suffered from such a serious case of what has come in these cases to be known as “prosecutorial tunnel-vision”—that they would immediately jump to the conclusion that Mann and Elkins “obviously” committed the crimes together as conspirators. They would reach this conclusion despite the fact that Brooke testified that she only saw one perpetrator, that only Mann’s DNA was found at the crime scene, that Mann and Elkins lived 45 minutes from each other, and that there was no evidence that Mann and Elkins had ever met, much less committed such a heinous crime together.

And this is not paranoid fantasy on my part. As any lawyer who has done this type of post-conviction DNA work can testify, this type of reaction from a prosecutor is not far-fetched when a prosecutor has a case of tunnel vision. In case after case across the country where DNA has proven an inmate innocent, the prosecutors have suddenly changed the facts of the case to try to explain away the new DNA results.<sup>9</sup> In cases where, for example, the rape victim testified at trial that there was only one rapist, and DNA later proved the convicted inmate innocent, a prosecutor with tunnel vision will suddenly claim that the victim must have been mistaken given all the stress of the situation, and that there must have been two perpetrators—the inmate in prison and the man whose DNA is now found in the rape kit.

This type of post-DNA revisionist history is so common that it has a name in the innocence world—the “unindicted co-ejaculator theory.”<sup>10</sup> In a case where previously there was just one rapist, when the post-conviction DNA testing points

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<sup>9</sup> For a thorough discussion of what has become known as “prosecutorial tunnel vision,” see e.g., Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Post-Conviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401 (2011); Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2011); Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1189 (2003); Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L. J. 475 (2006); Alafair Burke, *NEUTRALIZING COGNITIVE BIAS: AN INVITATION TO PROSECUTORS*, 2 N.Y.U. J. L. & LIBERTY 512 (2007); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 140–44 (2004).

<sup>10</sup> Orenstein, *supra* note 9, at 413–14.

to someone other than the inmate, the prosecution will suddenly conjure up an “unindicted co-ejaculator” who allegedly committed the crime with the inmate and who is the only one of the two who left his semen in the place that was later detectable. When the mind cannot accept that a mistake has been made, it latches on to any other possible explanation that is offered no matter how seemingly far-fetched, and no matter how much it contradicts known facts.

Thus, because of this concern, my desperate wish was to have someone fair and neutral approach Mann, with video recorders running, to get Mann’s honest and uninfluenced reaction when informed of the DNA results. I first contacted my friends at the FBI from my days as a federal prosecutor. The FBI listened and understood my concerns, but after they ran it up the flagpole internally, I was informed that the FBI, a federal agency, did not have jurisdiction to interview Mann in prison for a crime that was within state rather than federal purview.

While brainstorming about my next steps, I remembered my positive interactions with Petro and Canepa while trying to get SB11 through the legislature. I decided to try to get a personal meeting with Petro to see if he and Canepa would hear my plea and ensure a fair interview of Mann that was recorded. And although I had dealt with Petro and Canepa on the SB11 landscape, I was not sure they would remember me or give me a private audience on such a sensitive matter. This was a strange request for someone in my position to make of an Attorney General, the head law enforcement in the state.

So the OIP co-founder John Cranley and I visited local State Senator Bill Seitz, who Cranley trusted and knew was close to Petro. Seitz, a law-and-order Republican, had been key in getting the DNA law passed a year or two earlier. After we described the situation and our concerns to Seitz, we asked Seitz if he thought this was something we could bring to Petro’s attention in confidence. Could we trust Petro? Seitz said that he knew Petro, that he knew Petro would want to hear the story, and that we could trust Petro. Seitz then called Petro from the phone on his desk, and within two minutes we had the Attorney General on the

speakerphone with the private audience we had been seeking. We explained the problem. Petro listened and asked many questions. The call lasted maybe twenty minutes. Before ending the call, Petro indicated that he would take the matter under advisement, that we could count on him to take our request seriously, and that our conversation would remain confidential for the time being.

Within a day or two of this call, however, another strategy I had been working on panned out. I had leaked the information about the Mann DNA match to a reporter I trusted and asked him to try to record an interview with Mann in prison. The reporter called me back a few days later and told me he had managed to get a prison call with Mann, pretending like he was interviewing Mann about Mann's own case. During the call, the reporter brought up Elkins and asked if Mann had known Elkins before they served time together in prison. Mann was unequivocal in the recording that he had never seen Elkins before they met in prison. After hearing this, my concerns were somewhat alleviated. If the prosecution now attempted to "flip" Mann to implicate Elkins in an "unindicted co-ejaculator" move, we would be able to impeach such attempts with a tape in which Mann, speaking off the cuff, sounded pretty convincing that had never met Elkins before they met in the penitentiary.

Despite this success in getting Mann on tape, and because Petro had sounded so sincere in our conference call, I decided to continue following through with Petro to see if, by any chance, we could enlist his help in convincing the Summit County officials to finally drop the case against Elkins and go after Mann. I followed up our phone call to Petro with a detailed letter summarizing the situation and expressly asking that he work on our behalf to broker a resolution with the local prosecutors.

Shortly thereafter, in October of 2005, I held a press conference in Summit County, along with investigator Martin Yant who had worked on the case, to announce the new DNA results implicating Mann. The night before the press conference, I called the Summit County Prosecutor to tell her of the results and

inform her that we would be holding a press conference the following day. Although up to that time I had only dealt with her underlings, who had come across as close-minded and less than professional, the County Prosecutor was very reasonable on the telephone and assured me that the DNA match to Mann would be taken seriously by her office.

The revelation about Mann appeared in large font on the front page of the local papers the day after the press conference. But when I read the quotes the reporters had obtained from the prosecutors that day and in the weeks that followed, however, I knew my original paranoia had not been misplaced. Despite now having DNA test results that placed Mann at the crime scene, it appeared that Summit County was going to continue fighting Elkins' exoneration. They repeatedly dismissed the new DNA results in the press as insignificant and inconclusive, while insisting that Elkins was rightfully behind bars and would remain so for life.

What happened next is, I believe, unprecedented in any such case anywhere in the country before or since the Elkins case. And it is one of the things that makes Petro stand out as such a heroic figure. I received a call from Canepa a few days later stating that he and Petro had received my letter and spent the last few weeks examining the case in great detail. They had come to the conclusion that Elkins was innocent. Further, they had read the responses of the prosecutors in the newspaper, and had been shocked that they were not agreeing to release Elkins. Canepa had reached out to the prosecutors several times to set up a meeting to discuss the matter, but the invitations had been repeatedly snubbed.

Canepa then told me that Petro would not sit by idly and let Elkins sit in prison any longer. Petro did not have the legal authority under Ohio law to overturn the decision of the local prosecutor. He would, however, join the OIP in filing briefs on Elkins' behalf and supporting his innocence. And he would use his position as Attorney General as a bully pulpit to attempt to pressure the local prosecutors into doing the right thing. And that is exactly what happened next.

Petro held a press conference announcing his support of Elkins and expressing frustration at the position of the local prosecutors. He then took the prosecution on in the press over a several week period, and his comments grew in intensity each week as the prosecutors dug in their heels. This caused the Elkins case to be discussed heavily on talk radio, blogs, and in all other forms of media in Northeastern Ohio. Petro's battle with the local prosecutors appeared to really be turning up the heat on the local prosecutors.

This public battle between Petro and the local prosecutors over the fate of Elkins continued through November and early December of 2005. On December 14, 2005, I received a call from the DNA lab that another piece of evidence—a pubic hair that had been found on the gown Brooke Sutton was wearing when she was attacked—came back to match the DNA profile of Mann. I immediately called Petro's office and informed them of this new result. Petro decided to have a joint press conference with the OIP the next morning to announce the latest DNA results and pressure the local prosecutors to release Elkins by Christmas. I informed the prosecutors by fax that we had obtained new DNA results, and that we would be holding the joint AG/OIP press conference the following morning.

On the morning of December 15th, shortly before our press conference commenced in Petro's office in Columbus at around 11am, Petro received a fax from the local prosecutor announcing that they were dropping all charges against Elkins and allowing him to be released from prison that day. One can imagine the jubilation that ensued. A few hours later, we were in Mansfield, Ohio greeting Elkins at the prison doors and watching him reunite with his sons and the rest of his family.

The prosecution later revealed that after our first DNA tests came back implicating Mann, they had begun a series of interrogations of Mann in prison. Eventually, Mann made incriminating statements that convinced them of Mann's guilt and Clarence's innocence. To this day, the Summit County prosecutors sometimes claim that Elkins was not exonerated by DNA testing. Rather, they

claim that their interrogation of Mann was what broke the case open and resulted in Elkins' freedom.<sup>11</sup> While this seems nonsensical to me, what I really care about is the final result. And I know that Elkins' freedom would not have been realized nearly as quickly, if at all, if it had not been for the courageous intervention of Jim Petro.

I know of no other Attorney General in the United States who has, before or since, taken on an entrenched local prosecutor to fight for an innocent inmate like Petro did with Elkins in 2005. At that time, Petro was looking at a run for Governor of Ohio in the next election. Sticking his neck out for someone in prison convicted of murder is so politically risky for someone in his position that it simply is not done. When Petro describes his decision to come out in support of Elkins in *False Justice*, he depicts it as a “no-brainer.”<sup>12</sup> That it was a simple decision because the right answer was so clear. Now that I know him so well, I know that this is true. That is how Petro thinks, plain and simple. “This is the right answer, so this is what I will do.” It is not more complicated than that.

### CHAPTER 3: INNOCENCE REFORM, ROGER DEAN GILLISPIE, AND MORE

Jim Petro did not prevail in his campaign for Governor, and thus left the position of Attorney General in 2007 to reenter private practice. Within a month of leaving office, Petro contacted me and expressed his interest in working pro bono for the OIP.

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<sup>11</sup> The prosecutors in Summit County who handled the interrogation of Mann, I was told, were not the same prosecutors who originally tried and convicted Elkins, and who handled the March 2005 hearing. I was told that these original were removed from the case once the match to Mann was obtained and made public. The new prosecutors who interrogated Mann, or who supervised the police interrogation of Mann, did not know, to my knowledge, that a reporter had obtained a secretly recorded conversation of Mann in which Mann stated that he did not know Elkins. Thus, to their credit, it appears that my initial fears regarding the “unindicted co-ejaculator theory” were not borne out with respect to the prosecutors who later handled the case and supervised the interrogation of Mann.

<sup>12</sup> PETRO & PETRO, *supra* note 1, at 43–44.

As a result, in the past four years since leaving office, Petro and I have worked closely together on a number of innocence-related projects. Most notably, I asked Petro to spearhead the effort to push our new Innocence Protection Act, SB77, through the legislature.<sup>13</sup> This bill contained the complete package of reforms that the Innocence Network has been pushing for years in states all across the country. It contained: (1) eyewitness identification reforms, requiring the police to follow best practices in showing photo lineups to witnesses in order to increase accuracy and decrease misidentifications; (2) a DNA preservation law, requiring the police and prosecutors to save the biological material in homicide and sexual assault cases so that inmates would have a chance to prove their innocence; (3) police incentives for the recording of interrogations in certain cases, to provide a clean record for review where the defendant alleges that he made a false confession; and (4) expansions in the original DNA law, SB11, that Jim and I worked on together in 2003 when we first met.<sup>14</sup>

Jim spent countless hours in 2008 through 2010 talking to legislators and law enforcement associations championing the new bill. He traveled with me to statewide police and prosecutor meetings to speak in front of large groups to garner support, or at least to soften resistance. The bill passed the Senate in 2009 and then the House in 2010. It took more than two years to get the bill through both chambers, and the fight was not easy. It required more work than I ever imagined. By the time the bill entered the House, working on the bill had become my full-time job. I tried to cram my OIP cases and law professor things like teaching classes into little slots of time when I was not working on the bill. But Jim was with me every step of the way, testifying on behalf of subcommittees and

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<sup>13</sup> This bill arose out of a joint project between the Ohio Innocence Project and the COLUMBUS DISPATCH. The project had many components, including seeking DNA testing in thirty cases. For more details, see *Test of Convictions: A Dispatch Investigation*, COLUMBUS DISPATCH, <http://www.dispatch.com/content/topic/special-reports/test-of-convictions-2.html>.

<sup>14</sup> See Alana Salzberg, *Ohio Passes Major Package of Reforms on Wrongful Convictions; Governor is Expected to Sign Bill, Making Ohio a National Model*, INNOCENCEPROJECT.ORG (March 16, 2011), [http://www.innocenceproject.org/Content/Ohio\\_Passes\\_Major\\_Package\\_of\\_Reforms\\_on\\_Wrongful\\_Convictions\\_Governor\\_Is\\_Expected\\_to\\_Sign\\_Bill\\_Making\\_Ohio\\_a\\_National\\_Model.php](http://www.innocenceproject.org/Content/Ohio_Passes_Major_Package_of_Reforms_on_Wrongful_Convictions_Governor_Is_Expected_to_Sign_Bill_Making_Ohio_a_National_Model.php)



setting up private meetings with legislators when necessary to push the bill. He studied the empirical research behind the reforms and could recite the essential facts and statistics with ease.

The bill was eventually signed into law by Governor Ted Strickland on April 5, 2010.<sup>15</sup> It has been called a “national model” and the “one of the most important pieces of criminal justice legislation in Ohio in a century.”<sup>16</sup> It will prevent an untold number of future wrongful convictions that we will never know or hear about because they will be prevented from happening in the first place. And it would not have been possible without the credibility, leverage, and tireless dedication of Jim Petro.

After leaving office, Jim also volunteered his time and talents to a number of OIP cases, including the Dayton, Ohio case of Roger Dean Gillispie. Although I will not detail the facts of the Gillispie case here (Petro describes the case in great detail in *False Justice*), suffice it to say Petro has worked very hard for a wrongfully convicted man, in prison for twenty years for a rape he did not commit, who does not have DNA to prove his innocence because the police and prosecutors did not preserve the evidence from the crime scene. While it is politically risky for someone like Petro to assert innocence in a case without DNA, Petro made this decision after thoroughly reviewing the case because he believed it was the right thing to do. Petro’s talents and credibility have served Gillispie well: Petro’s argument to the Second District Court of Appeals resulted in a reversal and remand to the district court for a hearing.

Jim also dedicated his time to help Ohio’s DNA exonerees obtain adequate compensation from the state. I had become gradually more and more concerned about compensation from 2003 through 2007, because I saw our exonerees represented by attorneys who charged them too much in my opinion (up to one-

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<sup>15</sup> See Alana Salzberg, *Governor Strickland Signs Groundbreaking Reform Package On Wrongful Convictions, Making Ohio a National Model*, INNOCENCEPROJECT.ORG (Apr. 5, 2010), [http://www.innocenceproject.org/Content/Governor\\_Strickland\\_Signs\\_Groundbreaking\\_Reform\\_Package\\_On\\_Wrongful\\_Convictions\\_Making\\_Ohio\\_a\\_National\\_Model.php](http://www.innocenceproject.org/Content/Governor_Strickland_Signs_Groundbreaking_Reform_Package_On_Wrongful_Convictions_Making_Ohio_a_National_Model.php)

<sup>16</sup> See Salzberg, *supra* note 14.

third of their state settlement), defaulted their compensation claims through negligence, and even in some cases got in disputes with exonerees about attorneys' fees. In one instance, for example, an attorney sued Elkins in a dispute over his fees, even though Elkins had already paid out more than he should have to attorneys, and had generously given away most of the rest of his settlement to family members. Elkins had little left in his pocket by this time, but the attorney's suit went forward nonetheless. The attorney used a court order to seize some of Elkins' little remaining assets. In my opinion, even if the attorney was correct on the merits of the contractual dispute, it should have, by that time, been chalked up as a pro bono case.

As a result, by the time Petro left office, I wanted to put together a team of trusted attorneys who would do the compensation suits while keeping expenses and fees down, putting as much money as possible into the exonerees' pockets. Since that time, with the help of Petro and others,<sup>17</sup> DNA exonerees Robert McClendon and Raymond Towler have obtained compensation from the state with less than 3% of their settlements going to costs, expert witnesses and attorneys fees combined.

For all of these reasons, I had the honor of presenting Petro with the Innocence Network's "Champion of Justice Award" at the annual Innocence Network conference on April 8, 2011. This award is given to only one person each year, and is given to the person who has done the most to further the cause of the wrongfully convicted. At my nomination, Petro was selected by the Innocence Network Board of Directors over a field of impressive advocates and public officials from across the country (and indeed the world).

When Petro received the award in front of a crowd of more than 500 people, nearby on display was a painting that OIP client Gillispie had painted for him as a gift. This painting, entitled "Native Cowboy," appears below with the note to

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<sup>17</sup> Ohio attorney Michele Berry has been the lead attorney on some of these cases with Gregory Cohen also providing valuable assistance.

Petro that Gillispie wrote on the back. The Native Cowboy shows a subject that appears half Native American and half cowboy. Gillispie told me that he sees Petro as the Native Cowboy, because he is a prosecutor who willingly changed his clothing and became a defense attorney to help Gillispie and so many others in Gillispie's position.

The postscript of *False Justice* ends with Petro movingly discussing his hope that one day we would win the Gillispie case, and Dean would be free once again and able to reunite with his family and restart his life. In this respect, I can go beyond reviewing *False Justice*, and can offer an update. On December 22, 2011, Dean was release from prison after federal magistrate judge Michael Merz threw out his conviction because of police misconduct. Three days later, Dean was able to spend his first Christmas in twenty years with his friends and family. For the first week of Dean's release, his parent's house, where Dean now resides, was a constant flow of friends and well-wishers, and the hugs and tears flowed freely. Jim and Nancy Petro, through Jim's work on the case and their book chronicling the injustice of Dean's case, helped repair a small piece of the world that had been badly fractured. To that end Dean, and I, are forever in their debt.<sup>18</sup>

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<sup>18</sup> The details of Dean's victory in federal court, and his release from prison, including video footage, can be seen at: <http://magazine.uc.edu/favorites/web-only/Innocence/Gillispie.html>



This painting is Gillispie's interpretation of a similar work by artist J.D. Challenger. The Challenger estate has granted permission to reprint Gillispie's interpretation of this Challenger piece in this journal.



## The Native Cowboy

It is a great honor and privilege to present this painting to Mr. Jim Petro, a man of the people, one who has never lost sight of the common working man and who has put forth a great effort to correct a wrong that occurred nearly twenty years ago.

Faith and encouragement has once again been restored to a family that had lost all but their prayers. They can now see a twinkle of light at the end of this

long dark nightmare that gives hope that the truth will free an innocent man, their son.

This painting was done with heart-felt gratitude and personal integrity for a man who has and will continue to make a difference.

Dean "Spiz" Gillispie

## CHAPTER 4: FALSE JUSTICE

*False Justice: Eight Myths that Convict the Innocent*, is Petro's memoir of his prosecutorial and political career, and his eventual enlightenment to the problem of wrongful conviction.<sup>19</sup> In some respects, I have already reviewed the book, because I have told several of the key stories that Petro tells in the book—from those of enacting SB77 to the Elkins and Gillispie cases—albeit from my perspective rather than Petro's.

Although the stories are Petro's, the book was written primarily by Petro's wife, Nancy Petro. Nancy has become a dynamo on the issue of wrongful convictions in her own right. After writing the book, she has continued to blog about wrongful convictions on the *False Justice* Facebook page,<sup>20</sup> updating readers with all that is going on in the movement. I am half convinced that Nancy Petro may know more about the issue of wrongful convictions than any professor teaching on the subject anywhere in the United States. Her energy is boundless, and her passion for the subject never ceases to amaze me.

Years ago, Nancy went through the same enlightenment about wrongful convictions as did Jim when he served as Attorney General, and she resolved then to learn as much about the issue as possible. She has told me that she woke up one night in the middle of the night with the idea that she and Jim had to write a book together to share their experiences with others.

The resulting book is interesting, informative and easy to read. I have had a number of people tell me that they started reading it and could not put it down, finishing it in less than two days. Although there have been a series of books on the subject written in recent years, including John Grisham's *The Innocent Man*, I believe that *False Justice* might be the most important book to the Innocence

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<sup>19</sup> JIM PETRO & NANCY PETRO, *FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT*, (Kaplan Press 2010).

<sup>20</sup> See Nancy Petro, *False Justice Facebook page*, <http://www.facebook.com/pages/False-Justice/127688090612221>

Movement in the long run. It has a particular ability to influence in a way that other books cannot, specifically because it is written by a former Attorney General and the perspective of a law-and-order Republican. It describes how Jim gradually becomes aware of the problem, and makes clear that his action plan to help the wrongfully convicted is not in any way inconsistent with the interests of law enforcement. Every prosecutor and police officer should be encouraged to read this book, as it will resonate with that particular audience more than other books on the subject.

The format of the book is also clever in that it tells interesting stories while revealing eight myths that lead to wrongful convictions. These myths are: (1) everyone in prison claims innocence; (2) our system almost never convicts an innocent person; (3) only guilty people confess; (4) wrongful convictions are the result of innocent human error; (5) an eyewitness is the best evidence; (6) conviction errors get corrected on appeal; (7) it dishonors the victim to question a conviction; and (8) if the system has problems, the pros will fix them.

I would like to comment briefly on two of the myths illuminated by the Petros. Myth Number six in particular, that conviction errors get corrected on appeal, is a very troubling one.<sup>21</sup> I find that even well-educated lawyers, with years of experience in the criminal justice system, sometimes buy into this one. For example, about three years ago, I asked a prosecutor who specializes in capital cases to speak to my criminal law class. A student raised his hand and asked the prosecutor whether he has any concerns that our system could ever convict and execute an innocent person. The prosecutor responded with strenuous resolve that by the time someone is executed in this country, they have had several direct appeals and then several courts examine the case in post-conviction habeas litigation. He made the comment that by the time someone is executed, “probably ten or twelve courts have reviewed the case in depth, including the facts and any

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<sup>21</sup> PETRO & PETRO, *supra* note 19, at 233–34.



new evidence, and specifically determined that the death row inmate is not innocent.”

This again was one of those moments where the prosecutor’s comments seemed so detached from reality, yet he so clearly believed what he was saying, that I was sitting there wondering which one of us was on Mars. Having done this work for many years, I know that the system is set up primarily to look for legal errors having nothing to do with innocence or guilt. The procedural barriers are set up with layer after layer, attempting to prohibit any sort of true, objective, *de novo* review of the facts.<sup>22</sup> That a lawyer who specializes in this work could honestly believe that ten or twelve courts have fully and openly examined the facts of a case and each determined that an inmate is clearly guilty before he is executed seems

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<sup>22</sup> After conviction, on direct appeal, if an inmate argues that the evidence was insufficient for conviction, all inferences are drawn in favor of the party that won below—the prosecution. Thus, if, for example, a defendant presented an alibi defense but this defense was not accepted by the jury, the court of appeals must assume that the jury found the defendant’s alibi witnesses to not be not credible. This is a far cry from a true, objective evaluation of whether the defendant’s alibi defense was valid or not. To the contrary, the law eschews such a responsibility on appeal by construing all facts against the defendant, rather than making a neutral inquiry into the validity of such facts. Similarly, when an inmate argues on direct appeal that the conviction was against the manifest weight of the evidence, the appellate court also does not make an objective, *de novo* review of the record. In reviewing such a claim, an appellate court may not merely substitute its view for that of the jury, but must find that “in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” *Id.* In other words, the only time a neutral evaluation occurs is at trial, and if the jury makes a mistake, that is pretty much it except in truly exceptional cases.

But in most post-conviction cases, the inmate does not claim innocence based on the trial evidence that was reviewed on direct appeal, but on new evidence that surfaced after conviction and the direct appeals were exhausted. If new evidence surfaces many years later, layer after layer of procedural barriers exist to inhibit the courts from considering such evidence. For example, if the defendant had previously filed a post-conviction motion, courts often dismiss the new motion claiming that the defendant already had his “one bite at the apple.” Or, in many other cases, courts will dismiss the new evidence petition on grounds that the new evidence could have been discovered earlier, thus, the motion is untimely. Any lawyer who has litigated post-conviction innocence claims knows that trying to get through all the procedural barriers so that the new evidence can be considered is like walking through a minefield. And while in some cases the field of landmines is traversed, and the new evidence is considered on the merits, the idea that death row inmates have ten to twelve different courts that make independent inquiries into the facts to determine if an inmate is innocent before they are executed is utter nonsense. In the vast majority of cases, the jury decides the facts, and after that, there is no objective, *de novo* review of those facts. In such cases, if the jury made a mistake, the inmate is out of luck unless he is lucky enough to have some sort of procedural error in his case that will allow him to someday reopen it.

astonishing. Yet, I think that this prosecutor honestly believed what he was saying. I think he had closed his eyes to reality and bought into a myth. If a prosecutor working in the capital punishment system can believe this myth, then it is easy to see how the public would buy into it as well.

I would also like to comment on Myth Number Four, that wrongful convictions happen because of innocent human error.<sup>23</sup> The Petros in *False Justice* discuss intentional *Brady* violations that result in wrongful convictions (the failure of the police and prosecutors to disclose exculpatory evidence), but the majority of wrongful conviction cases occur without a *Brady* violation or any intentional wrongdoing.<sup>24</sup> But does this mean, therefore, that most wrongful convictions occur by innocent human error? I think the answer depends on how one defines “innocent error.”

I believe, from personal experience, that the vast majority of wrongful convictions occur not because a police officer or prosecutor intentionally sought to convict an innocent person. Rather, I believe most occur because of ignorance and negligence—prosecutors introduce unreliable eyewitness testimony or “junk” science fully believing that they are introducing solid, reliable evidence, and thus are seeking a just conviction. Such prosecutors are innocent of any intentional wrongdoing. They are not innocent, however, in the sense that they have great responsibility over the lives and freedom of others, but have often failed to take the necessary steps to question their own activities and learn the problems with the system.

The DNA exonerations over the past two decades and the corresponding scientific studies of these cases have revealed deep systemic flaws in the system with eyewitness identifications, junk science and other problems.<sup>25</sup> The studies

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<sup>23</sup> PETRO & PETRO, *supra* note 19, at 228–29.

<sup>24</sup> Statistical charts show most wrongful convictions do not include a finding of intentional wrongdoing by police or prosecutor. See *The Causes of Wrongful Conviction*, INNOCENCEPROJECT.ORG, <http://www.innocenceproject.org/understand/#>

<sup>25</sup> For a discussion of the systematic flaws in our criminal justice system revealed by the Innocence Movement, see JIM DWYER, BARRY SCHECK & PETER NEUFELD, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (3rd ed. 2003); BRANDON GARRETT,

offer an unprecedented learning moment if we are willing to listen with open minds. The failure to respond to the problem of wrongful conviction, the failure to explore and learn from our mistakes, is in my opinion, where the fault lies as the system continues to resist change and reform.

## CHAPTER 5: THE ELUSIVE “TRUE” PROSECUTOR

In this final chapter, I offer the observation that, from my own experience, prosecutors in this country are too often *not* like Jim Petro. Too many prosecutors suffer from tunnel vision and resist efforts to correct wrongful convictions in ways that contradict our ethical norms, as I will discuss in more detail in a moment. Before I do, however, I would like to make a few political observations that are apparent to me after serving for many years as a prosecutor in the federal judicial system, and then for more than a decade as a post-conviction innocence lawyer in the state judicial system. All of these observations are overbroad generalizations, and none of them apply in all instances. In other words, there are clear exceptions to each of these observations.

First, I have noticed that at least in Ohio, Republicans are generally more receptive to innocence issues and the plight of the wrongfully convicted than Democrats. This might seem counterintuitive, as Democrats are stereotyped as the “bleeding hearts,” but I have found this to be true in terms of all three branches of government: judges, prosecutors, and legislators. Where I typically find the stiffest resistance in the courtroom is in Democratic counties with Democrats holding the elected office of judge and prosecutor. In contrast, where I have had my most reasonable conversations with the opposition has been in Republican strongholds.

When working to pass SB11 and SB77, the legislators who seemed the most motivated to pass the bills were on the Republican side of the aisle. Although

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CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); *see also The Causes of Wrongful Conviction*, INNOCENCEPROJECT.ORG, <http://www.innocenceproject.org/understand/> (last visited Nov. 21, 2011).

many Democrats supported the bill, the strongest resistance seemingly always came from the Democratic side. People will sometimes comment to me that it is strange that Jim Petro, a lifelong Republican, now is a champion of the Innocence Movement. But this fact is not inconsistent with what I have witnessed all across Ohio from Republicans.

I do not know why it is the case that Democrats seem generally less inclined to support innocence issues than Republicans. I suspect that is has to do with politics. Democrats perhaps fear they are perceived as “soft on crime,” and thus, go overboard to show how tough they are. Republicans, on the other hand, are given the benefit of the doubt on crime by the public, and thus, might feel secure enough to be reasonable. There is no empirical proof of this assertion, but I strongly suspect this is what is going on.

Second, after practicing for many years before appointed judges in the federal system, the politics infused into OIP cases in the elected state system in Ohio have been nothing short of a culture shock for me. I have seen a number of cases where it appears that the trial court judges have denied our strong innocence claims, or our request for DNA testing, simply on grounds of politics, not wanting to give any ammunition to their campaign opponents who might try to paint them as soft on crime. In contrast, I never got the sense that the outcome of any case was preordained in the federal system. Although judges had their personal politics that could influence a case, there was no sense that outside pressures routinely entered the equation. My preference for an appointment system that insulates the court from political pressures has gone from slight to stringent in the past decade. I now know that the fair, neutral legal system that is often taught in law school is a farce in some jurisdictions, and I try to make sure my students’ eyes have been opened to this reality.

Finally, I have noticed that, by and large, police officers are more open to innocence claims than prosecutors. Prosecutors will frequently become defensive as soon as they sense that a post-conviction innocence claim is on the horizon,

even if the prosecutor who handled the case many years earlier has retired and the current prosecutor simply inherited the old case once it was reactivated. Many police officers, in contrast, when called by an OIP member and asked about the old file, will start asking questions about their old cases, become curious about the new innocence claim, and seem genuinely interested in hearing whether a mistake might have been made.

I do not know why this is the case but suspect that it might have to do with the adversarial system. Prosecutors live in the adversarial criminal justice system, and perceive that their job is to fight the opposition. Police officers, in contrast, have some involvement in the adversarial system, but are not as deeply entrenched. Much of their activity is simply to collect evidence and turn it over to prosecutors, who then start the adversarial proceedings.

This point dovetails with my final point—that we do not yet have enough prosecutors who are “true” prosecutors in the vein of Petro. I have already described unreasonable resistance from prosecutors to Elkins’ attempts at exoneration, once DNA testing proved him innocent. This sort of resistance is something we have seen too frequently at the OIP.

I will illustrate this point further by describing how prosecutors often respond at an earlier stage—when we are first seeking DNA testing in an old case. Before going any further, let me set the stage for how these DNA cases typically arise. In the OIP, we receive letters from inmates seeking assistance. When a letter is received, the first inquiry we make is whether the inmate is asserting innocence. Often, inmates will write complaining about the sentence they received, conditions in prison, or about some other legal error in their trial, but they do not clearly assert innocence. If the inmate does not assert actual, factual innocence, the case is rejected.

If the inmate asserts actual innocence, we examine the case to determine if it is the type of case where there might be DNA evidence that could shed light on the

issue of innocence or guilt.<sup>26</sup> If it is a rape case, we look to see whether a rape kit was taken at a hospital following the attack. If it is a murder case, we look to see whether, for example, there was a struggle, such that the perpetrator's DNA was likely left under the victim's fingernails. Or, we look to see if the perpetrator left something like his hat at the scene, or handled items at the scene like rope, beer bottles, or cigarettes. If it appears that DNA could exist that would identify the perpetrator, we are likely to proceed with the case and seek DNA testing.

Now, at this point, when first seeking DNA testing, we have made absolutely no judgment about whether the inmate is innocent or guilty. And we are not invested in the answer. I tell my students, and it is the OIP's policy, that the best answer we could get is that the inmate is confirmed to be guilty. If the DNA testing confirms guilt, then the perpetrator is not still on the street committing more crimes, the victim does not have to be told that he or she made a mistake, and a person in prison falsely claiming innocence is silenced. The OIP has had a number of cases result in confirmations of guilt. Such a result is not inconsistent with the OIP's mission, and I lose no sleep at night in a DNA case wondering if someone is innocent or guilty. The point is to perform the testing and let the chips fall where they may.

As a result of this position, the OIP is not like the typical defense attorney, whose obligation it is to represent the client regardless of guilt or innocence. We make clear up front to inmates seeking our assistance that we are a specialized public interest group interested in the truth, and that when evidence surfaces that undermines the innocence claim, we will withdraw from the case.<sup>27</sup> Withdrawal occurs frequently, as one can imagine.

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<sup>26</sup> The OIP will also, on some occasions, work on non-DNA cases. The Gillispie case, referred to previously and discussed in FALSE JUSTICE, is one such example. In this section I refer only to the OIP's screening process in DNA cases, because that is all that is relevant to the example I later use to illustrate prosecutorial hostility to innocence claims.

<sup>27</sup> To view the OIP's representation agreement with inmates, see page 2 of the following document: *Ohio Innocence Project (OIP) Screening Questionnaire* (Revised Sept. 2011), <http://www.law.uc.edu/sites/default/files/oipquestionnaire.pdf>

In some of the cases where DNA is available and we seek testing, it might appear that there is very little chance that the inmate is innocent. In some instances I feel 85% confident that the inmate is guilty. In other instances I might not have a feeling either way. But history has proven that even in cases where the evidence against the inmate at trial seemed overwhelming (such as ten different eyewitnesses testifying that they are positive the defendant was the perpetrator<sup>28</sup>), DNA sometimes proves the trial evidence wrong. It is better to be safe than sorry. Since an Ohio DNA laboratory<sup>29</sup> provides free DNA testing to Ohio inmates seeking testing, it costs taxpayers nothing to find out.

After determining that we want to move forward and seek DNA testing in a case, we typically call the prosecutor's office from which the case arose and ask for consent to test. We explain that the testing will be done for free. Probably about eighty percent of the time the answer is a resounding "No." We then have to commence litigation to win the right to test under Ohio's DNA statute, which sometimes takes years and costs the taxpayers perhaps tens of thousands of dollars per case.<sup>30</sup>

In one case, in a county that shall remain nameless, I called, several years ago, and asked for permission to perform DNA testing in an old rape case. To increase the chances of obtaining consent, I followed up with an email offering that the OIP would cover all the costs of testing (this was before the DNA lab began providing free testing in Ohio). After the prosecution rejected my request, I filed suit in common pleas court for the right to DNA testing. The trial court took several

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<sup>28</sup> See DWYER, SCHECK, & NEUFELD, *supra* note 25, at XX.

<sup>29</sup> The laboratory is DNA Diagnostics Center (DDC), located in Fairfield, Ohio. See DDC DNA DIAGNOSTIC CENTER, <http://www.dnacenter.com> (last visited Nov. 21, 2011).

<sup>30</sup> There is no statistic which shows how taxpayer money is spent opposing requests for DNA testing. But when one considers all the hours that prosecutors spend writing their briefs--many times 20 or 30 pages in length--and preparing for hearings and oral arguments, the salary spent towards such activity would be staggering in the typical case. And this is not to mention all the hours spent by judges, clerks and court administrators handling the litigation in such cases, and writing judicial opinions in both the trial court, court of appeals, and sometimes the Supreme Court of Ohio. It is very easy to see that in some of the OIP cases that have been litigating in the courts for years, tens of thousands of dollars in state employee salaries have been spent opposing DNA testing that would cost nothing to simply perform in the first instance.

months to litigate the case, and ultimately denied the right. The OIP then appealed, and the parties had to file various briefs and litigate the case for another year in the appellate court. The appellate court ultimately overturned the lower court, holding that the case clearly fell within the parameters of Ohio's DNA statute. The case was then remanded back down to the lower court for DNA testing. A few months later, we received the results, and it confirmed the guilt of the inmate.

At that point in a case, we usually move to dismiss the litigation and withdraw from the case. The prosecution notified us, however, that it wanted to have a hearing in court where the case would be dismissed, rather than having it done by paper filings as would typically occur. Although going to court to dismiss the case seemed like a waste of time, we did not contest this request. The night before the court hearing, however, a reporter I have known for several years called me and told me, in sum, "the prosecutor is getting the media there in the morning, and they are planning to publicly criticize the OIP for wasting taxpayer money for the past two years, litigating a case for an inmate who turned out to be proven guilty. I'm just giving you a heads up as to what is going on. And it is going to be handled by the elected County Prosecutor, not the assistant prosecutor who has been handling the case so far."

After I received this call, I sent an email to the prosecutor's office reminding them that the OIP had agreed to pay for testing two years earlier. We could have done the testing and confirmed the guilt of the inmate two years earlier with no cost to the taxpayers. It was, in reality, the decision of the prosecution to oppose free testing that wasted tens of thousands of taxpayer dollars.

I did not get a response to this email. The reporter called me back a few hours later and informed me that the County Prosecutor had called off the media alert. The next morning, the assistant prosecutor handled the dismissal of the case while the elected County Prosecutor was nowhere in sight. The matter was dismissed



without fanfare. I chose not to raise the issue of how the prosecution had wasted taxpayer money at the hearing or when called by the media later in the day.

I use this as one example of prosecutorial hostility to DNA requests and claims of innocence. I do not have any explanation for such behavior. Prosecutors are charged in our country to seek justice, not to win cases.<sup>31</sup> The United States Supreme Court once noted, for example, that prosecutors are “the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>32</sup> But I rarely see this sort of dispassionate sense of fairness and objectivity in Ohio. The game seems to be to win, and then “defend the conviction” at all costs.

As a former prosecutor, I know that young lawyers go into prosecutorial work to do good—to protect the public and defend the victim. Putting the bad guys away is a necessary and admirable profession. And prosecutors who unreasonably oppose post-conviction innocence claims are not doing so because they are corrupt or are attempting to keep innocent people in prison. Rather, I believe that they suffer from tunnel vision.

As a former prosecutor myself, I know how tunnel vision can develop. Much of a prosecutor’s job is spent deflecting false attempts by criminals to avoid responsibility for their criminal acts. I will provide one example from my own experience. When I was a new federal prosecutor, I was in charge of a bank robbery case. The FBI agents in charge of the investigation were convinced that it was an inside job—that a teller who worked at the bank had set it up. The teller denied any involvement, and did so convincingly. At one point, I put her in the grand jury to testify, in an attempt to “crack” her by putting her under oath grilling her about the inconsistencies in the story she gave police immediately after the

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<sup>31</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2007) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); see also Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 39–40 (2009).

<sup>32</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

bank robbery. She began crying and pleading that that she was innocent, that the FBI agents were ruining her life, and that her young son was so upset by all of this that he was failing in school. She was so convincing in her performance that soon the grand jurors started glaring at me as if to say, “get this poor innocent woman out of here and stop harassing her.” After the grand jury episode, I told the FBI agents that despite the suspicious circumstances, I believed she was not involved.

A few months later, the fingerprint results from the demand note came back. The demand note used in the bank robbery consisted of letters cut from a magazine and pasted on a white piece of paper. The teller’s fingerprints were on nearly every letter as she held the magazine to cut out the letters. The FBI agents laughed at my naiveté.

When these sorts of instances occur over and over again, over an extended period of time, during a long career, I can understand how tunnel vision begins to develop. The reflex develops to reject any and all arguments for innocence. You know, from your years of experience as a prosecutor, that there has to be a catch somewhere.

Prosecutorial tunnel vision of this nature occurs everywhere in the United States—not just in Ohio. It is so pervasive that any lawyer who does post-conviction innocence work can tell story after story like the ones I have told in this article. A body of scholarly literature has developed that has studied and catalogued the instances of tunnel vision arising in post-conviction innocence claims from prosecutors through time.<sup>33</sup>

There are exceptions, to be sure. Ron O’Brien, Franklin County Prosecutor, is as true a prosecutor as one can find. His interest is in justice and obtaining the right outcome, and this interest has been reflected in how he has handled all his cases with OIP, including the exonerations of Robert McClendon and Joseph Fears. When talking with Ron O’Brien and the prosecutors in his office, you do not sense that the hackles are up from the start. Our conversations proceed like

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<sup>33</sup> See *supra* note 9.

two objective, disinterested people trying to figure out the right answer for society and justice generally.

Matthew Meyers is an assistant prosecutor in Cuyahoga County who also seems genuinely motivated by doing the right thing rather than politics. Interactions with prosecutors in Seneca, Clermont, and several other counties, have proved that they are sometimes open to post-conviction DNA testing and objectively and fairly examining the results.

In recent years, I have spent quite a bit of time outside of the United States helping attorneys and scholars set up Innocence Network organizations in their home countries. In Western European countries, where the systems are inquisitorial rather than adversarial, scholars tell me that the prosecutors are trained early on to seek the truth and to be as objective as possible. This responsibility is taken seriously. Objectivity and fairness are part of the prosecutorial culture, and it is ingrained in these attorneys from the start. Even defense attorneys from these countries tell me that when they hear or read stories of prosecutorial resistance to post-conviction innocence claims in the United States, they cannot fathom such behavior. Western European defense attorneys have told me repeatedly that prosecutors in their home country typically do not act that way.

Although I would not depart from the adversarial system for reasons too complicated to elaborate on here, I have come to conclude that our system needs to adopt some aspects of the inquisitorial system. Most notably, we need to do a better job of enforcing the duty of the prosecutor to remain objective and seek justice first and foremost. And while I understand how tunnel vision develops, it does not mean that it should not be resisted, that we should not fight to minimize it.

## CONCLUSION

*False Justice* is a book that not only outlines the Innocence Movement, but provides a roadmap for how we can improve the criminal justice system in this country. If we are to truly learn from the Innocence Movement, however, we must do more to ensure that prosecutors follow the example of Jim Petro and others like him. Reinvigorating our ethical standards by requiring prosecutors to remain objective and seek justice, rather than convictions, is a starting point. Encouraging all prosecutors and police officers to read *False Justice*, and to emulate Petro's example, is the best first step.