HOW TO CONVICT AN INNOCENT MAN

EUNICE CITIZEN

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MISSING EVIDENCE, BAD FAITH AND THE HAPHAZARD NATURE OF JUSTICE

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Library of Congress Cataloging-in-Publication Data
Ordering Information: Quantity sales and special discounts are available on bulk purchases by corporations, professional associations, academic institutions and others.

Printed in the United States of America
ISBN-13: 978-0-692-49414-1

DISCLAIMER:

I am not a lawyer. I am a simple citizen. I wield no political connections or wealth to force a powerful hand to have a listening ear. I flirted with discouragement when deciding to write about systematic injustices found in the justice system—but then something occurred to me. The greatest laws ever passed in this country, in fact, this country itself, was inspired by those outside the legal profession. Thomas Paine was an English-born writer whose work *Common Sense,* published in 1776, led to the American Revolution. This revolution led to the greatest legal document ever written, the United States Constitution in 1787. Rosa Parks was a seamstress, whose action on a city bus caused action in the White House. The commoner has unusual power. Without the platform of pedigree or the deference of fame, the commoner can be confident when standing firm in the one thing able to conquer all—Truth.

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INTRODUCTION

If you are going to convict an innocent man, take away his freedom and send him to prison for life, there's a proven course of action you must take. If done right, this course of action will circumvent many of the legal obstacles erected for the sole purpose of protecting his due process. Regrettably, justice has a work around.

This work around is difficult for most criminal defense lawyers to overcome. The layperson does not have a chance. To convict the innocent, you must have more than just intimate knowledge of the law, its weaknesses and strengths. You must seamlessly navigate a web of influential personal, political and prosecutorial relationships. In the end, convicting the innocent is an inside job.

RULES TO CONVICT THE INNOCENT:

- Make a believable accusation.
- Pick a county governance overflowing with corruption and mismanagement to try the case.
- Pick a politically ambitious district attorney with a proven history of botched cases.
- Pick a judge inexperienced in the type of case before him.
- Pick an unorganized, unaccountable police department to house evidence.
- Pick incompetent custodians to watch over critical evidence.
- Pick which evidence to lose, which evidence to keep, and then go to trial.

Admittedly, the word "pick" is a loaded term. It implies the crime and the wrongful conviction were staged; this is rarely the case. Law enforcement generally responds and reacts to crimes committed without their foreknowledge. Instead, the term "pick" should be viewed as "good fortune" enjoyed by those of ill will and misguided motives similar to how an unlocked door places a smile on the face of a thief. The unlocked

door simply grants a thief an easier road to execute his predetermined actions.

Seldom will the bullet points mentioned above come together on purpose. Even coercion requires an element of luck. There is never a publicized planning conference where police, prosecutors and judges convene to plan their next innocent victim to convict. Injustice is more spontaneous than that. Injustice is similar to noticing three birds flying in a triangular formation only to notice five minutes later that another fifty birds have joined the original three. It is only when the larger group has been formed that the symmetry in the air and on power lines is really noticed and appreciated. The grouping of common objectives that morphs into cooperating actions takes a while to become observable to the untrained eye.

PLENTIFUL STORIES OF INJUSTICE

The Internet overflows with stories of injustice. Many find it difficult to believe so many people can be unlawfully convicted—that is until some freshman law school class or a philanthropic law firm does the hard work to expose errors of law or outright corruption. Things are changing. Now that police misconduct and

prosecutorial misdealings are at historic highs, many have finally realized one humbling fact: anyone at any time can be accused and convicted of anything. Certain cases highlight this humbling reality so clearly that it causes even the most jaded citizen to consider whether due process is a legal principle or an empty promise. Once such case is *Davis v. The State*.

In *Davis v. The State*, there exists so many instances of evidence mishandling, errors of process, and errors of investigation that the volume alone can numb one's senses. That is generally the fear with detailing egregious, miscarriages of justice. Recalling so many violations of due process can remove the shock and instead seduce the average citizen into a shoulder shrug response—that is until the citizen is the defendant or someone he or she loves.

It is possible that one may be led to think this book is a biased writing by a friend or family member of the convicted. One may wonder if this is a one sided treatise designed to hide or make light of any evidence pointing to the potential guilt of Scott Davis; it is not. There are facts in this book that speak for *and* against Scott Davis. I am neither a friend nor family member of Davis or his

family. Whether one agrees that Davis should be granted a new trial or not, the dangerous leaning of increasing governmental power to impose baseless convictions should enrage the readers of this book. This book stresses that one does not have to do anything wrong to end up in prison for life. The reader needs to understand that exactly what happened to Scott Winfield Davis can easily happen to them. Below are the most obvious problems found concerning the Davis prosecution.

- Fingerprints – Lost
- Murder weapon – Lost
- Two police interview tapes are incomplete, edited and non-continuous
- Evidence room was chaotic, disorganized, and contained unlabeled evidence boxes
- Over 300 standard operating procedures (SOP) violations
- False affidavit concerning location of murder weapon
- 72 additional pieces of evidence lost without a trace before trial

THE CHARACTER OF JUSTICE/INJUSTICE

Both justice and injustice share a common thread; both begin with an accusation—and a believable accusation at that. But more is required for injustice to win. There must be a slow, chipping away of due process. So much so that when the trial finally takes place, the constitutional guarantee of due process is so compromised as to make it nearly impossible for justice to have its day. The erosion starts early with evidence collection and preservation, followed by ever so slight oversights that become major biases the longer the judicial process drags on.

For injustice to win, it must feed off of bias, prejudice, incompetence and corruption. Defendants who are prime to become innocent victims of an erroneous verdict often fit a certain profile. One would be incorrect if he or she thought erroneous verdicts are only suffered by indigent, minority defendants. Injustice is no respecter of persons. However, certain profiles tend to forge straighter pathways from the courtroom to prison. Certain profiles cause many in the law enforcement field to take one small, toxic step at the very beginning of critical investigations. That small step

is called "likelihood."

LIKELIHOOD

Likelihood is deceptive. Likelihood often hijacks the investigative process long before an arrest takes place. Likelihood helps to "pre-convict" the black guy walking down the street because he is "likely" to be the same black guy who just robbed a woman one street over. Likelihood assumes the serial rapist is probably the loner, white guy that stays to himself. Likelihood can seduce investigators into missing or reducing the importance of key evidence, especially at critical times immediately after a homicide because they sincerely believe they already know who did it.

How many innocent people are convicted each year on average? How many men and women sit in prison based on the likelihood they committed a crime even when there is zero evidence to uphold such a position? The Innocence Project states the following, in part, on the matter of false convictions:

"...The few studies that have been done estimate that between 2.3% and 5% of all prisoners in the US are innocent (for context, if just 1% of all prisoners are innocent, that

would mean that more than 20,000 innocent people are in prison). More broadly, we know that ***innocent people are often identified as suspects by law enforcement and that DNA testing often clears them before they go to trial,*** *but that DNA testing is impossible in the vast majority of criminal cases. In approximately 25% of cases where DNA testing was done by the FBI during the course of investigations, suspects were excluded by the testing. That doesn't mean we believe 25% of convictions are in error, but when coupled with the fact that DNA testing is only possible in 5-10% of all criminal cases, it shows that science cannot always clear innocent suspects, which can result in wrongful convictions."* [1]

Critical in this statement from the organization that has facilitated the release of more innocent prisoners from prison than any other entity is this: *"Innocent people are often identified as suspects by law enforcement."* In other words, law enforcement officers routinely move from likelihood to making an assumption they know who perpetrated a crime long before there is evidence to support this damning conclusion. So what can be learned from the dangers of likelihood and assumption?

1 http://www.innocenceproject.org/faqs/how-many-innocent-people-are-there-in-prison

When details of a crime point to an obvious offender, fairness requires a moment of pause because the obvious is often wrong. The obvious is most often the course of least resistance. The protective measure against overlooking the perpetrator of a crime can be found in an old proverb—"The sun shines whether you look at it or not." The guilty will not be less guilty if law enforcement and the general public do not assume their guilt; guilt will shine or be revealed all on its own. Conversely, innocence requires advocates. By simply changing the sequence of how law enforcement personnel approach the investigation process, one can change how one sees the world, and, more importantly, it can change how one sees the world of justice.

GUILT

There is a fundamental problem with innocence. Innocence is invisible. On the other hand, guilt nearly always leaves evidence. It is a terrible irony that few people think about. Proving one has done nothing is nearly impossible because the absence of an action leaves no evidence. A smart prosecutor will plant the seed of what a defendant might have done during a certain time

frame, or even more damaging, what he had the time to do. Innocence is dangerous.

Davis v. The State focuses on one city, one county, and hundreds of inexplicable errors. The city, Atlanta, Georgia, the county, Fulton County. After all is said and done, there exists one pivotal question: How can a man be convicted with zero inculpatory evidence (i.e., DNA, eyewitness, fingerprints, murder weapon or credible confession pointing to the defendants guilt)? Furthermore, how could he have received a fair trial when the exculpatory evidence, or evidence in favor of his innocence, was lost by the very individuals accusing him of the crime? What does this mean for fairness, due process, and justice? This barely scratches the surface of all that's wrong with the Davis guilty verdict.

WHY WAS THE BOOK WRITTEN?

Since being jailed in 2006, no writer, journalist or media person has been given access to interview Scott Davis. However, in the fall of 2014, I was allowed several hours with Davis at the Phillips State Prison in Buford, Georgia. After speaking for a period of time, and subsequently wading through thousands of court

transcripts, audiotapes, and legal filings, one thing became clear—something in this case was amiss. The judicial process used to convict Davis is unsustainable in a free society. Weeks after the interview, I presented several law professors with his case summary. While using different language to explain their position, none were confident Davis received a fair trial. None. Speaking off the record, the esteemed criminal law professors explained how the concept of due process is often times just that, a concept. Due process can be a theory with little to no application to reality when powerful prosecutors and cooperating law enforcement officials want a conviction. They almost always get their man.I was studying the *Davis v. The State* case while concurrently reading *Convicted But Innocent: Wrongful Conviction and Public Policy* (C. Ronald Huff, Arye Rattner, Edward Sagarin). Conclusions reached from studying the Davis case and reading this book were terribly disturbing. Huff's research asserts that nearly 10,000 people are wrongly convicted each calendar year. Even though DNA has elevated the awareness of how convicted felons are often innocent citizens, no such test exists highlighting the danger of evidence omitted or

lost on purpose or by mistake. I found no text that fully covered the toxic nature of bias or how circumstantial evidence was frequently presented as science in the courtroom.

Public outcry seems to be the only form of non-legal protest that, when done correctly, can force the hand of the legal system to change its ways. Only public outcry can agitate the smug bureaucracy into action. As a small example of how easily an innocent man can be convicted, consider Gary Dotson.

In July 1979, Gary Dotson was accused of raping one Cathleen Webb. Dotson proclaimed his innocence from the day of his arrest. He was convicted and sentenced to 25-50 years in jail. Then an odd thing occurred; after six years in prison, his accuser recanted. Cathleen Webb confessed the entire story was fabricated to cover a potential pregnancy. Her accusation was a contingency plan to protect her reputation. Dotson was let out on bond, but then returned to jail when the judge said he did not believe the accuser's recantation. He believed her accusation, but not her apology. Public outcry reached the governor's office. Finally, the governor of Illinois got involved and fully pardoned Dotson. A DNA

test revealed it was impossible for Dotson to have raped Webb. Consider what would have happened if Dotson's accuser died before recanting her story? An innocent man would have remained in jail for most of his natural life.

Is the American public comfortable allowing fellow citizens to sit in jail for decades in cases where evidence is missing or has been tampered? How about when a witness is the only evidence, as in the case of Cathleen Webb? The concept of "presumed innocent until proven guilty" is a theory that lulls many defendants into a posture of comfort when they really should remain in a defensive stance. It is simply too easy for an innocent man to be convicted.

CHAPTER ONE

OBSESSED WITH THE OBVIOUS

When a crime occurs, time is the enemy. Investigators seek to gather facts and move on these facts immediately. Suspects are identified and sought. Interviews are taken. Pressure is mounted to find accomplices. Much of this activity occurs within the first 48 hours. Often times, the desire to find a perpetrator in a speedy fashion nearly guarantees unredeemable mistakes. Thirty years ago I heard a story.

"Be back in an hour, honey."

"Take your time," Tim responded as he kissed his wife and then watched her pull out of their Asheville driveway. The neighborhood was quaint, the homes best described as Martha's Vineyard in the south.

Tim was an engineer, a newly married husband and

father. His wife, Jessica, was making her first real trip out of the house since the birth of their beautiful daughter, Kennedy. Tim sat proudly on the large porch with Jack, his faithful dog, at his feet. Kennedy was asleep just inside in her pink, rolling crib. This was one of those easy, yet noisy Sundays. An orchestra of yards being cut filled the air. The smell of barbeque was afloat.

From across the street was tossed a question.

"Tim, got a few minutes?" His neighbor had been trying to show off the new tool shed for a couple weeks now. Tim thought about it, peaked in on Kennedy sleeping, and eased out of his chair.

"Only have a couple," he half-yelled, half-whispered to his neighbor.

Two minutes turned to eight, and eight to twelve. By this time they were in the rear of his neighbor's fairly large backyard when Tim instantly realized he'd better get back home to check on things.

"Gotta go man." The men shook hands in haste.

Tim jogged up the sloped backyard. Approaching the street, he was uneasy—he had an eerie feeling.

Tim squinted. The fence was partially open.

"I left that closed."

He ran up the walkway and came to a jolting stop. At his feet—blood.

"Oh God."

He leaped over the five steps leading to his porch. More blood.

"The baby!" Tim yelled.

Inside the door, the crib was overturned. Kennedy was gone. Furniture misplaced, curtains ripped. Formula spilled across the floor.

Tim let out an unintelligible scream. Anxious sweat soaked his shirt. He couldn't breathe.

A jagged line of blood connected at the bottom of the stairs and was leading to the top.

"Where's Jack?" he whispered nervously to himself, trying to ignore what he was thinking. He was thinking the impossible, the illogical.

Tim ran into the kitchen, opened his gun case, and grabbed his shotgun. He sprinted up the stairs. Tears dripping as he stepped on Jack's hair mixed in with human blood. Slowly, he opened the master bedroom door to find his beloved dog, Jack, in the corner. Jack was breathing heavy, his tongue extended, his eyes darkened

in a way Tim had never seen. A sinister look. His paws stained in blood.

"Oh God no, Jack!" Tim raised his shotgun, gritted his teeth and pulled the trigger. Jack was dead.

His back now pressed against the wall, Tim slid to the floor. He began to sob uncontrollably when his cry was joined by a much younger, higher-pitched scream.

Tim quickly wiped his eyes with the back of his hand and leaped to his feet. "What's that?"

He ran out of the room into the hallway. Looked right and left and then back into the bedroom. The cry was coming from the corner.

He approached the closet to find little Kennedy covered in blood. She was crying, but alive. The blast had awakened her. His hands shaking, Tim picked up the baby and removed Jack's hair from her forehead and diaper. Tim's eyes were beet red. His face was a soup of sweat, mucous and tears.

"Kennedy!" he cried.

Then he noticed something. Something wasn't right. Kennedy had no bite marks. She wasn't bleeding. The blood on her wasn't hers.

Tim ran downstairs and noticed the back door of the

kitchen open. He raced into the backyard to find a mangy pit bull barely holding onto life at the bottom of the stairs. With Kennedy pressed firmly against his chest, he carefully, more carefully, retraced his steps from the front door inside.

While across the street with his neighbor, the pit bull wandered into their front yard with ill intent. A fight ensued. Jack defended little Kennedy with his very life. Jack fought the intruding attack dog in the house and out into the back yard. The pit bull was wounded, but Jack was terribly wounded as well. Jack, though mortally wounded, returned to the baby, turned over Kennedy's crib, and with blood dripping from his nose, dragged the infant up the stairs hiding her in a closet away from harm. It was there he waited for his master to return. But Tim had been obsessed with the obvious. In his emotional haste, judgment was executed based on what seemed to be logical, but the truth resided in the illogical. The facts were all there, he just processed them incorrectly. In an effort to administer justice, Tim killed the innocent.

Being innocent is far more dangerous than being guilty. In seeking to administer justice, those charged

with finding, processing and rightly dividing evidence have impenetrable bias; in fact we all do. Evidence is only as credible as the premise upon which you define credibility. Science, or the dependable repetition of results, has ingrained in its discipline a disdain for illogic—which ironically is where you must often look to find hard answers. Crime doesn't always make sense, but humans possess a strong bias towards *making* sense where none exists. And this is precisely why being innocent places an accused person in harm's way. Given the right prosecutorial motivation, anyone can be convicted of any crime, anywhere, for any reason. Public trials can be easily transformed into private vendettas when the offended party wields political or monetary clout. It is a sobering thought, but everyone has a price—even Lady Justice.

Volumes of books have been written in an effort to expose the ease with which justice can be thwarted. While ours is a legal system with many design flaws, these are correctible flaws only made fatal when mixed with human bias. Bias reconstitutes tangential evidence as material to a case. Bias creates an untraceable filter through which all facts are viewed. Bias can be slight

and it can be invisible. Often, a suspect is not convicted on facts, but the bias towards which the facts lean.

Few felony murder cases involve a videotape of the suspect killing the victim. Cases of this magnitude require an intense gathering of evidence, depositions, investigations, testing, motions, trials, appeals and more. There are no shortcuts to justice—only injustice has those. Cases of high consequence suffer another human problem in the form of projection. That is, vested parties with a stake in the outcome of a case can sincerely, yet erroneously, create something that does not exist in an effort to explain something that does. When emotions are permitted to lead, opinions and facts lose their distinction.

Memories are not memorials; rather, memories are malleable, adjusting to the weight of expectations placed upon them. Details are frequently forgotten and replaced by events that never occurred—and all of this may have no ill motive. A witness can be sincere, yet be sincerely wrong.

Horrific crimes cause intense pain, inexplicable hurt and profound despair. These painful and often tormenting results are not concepts, they are real. As a

response to something so real and hurtful, it is simply unacceptable to conclude that the responsible party may remain anonymous. He or she must have a name, and if they do not, often the name "guilty" will do. How many times has evidence at the scene of a crime pointed to one person when it was actually another? How many times has this evidence pointed to one motive but it was actually another? How often do investigators charged with finding a killer have a certain killer in mind even before the search begins?

Once convicted, it is a herculean task to be exonerated. Those who are imprisoned erroneously traverse a difficult road. First, it should be noted that many prisoners vehemently claim innocence; however, one must be careful, as a passionate claim does not always belie a true claim. Secondly, there are innocent prisoners who sit quietly, having made peace with the injustice set upon them. These facts beg these questions: What does innocence look like? How does it act? Would you know it if you saw it?

CHAPTER TWO

THE DEFENDANT

It was near midnight on December 11, 1996. An Atlanta firefighter stood exhausted. He had worked for hours taming the flames of a mysterious house fire. It was mysterious because this was the Buckhead community of Atlanta—an upscale enclave where governors and industry titans call home. Something just didn't feel right. Wiping his brow, the firefighter took a backward step into wet ashes underfoot. He felt flesh. It was a human body. The body would later be identified as David Coffin, Jr., heir to a billon dollar Connecticut family fortune. He was 41. Coffin had been shot and left to burn in the flames of his home—and in the flames of a forbidden relationship—so said investigators. The only question that night was, "Who was the killer?"

Investigators had their suspicions as to the most likely suspect.

But this would not be your common murder investigation, if such a thing exists. The Coffin murder revealed a web of conflicting relationships and untraceable influence. A closer look at the players involved with the Davis prosecution revealed sex, cocaine, and unchecked egos—and that only describes an assistant district attorney working the case. The Coffin murder is a story full of household names from Arnold Schwarzenegger to Cisco Systems. It is a clinic on what many view as police misconduct, and the dangers of overzealous prosecutors. The case shines a critical light on the controversial legal doctrine of *bad faith*.

Barry Scheck, famed attorney and founder of The Innocence Project, has firmly planted one fact in public discourse: The only key that fits every jail cell in America holding an innocent man hostage is the key of evidence. Evidence can provide, beyond a scientific certainty, the legal justification needed for a new trial. According to The Innocence Project, the numbers below represent convicted felons who've had their sentences vacated because of scientific evidence such as DNA.

- There have been 321 post-conviction DNA exonerations in the United States.
- The first DNA exoneration took place in 1989. Exonerations have been won in 38 states; since 2000, there have been 254 exonerations.
- 20 of the 321 people exonerated through DNA served time on death row. Another 16 were charged with capital crimes but not sentenced to death.
- The average length of time served by exonerees is 13.5 years. The total number of years served is approximately 4,337.[2]

A close look at this data surfaces a dangerous inference. All exonerations were based on existing evidence. Think about it. Each of the 321 convicts, some who were on death row, would have remained in jail for life or been executed had the evidence that freed them not been preserved long enough to be scientifically tested. This begs an obvious question. If evidence with the potential to prove a person's innocence or guilt goes

2 http://www.innocenceproject.org

missing, can the accused ever receive a fair trial? What happens when DNA or fingerprints are destroyed due to negligence? What happens when volumes of evidence disappear without a trace, except for those items that favor the prosecution? These are some of the complex questions that must be dealt with in the Coffin murder case. A case with so many twists, even the seasoned reader of murder mysteries would blush. In the end, the questions remain—did Scott Davis receive a fair trial? And with the loss of evidence could he ever receive a fair trial?

THE INTERVIEW

Phillips State Prison sits in a rock quarry several miles past nowhere. After clearing security, I walked into the large mess hall to find Scott Davis in the far left corner, seated with his back to me. He wore a starched white uniform with blue stripes. He turned to greet me with beet red bloodshot eyes. I didn't discern a lack of sleep, but a lack of peace. Immediately, I took notes.

"Tell me what happened on the night of the murder," I asked.

"I'm innocent," he said. "There was no reason for me

not to cooperate that night," Scott said in fervor.

"Wait," I responded. "Back up and give me context."

It seemed Scott was anxious to tell his side of the story. I found out later his first statement concerned what happened the night of the murder when Detective Rick Chambers of the Atlanta Police Department asked him to come down to the station for questioning. Davis thought, "Since I'm innocent, I have nothing to fear." And so he went to police headquarters without an attorney—a move he would later regret. He gave an initial statement and asked to be taken back home around 3:45 AM. According to Scott, Detective Chambers refused his request and instead began a more intense interrogation process. Scott recalled a series of spit-laced screaming rants. In particular, Chambers continually threatened he would personally make sure Scott burned in the electric chair.

Scott contends his Miranda rights were not issued. This is not surprising as investigators often flirt with the legal line to find criminals who have crossed it. Thankfully, a tape was recording every word in the interrogation room; at least that is what Scott thought. It would be years before he learned of the presence of

a second tape recording, and the actions taken to hide Detective Chambers' actions that night.

In the wee hours of the morning, Chambers told Scott he could go home. In an attempt to pick up the pieces of his life in the months after the interrogation, Scott moved to California and became a successful software consultant to Silicon Valley companies. He even mounted an independent run for governor against Arnold Schwarzenegger. As I sat there at his prison table, it was clear he wanted to make sure I understood one thing: he had never been in trouble with the law. He had nothing to hide. Davis grew up a varsity athlete in baseball and football. He attended UNC Chapel Hill, graduating with a BS in finance and went on to earn an MBA at the University of Georgia where he met his future wife Megan Lee.

Surely, once people learned his character, and that he'd always been a law-abiding citizen, they would start looking for the real killer. Unfortunately, when a crime is committed no judge is around. No jury is taking notes. No character witnesses are passing out leaflets validating your integrity. The first human touches are that of local police, coroners, detectives and evidence

room employees. They are the custodians of innocence, the custodians of guilt. Decisions to maintain what is found on the scene can have far-reaching influence on the outcome of the trial to follow. To prove a collector of evidence has, with ill motive, destroyed the evidence is nearly impossible. Short of an outright confession, it is unreasonable to assume the state would be held legally responsible for such a loss, even when that loss means a man loses his freedom. Law enforcement and its auxiliary entities are presumed to be of good will; therefore, negligence is rarely deemed *bad faith*—a legal term for ill intent. Losing evidence is more often deemed an error of the mind, not the heart.

And that is the central problem with the *bad faith* doctrine. Matters of the heart rarely leave evidence. Missing evidence, no matter the reason, places an unreasonable requirement on the defendant to bring to light that which has disappeared in the dark. In Scott's case, over seventy pieces of evidence were lost between the night of the murder and the start of the trial. Clothes, the murder weapon, along with significant and insignificant items had been collected and logged into evidence only to vanish before trial. The importance of

this cannot be overstated. According to Scott, the loss of the murder weapon and fingerprints collected at the scene alone justify a new trial.

THE COURTS

How aggressively does the arc between fair trial and injustice swing when potentially exculpatory evidence is lost? How does Davis prove he is innocent without the gun or other fingerprints that show none of his DNA is on either? And why wouldn't the original fingerprints found be run through law enforcement's database to at least locate an identity?

Appellate courts around the country have upheld hundreds of verdicts based on a defendant's inability to show bad faith on the part of law enforcement. Bad faith, or actions done with conscious dishonesty or malice, says the moral state of the actor has greater legal consequence than the action itself. The heart of bad faith is proving a person's intent—which again is virtually impossible. It is this requirement that forces many to believe the natural leaning of our judicial system favors the prosecution. There exists a gap between the critical role of evidence, and what happens when this evidence

is lost.

The US Supreme Court has attempted to right the sinking ship of bad faith. *Arizona v. Youngblood,* 488 U.S. 51 (1988), is a prime example of its complexities as a doctrine and its power to distract jurors from what matters most—the guilt or innocence of the man or woman in front of them.

REASONABLE DOUBT

When reading the details of the Davis case, one thing must be kept in mind: Every criminal case must be decided based on the presence or absence of *reasonable* doubt. The question asked of each juror is whether evidence presented has been robust enough to overcome or push the case beyond a reasonable doubt. Therefore, logic is every defendant's last line of defense. Logic permits us to view each law not in a case-dependent fashion, but as a continuum. We can confidently hold the law, including its most seasoned doctrines, against the light of reason.

When law enforcement personnel present evidence, it is not received with naked neutrality. It arrives wearing the robe of credibility. They are granted the benefit of

the doubt. Placed another way, imagine an academic test taken by a law enforcement officer. Now imagine the professor gives the officer a passing grade even before the test is graded. A regular citizen, on the other hand, is required to stand on the quality of his or her answers. The actions of law enforcement are assumed to be good without having to prove they are good.

EVIDENCE OF NO EVIDENCE

Fast forward to October 2004, eight years after the murder of David Coffin, Scott has traveled back to his alma mater, the University of Georgia, to attend a football game. After the game, Scott connected with old friends for a few drinks, but also in the group was someone he didn't know—Fulton County Assistant District Attorney, Gayle Abramson. Abramson would become famous a year later in 2005 when she successfully prosecuted the Atlanta Courthouse Shooter, Brian Nichols. That evening after the UGA game, Abramson seemed to attach herself to one of Scott's closest friends.

According to my interview with Scott, he watched as Abramson repeatedly used cocaine and ecstasy throughout the night. She then began to ask very

awkward questions. This caused him pause and he got as far away from Abramson as he could. As bizarre as an assistant DA doing drugs is, it got worse. Several months later, Scott and his same buddy from Atlanta were out on the town in California. Randomly, they again bumped into Gayle Abramson 5,000 miles away. The ADA came back to their apartment where they took pictures of her doing drugs and striping naked. I asked to see the pictures and Scott showed them to me. Abramson eventually admitted she was doing drugs and resigned from her official office. Yet, the Atlanta DA's office used the wiretaps Abramson had on Scott to bolster a weak case.

"What was on the tapes?" I asked. Certainly he must have incriminated himself.

While the wiretapped recordings included cursing rants and articulated Scott's disdain for Detective Rick Chambers, nothing was said that had anything to do with Scott's participation in the murder of David Coffin. So I still had the nagging question, "Why did they arrest you if they had no evidence?"

"Investigators built their case on one incriminating

statement," Scott told me. I sat up so as not to miss a word.

"The night of the murder when I was at police headquarters, I made one statement. I made a reference to David being shot. In the eyes of the police, no one knew this information except for the murderer, so they assumed I was the murderer."

THE CALL

"How do you explain having that information?" I asked. Scott explained that the police didn't know about a call he received at 12:18 AM. Call records in court proved he received the call, but the records could not prove what was said on the call. According to Scott, only a couple hours after the murderous fire, his estranged wife Megan called him and said, "David is dead. He was shot." That's how he got the information. Megan was Scott's estranged wife, and David was her boyfriend.

Scott recalled how he was shocked at this news and the particulars with which the murder was described to him. By the time Scott sat in front of Detective Chambers to discuss his whereabouts that night, his knowledge of how David died was viewed by investigators as an

admittance of guilt.

"Did you vehemently tell the detectives that Megan gave you this information?" I asked.

"Of course I did," Scott said.

The only problem was Megan would eventually deny she said anything of the kind.

Using his own words as the only evidence against him, a warrant was issued for his arrest. A six-week trial commenced and Scott was convicted of murder. Without any physical evidence, murder weapon or any fingerprints pointing to his guilt, could he possibly have received a fair trial?

Certainly a crime of this magnitude would not pivot on whether he had foreknowledge of the crime versus this information being given to him by his estranged wife. There was no objective evidence tying Scott to the murder. Fingerprints collected at the scene were not his, and were never run against a national database for identity purposes. The murder weapon was found at the scene, but later lost. There were no witnesses to the crime. In the end, law enforcement and the prosecution team needed a conviction and they got one.

THE POWER OF ASSUMPTION

As citizens, all we have is the assumption of innocence. We are assumed to have rights, but have no third party to whom we can use to enforce those rights. We are forced to turn back to law enforcement to protect our rights and privileges. This predicament carries over into every industry, especially the industry called the justice system. Ever stand against a policeman in his full uniform and attempt to win a simple traffic ticket, his word against yours? Exactly. So imagine what happens when the stakes are raised? What happens when a wrongful action by police doesn't cost you a speeding fee, but your very life? How do you prove ill-intent or bad faith against someone who enjoys the assumption of truth and integrity? Bad faith is an illogical wall to climb.

One case highlights the problem of *bad faith*, *Arizona v. Youngblood,* 488 U.S. 51 (1988). Larry Youngblood was accused of molesting David L., a 10-year-old boy. Youngblood was said to have abducted David from a church carnival, transported him to another location and sodomized the child. After a period of time, Youngblood then allegedly returned David to the carnival, threatening

to kill him if the young David ever told. The child was examined with a sexual crime kit and was found to have indeed been violated. However, investigators made several deeply reaching mistakes. Semen samples and other bodily fluids were not preserved or examined in enough time to scientifically identify the perpetrator. DNA technology wasn't as sophisticated as it is today. Absent proper refrigeration, time decay affected the samples beyond their usage—or so investigators thought. There were other problems.

The boy reported his perpetrator was African American. Youngblood fit this description. However, the boy also said his perpetrator had no scars; Youngblood has a prominent scar on his forehead. The boy said the passenger door had normal operation along with normal ignition. Youngblood's passenger door did not work. His ignition had to be manipulated with a screwdriver to turn the car on. Lastly, even while being accosted, David remembered country music playing on the radio. Family, friends and associates of Youngblood had never in their lives heard Youngblood listen to country music. In the end, Youngblood was convicted. Aside from claiming innocence, he maintained he had been deprived of due

process. That the lack of preserving semen found on the scene prevented him from accessing potentially exculpatory evidence, thus thwarting his right to due process. The Supreme Court disagreed. The Rehnquist Court determined: "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." The result? Years later, DNA technology and its accuracy grew. The deteriorated semen samples were retested and Youngblood was proven to a scientific certainty to be innocent of the crime. The sample was also placed into law enforcement databases, revealing the actual perpetrator to be Walter Cruise. Cruise was tried, convicted and sentenced to twenty-four years for the crime. One of the lessons learned from *Arizona v. Youngblood* is the importance of concentrating on what matters. What matters is the conviction or acquittal of the accused, not the moral motives of the custodians of evidence. The Court found that since the biological evidence had not been destroyed or unmaintained through malice that meant it did not rise to the level of harming due process. Bad faith is bad law.

JURORS

After the Davis trial, one juror, who wished to remain anonymous, mentioned how he struggled with the volume of evidence lost. "One, two or three pieces I can understand, but seventy pieces just vanished?" The judge in the Davis case admitted the lost evidence was material, but decided its mysterious vanishing did not violate Davis' constitutional right to due process because the evidence did not disappear due to bad faith on the part of law enforcement.

While many states have their own derivatives, federal law sets pace for rules of evidence in murder trials. The prosecution in the Davis trial skillfully circumvented applicable codes 1001 through 1008 of the US Federal Rules of Evidence, which forbid, in part, that any piece of evidence be admitted in a court of law except it is an original, except when "...the original is *unavailable*, only of *collateral importance*, a *public record*, *burdensome*, or *admitted by the other party* in writing or deposition..."[3] Since the evidence was lost it was unavailable. What was left was essentially hearsay on the part of the State as to

3 http://en.wikipedia.org/wiki/Best_evidence_rule#cite_note-4

what the lost evidence proved.

Ultimately, the murder trial relied heavily on circumstantial evidence. Scott Davis' attorney, Marcia Shein, stated the following in one of the subsequent court documents designed to solicit a new trial, "When the State fails to disclose evidence or tampers with evidence, it automatically violates due process and the confrontation clause of the Sixth and Fourteenth Amendments." Shein continued. "...When [The State messes] with the evidence or [doesn't'] disclose it, you get in trouble."

While this statement is legally correct, in reality, it is aspirational. Aspirational because proving a due process violation is herculean. For Shein, the stakes could not be higher. Her client was petitioning the court to vacate a felony conviction. The charge? Murder.

WHO IS SCOTT WINFIELD DAVIS?

Convincing decent people to go along with a horrible act requires some work. To do what is inhumane you must first strip the potential victim of his humanity. You must appoint the individual a monster, a killer or someone worthy of mistreatment—you must

dehumanize. Erased must be any semblance of good, kindness, thoughtfulness or innocence. None of these traits can exist when one seeks to violate someone personally, much less violate them corporately using a system designed to protect the innocent.

The first order of the day for prosecutors was to change the jurors' perspective on Davis. Surely, once people learned his character, and that he'd always been a law-abiding citizen they would start looking for the real killer. Unfortunately, when a crime is committed no judge is around. No jury is taking notes. No character witnesses

are passing out leaflets validating your integrity.

After leaving UGA, Scott led major software consulting projects for Andersen Consulting across the US. It stands to note that after the initial investigation into the Coffin murder in 1996, all charges were dropped against Davis by Atlanta's District Attorney, Paul Howard, in 1998. With his move to California, Scott attempted to move on with his life. While living in San Francisco, he was offered a senior position by his employer at the time. Thinking this opportunity would keep him in California many years, Scott purchased a home and eventually ran for public office in the form of the governorship. He ran as an independent candidate on the same ballot as Arnold Schwarzenegger. Understanding he wouldn't win, Scott felt the attention gained would also present an opportunity to speak to a greater audience about his thoughts on an issue he is passionate about; organ donation.

Until Scott was accused of murder in 1996, he had never been arrested for any crime. There was no history of violence in any form, whatsoever. This goes to the power of accusation as we discussed in chapter two. Accusation holds the power to pivot an individual's life away from good and instead towards skepticism. For

good or bad, accusation creates a biased filter through which we view a person's actions, motives and character. Accusation is phantom evidence.

At the time of Scott's case, Paul Howard was the District Attorney in Atlanta, Georgia. After Scott was arrested on December 13, 1996, he sat in jail for ninety days. During this time, Howard collected all details needed to potentially charge Davis with murder. However, after sitting in jail for ninety days, Davis was released on bond and later cleared by Howard on the cause of insufficient evidence. There was no evidence in existence that pointed out Davis as the murderer. This is an important point. Having a suspect in custody for ninety days and releasing him for lack of evidence sent a clear message as to Scott's non-involvement in the murder. A copy of the June 4, 1998 letter sent from District Attorney Paul L. Howard to Bruce H. Morris, Esq. (Attorney for Scott Davis) is copied below.

The body of the letter reads:

"With reference to our recent discussions concerning your client, please be advised that, at this time, the State is dismissing the warrant against Scott W. Davis. Our investigation into the death of David L. Coffin, Jr.

will continue."

Very truly yours,

Paul L. Howard, Jr.

District Attorney

Atlanta Judicial Circuit

OFFICE OF THE FULTON COUNTY DISTRICT ATTORNEY
Atlanta Judicial Circuit
136 Pryor Street, SW, 3rd Floor
Atlanta, Georgia 30303-3477

PAUL L. HOWARD, JR.
District Attorney

(404) 730-4981
(404) 730-0478 FAX

June 4, 1998

Bruce H. Morris, Esq.
Finestone & Morris
Suite 2540 Tower Place
3340 Peachtree Road, NE
Atlanta, Georgia 30326

Ref: Scott W. Davis
Charge of Murder

Dear Mr. Morris,

With reference to our recent discussions concerning your client, please be advised that, at this time, the State is dismissing the warrant against Scott W. Davis. Our investigation into the death of David L. Coffin, Jr. will continue.

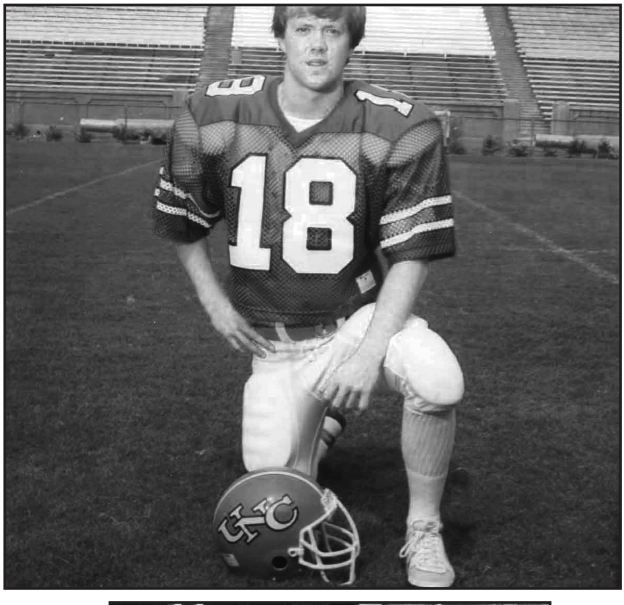
Very truly yours,

Paul L. Howard, Jr.
District Attorney
Atlanta Judicial Circuit

CREATING A GUILTY ATMOSPHERE

The State presented a narrative that successfully created an appearance of guilt, much like the prosecution did in *Arizona v. Youngblood*. Without hard evidence, one can make everything fit. Phone logs displayed calls made from Davis to his ex-wife Megan, along with calls made to friends, neighbors and associates during the 24 hour period encompassing the murder of David Coffin created a trend. A trend perceived as jealously transformed into a trend of perceived rage, which transformed into juror confidence a murder was committed by Davis.

On April 28, 2009, Davis' was found guilty of murder beyond a reasonable doubt in the absence of material evidence that could have set him free. Most jurors stated the missing evidence did not make a difference in their decision—largely because they didn't know whether further testing would have provided a better case for the defense. When pressed further, one juror stated if the seventy pieces of missing information developed a trend away from Davis, "...the verdict would have been different." How did all of this happen? A better question may be, who allowed this to happen?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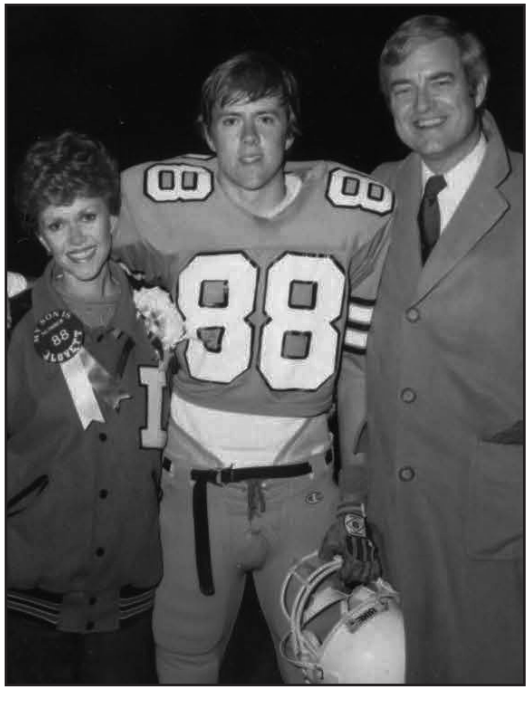
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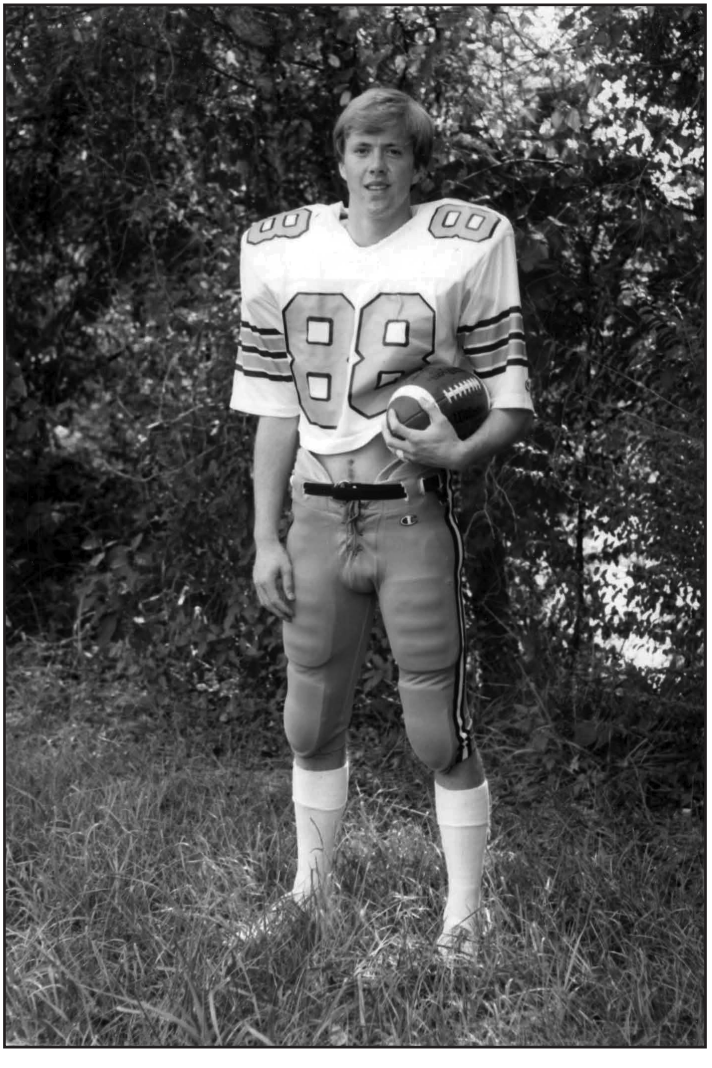
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CHAPTER THREE

A DANGEROUS FORMULA: ATLANTA DA + ATLANTA PD

Before Scott Davis was arrested, before Atlanta Police Detectives had an opportunity to do anything wrong, before evidence would be collected and strategically lost, one thing had to take place—an indictment. The individual who led this process was Paul L. Howard.

Paul L. Howard, Jr. became Georgia's first African American elected to the office of District Attorney. When he campaigned in 1996, the city had successfully hosted the Summer Olympic Games, which had the business community chomping at the bit to leverage this international spotlight into renewed development. The one thing that stood in the way was Atlanta's notoriously high crime rate. Paul Howard did what any aspiring

politician would do in a similar situation—he promised to get tough on crime.

As Howard was sworn into office in January 1997, the opportunities to make good on his plan to get tough on crime seemed plentiful—but things don't always go as planned, at least not initially. The case of Scott Davis stands as prime example. Davis, initially arrested for the murder, was released from jail because investigators could find no evidence linking Davis to the crime. All charges were dropped. Howard would have to find another case to establish the reputation he sought.

Then the case of Michael "Little B" Lewis appeared on Howard's desk. Lewis was only 13-years-old at the time of his arrest for the murder of Darrell Woods. Woods was a 23-year-old man who was waiting in his car with his two young sons while his wife went into a convenience store. Lewis allegedly fired two shots into the car, killing Woods.[4] In his zeal to get tough on crime, Howard chose to prosecute Lewis as an adult. Fulton County Assistant District Attorney Suzy Ockleberry prosecuted the case, but presented no forensic evidence. What Ockleberry did have was several eyewitnesses to

4 http://www.wsbtv.com/news/news/little-b-seeks-new-trial/nJTjp/

the event. Her star witness was "Big E," a drug-dealing criminal facing a potential life sentence on a variety of drug-related charges. Several months after his testimony in the Lewis trial, Big E was completely exonerated of all the felony drug charges against him. Other eyewitnesses were two crack addicts who testified while high, seeking a portion the $4,000 in reward money that was offered. Ockleberry's investigator testified that Lewis' mother, Valerie Morgan, said Lewis confessed to her about killing Woods, but years later filled out an affidavit saying she never said any such thing to the investigator. Lewis' court-appointed defense attorney did virtually nothing to defend him. After just 90 minutes of deliberation, the jury returned a guilty verdict, Lewis was sentenced to life in prison, and District Attorney Paul Howard proved he was tough on crime.[5]

Three years later came another Lewis case, this time involving Ray Lewis, the renowned, and now retired, all-pro linebacker for the NFL's Baltimore Ravens. He and two friends, Reginald Oakley and Joseph Sweeting, got into a brawl with another group around 4 AM on January 31, 2000. When it was all said and done, two men, Jacinth

5 www.elainbrown.org

Baker and Richard Lollar, were dead from stab wounds. Howard initially charged Lewis, Oakley, and Sweeting with murder. This would be Howard's defining moment. Although he hadn't prosecuted a case himself in more than four years, he wanted to try this one. After all, with the high-profile nature of the case, Howard would be on national television during his first re-election campaign. But as the trial drew nearer, the case began falling apart, largely due to unreliable witnesses. Howard needed to do something. He ended up offering the celebrity defendant a deal—plead guilty to a misdemeanor charge of obstructing justice because of his initial "incomplete" statement to police and then testify against Oakley and Sweeting, both of whom were ultimately acquitted. [6]

What struck observers of this trial was the incompetence of Howard's assistant district attorneys throughout the trial. Not only were these prosecutors guilty of two different Brady violations (failing to turn over exculpatory evidence to the defense attorneys), the judge even berated one of them for not knowing how to conduct a redirect cross-examination. [7]

That kind of incompetence among Howard's

6 http://transcripts.cnn.com/TRANSCRIPTS/0006/05/bn.01.html
7 http://www.washingtonexaminer.com/ray-lewis-lb-quits-paul-howard-da-blunders-on/article/2518789

prosecutors has become business-as-usual over the years. Fast-forward to 2009, a year that opened with revelations of two major prosecutorial blunders that occurred years earlier. In the first, Georgia's Court of Appeals reversed the conviction of Arthur Tesler, a former Atlanta police officer who lied to FBI agents about the botched drug-raid killing of 92-year-old Kathryn Johnston (a case you'll hear more about later in this chapter). The conviction was overturned because the prosecution failed to prove that Tesler's crime was committed in Fulton County. Proving both "venue and ID" (where it happened and who did it), as it's called in the legal world, is one of the most basic things a prosecutor must do. It's something drilled into their heads during training.

The second blunder revealed that month was in the case of Rodney Denson, a middle school assistant principal who shot his estranged wife six times and his mistress three times (amazingly, both women survived). Denson's conviction was overturned because in the process of pleading guilty, prosecutors neglected to inform that by doing so he was also waiving his right against self-incrimination. There's a prescribed set of questions prosecutors must ask someone making a

plea to make sure they understand what rights they're giving up. This is another painfully basic procedure. All a prosecutor has to do is ask the standard questions from a script and the legal requirement is satisfied. What's more disturbing in both cases is not only Howard's prosecutors failing to execute procedural basics, but that no one from the DA's office caught these blunders, even though there are "supervisors" who monitor the progression of cases for that very purpose of catching legal blunders that could jeopardize an otherwise solid case. [8]

Howard's inability to hire and retain competent prosecutors is a problem he created entirely on his own accord. When he first took office, Howard systematically removed all of the experienced prosecutors and replaced them with his own hires. The record of blunders on his watch reveals nearly unbelievable inexperience and incompetence. Howard has trouble retaining his prosecutors. In the first half of 2011, 21 of his prosecutors left their positions. While many prosecutors often leave current position in order to advance their careers, many cited how the office's micromanagement of prosecutors takes away autonomy and discretion. Judges have also

8 http://www.peachpundit.com/2009/01/27/fulton-county-da-paul-howard-again-works-hard-to-demonstrate-his-incompetence-for-all/

commented that many prosecutors appear to know little about the cases they bring to trial. Howard pointed to low starting salaries as one of the culprits of poor retention. [9]

When the American Bar Association ran a version of the above story in its ABA Journal online, the comments of current and former Howard employees were very revealing. [10] [11]

Below is a sampling:

I currently work there and it has something to do with the pay, but it's not just the pay, it's the micromanagement, the distrust, increasing work load, diversion of office funds and manpower into projects that have absolutely nothing to do with the prosecution of felony cases, very few investigators, ever-increasing paper work that serves no purpose but to further micromanage attorneys, lack of autonomy, failure to terminate unproductive employees, failure to promote experienced attorneys, constant berating, complaining and admonishing of attorneys for contrived reasons or no reason at all, furloughs for

9 http://www.ajc.com/news/news/local/fulton-da-scrambles-in-response-to-exodus-of-prose/nQwSm/
10 http://www.abajournal.com/mobile/article/exodus_of_prosecutors_slows_case_disposition_in_fulton_county_ga._da_blames/
11 http://www.abajournal.com/mobile/comments/exodus_of_prosecutors_slows_case_disposition_in_fulton_county_ga._da_blames

everybody because of a 'budget crisis' while several people in the office got pay raises. It's complete and total mismanagement and I wish I could find another job. I would be proud and overjoyed to be #22 but several of my co-workers will probably beat me to it. By Let's Be Real on 2011 06 17, 2:15 AM CDT

The problems aren't about the money at that office. I started working for Howard with a salary in the mid-60s, and soon learned what many had told me before crossing the threshold: There's a heavy price to pay for the (relatively) good pay you receive. Excessive oversight of plea negotiations, pointless office procedures, and a general feeling of distrust affected me at every turn. I received little assistance from my investigators, even less from my supervisors, and was still expected to navigate a minefield laid between Howard and the judges to do my job. The DA's acrimonious relationship with practically every judge in Fulton County led to abuse heaped on the ADAs who represented Howard in court, but management was indifferent to those problems. Management was: Senior ADAs, senior chief ADAs, deputy DAs, senior assistant DAs, an amalgamation of pointless titles and fiefdoms given out by the DA to

show favor. One of the proudest days of my life was the day I turned in my two-week notice. Then Paul Howard had an armed investigator escort me to my office, block the door while I was given a few minutes to pack my personal belongings, and then march me to the sidewalk outside the courthouse, where I was liberated of my badge, identification, and security card. You have been warned... *By Marietta Lawyer on 2011 06 17, 3:18 PM CDT*

After almost 4 years at the office, I felt as though Paul Howard gave me no choice but to leave. Not only was I micromanaged and subjected to the disdain of the judges for Mr. Howard, but promoted several times with no raise while I saw him hire senior/chief ADAs without experience in Fulton County and demote other senior/chief ADAs without changing their salaries or status. There is a serious problem with management at the Fulton County DA's Office. While I am thankful for the opportunity to have worked with some of the most talented and skilled attorneys in prosecution, I would not recommend that anyone work there. Overall, it was a demoralizing and hapless place to work. By An ADA who left on 2011 06 18, 8:33 PM CDT

The problem with prosecutorial incompetence is that it has real impacts in the world. Real innocent people can get convicted of real crimes or real guilty people can be let go. Either way, society suffers. Take the case of Brian Nichols as an example. On March 11, 2005, the 33-year-old man went on a shooting spree inside and outside the Fulton County Courthouse, leaving four dead, including Judge Rowland Barnes, court reporter Julie Ann Brandau, deputy sheriff Hoyt Teasley, and federal agent David Wilhelm.

At the time, Nichols was being retried for rape charges. His first trial resulted in a hung jury. If Howard's office had done a better job prosecuting the first time around, the massacre might have been avoided. Jack Liles, the jury foreman from the first trial, spoke out about the incompetence of the prosecution.[12]

"Two younger Assistant District Attorneys actually handled the case. Actually, only a single one was in the courtroom for probably a half of the time. We essentially went to the jury room after hearing this case with a "he-said-she said" story. Not a lot of solid physical

12 http://www.newshounds.us/2005/04/01/disgruntled_juror_gets_15_minutes_of_fame_joins_oreilly_crusade_against_atlanta_da_paul_howard.php

evidence to support the alleged victim. Not a lot of solid evidence to dispel Brian Nichols' story, so it made for a very difficult deliberation in one sense... when they had the opportunity to cross-examine him, the cross-examination was terrible. They really did nothing more than just get Nichols to deny what the alleged victim claimed had happened. So, we were amazed when they rested their case with no more—not much more than just a few denials of the assertions of the alleged victim... When we asked them about it, they said, "Oh, we were surprised. We weren't expecting him to take the stand so we really didn't know what to ask him."

Similar to the Little B case, there was little to no forensic evidence presented by the prosecutors. It later came out that at least some of the forensic evidence was not even sent out for testing until *after* the mistrial. [13]

That indicates not only incompetence on the part of prosecutors for going to trial without adequately constructing their case, but also calls into question the quality of police investigation procedures. This wasn't the first or last time that the Atlanta Police Department

13 http://loompaland.blogspot.com/2005/03/atlanta-courthouse-murders-das-office.html

(APD) would be called out for questionable investigation activities.

Nearly ten years after the murder of David Coffin, it was in 2005 when lead APD homicide detective Rick Chambers claimed to have new evidence which linked Davis to the crime. The "new" evidence turned out to be nothing more than fabrications, and prosecutors involved in the case knew this but said nothing to stop Chambers' relentless pursuit of Davis. Someone had to be arrested for this crime. Meanwhile, one of the prosecutors involved in the case was known to be using illegal drugs, but was never investigated. [14]

Then there was the botched drug raid that saw the shooting death of Kathryn Johnston at the hands of APD officers. The three officers, Jason R. Smith, Gregg Junnier, and Arthur Tesler, all participated in providing false information to get a no-knock warrant so they could force their way into Johnston's house on suspicion of drugs being sold from there. A startled Johnston fired one poorly aimed shot through the closed door using an old pistol. The three officers returned a hail of 39 bullets, several of which hit Johnston. The officers then entered

14 http://freescottdavis.org/blog/prosecutorial-misconduct/#other-misconduct

the house, handcuffed the dying 92-year-old woman and searched the house for drugs. Finding none, the officers planted several bags of marijuana as a cover-up and later submitted cocaine they falsely claimed was purchased at the house.[15]

The egregious behavior of the three officers sparked a federal investigation of the APD to see how widespread such corruption might be. What US attorney David Nahmias found was a "culture of misconduct" where "...Atlanta police officers regularly lied to obtain search warrants and fabricated documentation of drug purchases".[16]

What happened next is even more interesting. Plans were underway for the civil rights division of the federal Department of Justice to carry out the investigation. This was important so that the legal consequences might apply to the entire Atlanta Police Department, not simply to the three officers. Meanwhile, DA Paul Howard announced his plans to seek murder charges against the three officers, which could derail the federal investigation. [17]

15 https://en.wikipedia.org/wiki/Kathryn_Johnston_shooting
16 http://www.gasupreme.us/biographies/nahmias.php
17 http://www.nytimes.com/2007/02/09/us/09atlanta.html?_r=1&

Why Howard might have done that is a complex question. Considering that the three officers who shot Johnston were white, it made him look like he was taking a stand against white-on-black police brutality, although officers using deadly force are rarely convicted. [18]

At the same time, derailing the larger federal investigation into APD misconduct and systematic violation of civil rights serves a blatantly political end: Getting re-elected. No DA can hope to stay in office without the support of the police union.

New York City Public Advocate Letitia James wrote the following for msnbc.com:[19]

"Our justice system allows district attorneys to be charged with the great responsibility of prosecuting the very same police officers they work side-by-side with every day and whose union support they seek when running for reelection... Any district attorney knows that an endorsement from law enforcement unions is vital to earning voters' trust. As a result, police unions play an outsized role in district attorney elections."

Sadly, it should come as no surprise that when it comes to police misconduct and brutality, very little

18 http://www.ajc.com/news/news/crime-law/police-using-deadly-force-are-rarely-convicted/ng8Nf/.
19 www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts

happens unless investigators at the federal level become involved. District Attorneys simply can't be relied upon to properly prosecute their own police departments.

Howard's professional judgment has also been called into question concerning his use of civil forfeiture funds seized by police from drug dealers and other criminals. It's essentially free money for police departments to pad their budgets. In one case that hits close to home, Howard used funds to put wrought iron security bars on his house, take staffers and their families out to dinner, purchase tickets to sporting events, and give $6,000 to a group of lawyers who inducted him into its hall of fame.[20] The Georgia Bureau of Investigation (GBI) looked into the matter and concluded that no criminal wrong-doing had taken place. [21]

The previous claims from current and former employees in Howard's office about his inability or unwillingness to properly manage his staff continue to be corroborated. In March 2015, one of Howard's victim/witness advocates, Wesley Vann, was sexting as well as threatening a witness in a death penalty case. Howard's

20 http://valdostatoday.com/2015/04/georgia-transparency-laws-on-seizures-coming/#sthash.ZZcU4PWP.dpuf
21 http://www.ajc.com/news/news/breaking-news/gbi-investigation-of-fulton-da-found-nothing-crimi/nfRLW/

response was to reprimand Vann and suspend him for 20 days. What's shocking about this is that it's not the first time Vann has been disciplined for inappropriate behaviors—it's the *third* time. Then again, it was Howard himself who pushed both for Vann's initial hire as well as his later promotion.[22] One can only wonder how far Vann would have to go in order for Howard to finally terminate him.

Criminal cases in Fulton County routinely get dismissed on speedy-trial grounds. It is not uncommon for these cases to be about murder, molestation, elderly abuse and armed robbery. In trying to combat speedy-trial dismissals back in 2010, Howard noted that more than 5,100 defendants in the county have had cases pending for more than two years. During the five years from 2005-2010, 65 speedy-trial motions were filed to dismiss indictments. Of those, 20 were granted, including 8 murder cases.[23] That's eight potential murderers back out on the streets of Atlanta because of Howard's indict-everything-and-figure-it-out-later mentality.

Paul Howard is currently in the midst of his fifth term

22 http://www.11alive.com/story/news/local/holding-powerful-accountable/2015/03/20/investigators-employee-inappropriate-actions-death-penalty-case/25108641/.
23 http://www.ajc.com/news/news/crime-law/fulton-cases-thrown-out-because-trials-long-delaye/nQm2W/.

as Fulton County's District Attorney. One could sum up much of his legacy as follows:

- More interested in maintaining and expanding his own personal political power than serving the greater public good.
- Unable to attract or retain competent prosecutors.
- Unwilling to properly manage his employees for maximum effectiveness.
- Lacks professional judgment in expenditures.
- Blames others for the products of his own shortcomings.
- Is too close to the APD to address widespread corruption therein.

CHAPTER FOUR

VERDICTS

Verdicts imply fairness. Verdicts wear the robe of objectivity because it is assumed that the collective wisdom of a jury appropriately weighed all relevant facts. This assumption is simply false.

In *Davis V. The State*, evidence was presented by a trier of fact—a veteran ballistics examiner. The weapon used in the homicide Davis is accused of committing was a handgun found at the scene—seems simple. Recover the weapon, test the weapon for traces of identifying evidence and arrest the person associated with the fingerprints. There was a huge problem. After the trial and conviction of Davis, The Georgia Bureau of Investigation weapons examiner, Bernadette Davy, was found to have falsified hundreds, if not thousands,

of test results, throwing the Georgia legal system into a predicament. Many defense attorneys who tried cases in which Davy testified against their clients questioned whether their clients deserved a new trial. What was the veracity of her testing? Should the courts retry every case affected by Davy? Christine Koeler, president of the Georgia Association of Criminal Defense Lawyers, expressed the disturbing news about Davy this way, "...We're going to see a lot of inmates saying, 'This person testified against me,' and demanding new trials, which is reasonable when a lot of cases come down to the ballistics expert..."

Koeler continued, "...Whenever someone takes it upon themselves to not follow protocol and falsify their findings, how do we know it only happened one time? Her credibility is shot, and that's the problem with falsification."

In a letter explaining the examiner's resignation, the Georgia Bureau of Investigation Deputy Director, Dr. George Herrin, Jr., stated in a letter dated April 1, 2009, that the examiner "intentionally fabricated data" over an 18 year career.

It is often the case in jurisprudence that the

evidentiary value of evidence is dependent on the credibility of the maker. Not even fraudulent actions by the ballistic evidence professional, seems to be important enough to grant Davis a new trial. If you want to get around the Bernadette Davy problem and convict an innocent man, what would you do? Lose the weapon all together. This is precisely what happened. The murder weapon was found at the scene of the crime, logged into evidence and signed for by the city's authorized custodian. When it came time for trial, the weapon disappeared. The city claims to have mistakenly lost it.

CHECKS WITH NO BALANCES

When a verdict is called into question, many courts decide the error uncovered would not have changed the outcome of the case. Therein lies a dangerous bias. When the defense or the prosecution believes that key facts are irrelevant, the line of questioning is altered and questions that could vindicate an innocent person are never asked. When a certain line of questioning is not taken, one cannot assume where is would have led. So how does one with a due process violation claim call

into accountability a system that protects itself? Only by publicizing the injustice in the most robust way as possible. Maintaining public trust is one of the few objectives an otherwise smug justice system will rise to address. However, one must, without malice or violence, call into question the deeply rooted concepts that cause so much harm to due process.

DEEPLY ROOTED

Deeply rooted concepts are called that for a reason. To uproot them, one cannot use force or even the purest of intellect. Only the soft touch of a new idea can change impenetrable systems. One must engage a new way to view an old problem that does not threaten the status quo, but rather empowers it to continue its old path but with more efficiency. The concept of justice is one of those deeply rooted ideas. It exists, but no one knows exactly where. We all want justice, but if asked to describe justice, the average citizen would be rattled with confusion and at a loss for words.

The words of Chief Justice Oliver Wendell Holmes provided great wisdom when he said, "A mind, once

expanded by a new idea, never returns to its original dimensions." Thinking about justice in a different way can only assist in helping the concept become a reality for all. Using Chief Justice Holmes as our guide allows us to consider this new question: how can one consistently get justice when there is no locator as to where it is? There is no objective map leading everyone to the same place. When you really think about it, justice is left to legal interpretation, the gyrations of emotions, and the interests of personal and political agenda. Justice must be stabilized. Justice must be static like cities on a map.

GPS

If one traveled long distances prior to GPS, one surely has an appreciation for maps. Maps provided an objective, academic way to view a personal trip. Maps granted a topical view of geography. Maps empowered travelers with the confidence to travel at night, using road signs and landmarks to confirm that they were headed in the right direction. Maps correct misguided detours while reducing time and money wasted on bad decisions. At first glance, maps look strikingly similar to the human vascular system. Roads on a map

resemble veins intersecting through multifold pages. Distinguished by numbers, colors and symbols, drivers were able to make out where they were going, and most importantly, how to get there. No matter how emotional the traveler became during the trip, the map that guided the trip contained no emotions and no bias. It simply provided every conceivable pathway to arrive anywhere in the US. It supplied the most efficient routes, and by default, also showed the driver the least efficient route. Its job was to point the way; it was the traveler's choice is to follow the map or not follow it.

HOW WE LEARNED OUR WAY

This anatomy of US highways was made popular by Rand McNally, a company founded in 1856 in Chicago Illinois. Its goal was to create reference models for the transportation industry. With over 46,000 miles of major highways in the US, not counting side roads, access streets and routes in and out of small town America, it took enormous effort to produce accurate maps. Physical work, satellite images, and engineering diagrams enabled this overwhelming accomplishment. Shortly after founders William Rand and Andrew

McNally published their first true automobile map in 1917, a booming oil industry desired to increase the consumption of oil. Therefore they worked with Rand McNally to place maps in every gas station across the country. They knew travel would be viewed as tedious and hated if everyone traveling got lost. If drivers were confused, they would waste time, money and gas. This confusion would destroy the automobile, hospitality and oil industries. There had to be a system that would make travel palatable. There had to be a map.

It is interesting to note that the highways, bridges, mountains and lakes existed before the maps were ever made. In other words, all the information was there, but until mapped out in visible form it could not be used to consistently benefit the traveler. Without a map, arriving on time without incident was a shot in the dark. Maps organized, clarified and allowed successful trips to become standard instead of a happenstance anomaly.

FINDING JUSTICE

Our justice system is much like those 46,000 miles of winding, roads before these roads were mapped out. Legal complexities, contradictory interpretations of evidence,

and frequent deprivations of due process makes arriving at that place called "justice" nearly a fluke. Just like the thousands of miles stretching from east to west coast, all the information is there; but this information has never been organized into a map, a system for consistently reaching this place called justice. When no map exists, volumes of unorganized information become a burden and a liability. Without a map, arriving at justice is a roll of the dice.

Let's back up for a moment. What is this thing called justice? The term itself represents one of the most galvanizing, yet ethereal concepts of American jurisprudence; the problem is, justice happens to be the advertised objective of our system, or in other words, the mascot. If one analyzes the justice system with even a modicum of honesty, one can only conclude the system is confused at best. While the laws from which we charge defendants are painfully specific, the outcomes are erratic. Cases presenting similar facts often receive widely varying verdicts from state to state. What is the reason for such extreme variance? Surprisingly, it is more than incompetence of counsel, or polluted or missing evidence. The haphazard nature of court case

verdicts stems from a simple, yet toxic omission in our justice system design. We have no agreed upon system; no "Rand McNally-like" objective map to guide our efforts.

No model stands outside our emotions, able to justify a conviction or acquittal. Without this anatomy, justice is left to a feeling, left to legal interpretation where one expert witness disagrees with another expert witness. Justice is left to the eye of the beholder, the discretion of the judge, and the collective wisdom of the jury.

THE IMPORTANCE OF ANATOMY

If one asks a physician to explain the external shape of the human body and its digits, he would, at a minimum, detail two arms, two legs, ten toes and ten fingers. And although there is much more to describe, this is a firm start to explaining the accepted, external, human form. Matters of critical importance must have an agreed upon anatomy; this cannot be overemphasized. Without it, we lack a framework to correct error. Without an anatomy, one cannot fix accidents; one cannot restore a person or thing back to its original state of health, or in the case of a prisoner, his freedom. Without a rubric for what is

best, each person possesses carte blanche to define life as he sees fit based on personal bias. Accepted anatomy allows us to immediately identify non-conformity. Anatomy breeds hope because it says, "We know how to get it right."

Without it, we would have to depend on people's ideas of what they think is right; which is exactly what the justice system often depends on when deciding matters of freedom or incarceration. The appellate process is the closest thing we have to "getting it right," but even when a case is under appeal, there is no objective model for what should have happened in the original verdict. Even "getting it right" by using an appeal is an aspirational goal because an appeal is not designed to perform this function. An appeal is not supposed to be a rehashing of facts, but a review or reprimand of what was legally incorrect in the prior case. An appeal is supposed to be a checks and balances of the legal antics of the trial judge and his cohorts. That said, it is the best we have. In the end, the appeal is left up to opinion—opinion on the law, but opinion nonetheless.

WHO SHOULD CREATE THE MODEL?

It was master artist Leonardo De Vinci, not a physician, who created the most intuitive, widely used, anatomical drawing in the world. The drawing known as *The Vitruvian Man or Renaissance Man* has a fascinating beginning. Found in one of Da Vinci's unused notebooks, his drawing of the human anatomy grew out of his insatiable desire to accurately depict the human body. He compiled a series of 18 mostly double-sided sheets exploding with more than 240 individual drawings and 13,000 words of notes. Today, his drawings have been pivotal to understanding the true function of the human body. Da Vinci went on, in great detail, to produce the first accurate depiction of human heart, detailing its twisting motion. He depicted the spine, the aortic nerve and many visual forms of our most critical body functions. Medicine, like every other discipline, needed a starting point. Da Vinci provided it.[24]

Now, ask the most accomplished attorney in the world what justice looks like. What answer would be given? Is it standardized? What is the shape? What is

24 http://en.wikipedia.org/wiki/Vitruvian_Man

meant by the phrase "justice has been served"? This phrase depicts justice as if it were a culinary dish. What is meant by the statement used to describe a prisoner as having "paid their debt to society"? Who determines the price and is this price fixed for every race, every creed and every culture? If so, then why do some prisoners pay higher prices than others for the exact same crime?

Capital murder in one state renders death, while in another state a defendant may receive 20 years. Even worse, depending on who the defendant is, he very well may go home early enough to catch the late night news. The system is unpredictable. It cannot be that justice, and its application, is so random as to circumvent observable form. This is a good place to point out another point. When one speaks of the need for an anatomy of justice, one is not hinting at precedent. Precedent, or previous rulings on cases confronting similar questions, is very different. Precedent is the trunk of a decision tree. Precedent allows a contemporary legal argument to mature quicker as older legal arguments have provided a compass for what was deemed right at the time of the prior decision. Precedent is much like the first iteration of a manuscript that becomes the foundation from

which better ideas grow. However, following precedent has major drawbacks.

Previous legal decisions only inform us of the best efforts of others who tried to sincerely solve problems that were similar to the ones being faced now. Precedent represents attorneys and judges who, at an earlier time, were also operating without an objective, unmovable understanding of justice. While precedent may seem to advance our thinking, at times it can prevent new, better ideas from ever taking root.

CHAPTER FIVE

STRATEGIC LIES AND THE IRRELEVANCE OF INTENT

We need look no further than the first 24 hours of the Coffin murder investigation to see the first rule of convicting the innocent in action. Make a believable accusation. If a lie needs to stand, it should be built upon truth. This primarily means that a wrongful accusation has the greatest chance of being believed when critical elements of the accusation are true. Let's say a man is accused of stealing from a closed store. It is very damaging yet truthful that he lives across the street from the store, and that he was seen walking by the store, smoking a cigarette around the time of the robbery. Although none of these truths are evidence that the man is a thief, these inconvenient truths make damaging inferences. A seasoned prosecutor will shape these solid

truths into a kind of industrial strength steel bowl and into it pour weaker evidence. The real truth becomes a glue for fragile allegations that otherwise would blow away in the wind. Truth is the ultimate adhesive for lies.

THE SCENE OF THE CRIME

Nowhere is truth more in danger of being corrupted and skewed than at the scene of the crime. The scene of the crime is arguably more important than the courtroom, and even more important than the jury room, because what happens at this pivotal location sets the tone for everything to follow. It is fertile ground for truth and lies to become one. The scene of the crime is the one place where indisputable, scientific evidence is often infused with innocent error or tainted by the inappropriate, personal agendas of corrupt law enforcement personnel.

In a fair world, the scene of a crime refers to the place where an innocent person became a victim. It is the spot where a person had forced upon them emotional or physical harm. Whether the perpetrator committed the crime by mistake, negligence, ignorance or evil intent, the victim is still called *victim*. This label is correct because the harm done does not change based upon the

intent of the perpetrator. A person who loses an arm in an automobile accident never grows the arm back because the person who hit their car did not do so on purpose. Harm is unmoved by the intent of the perpetrator. Harm is emotionless; harm is indiscriminate.

If this concept is neither acknowledged nor understood, then it is nearly impossible for justice to be equally distributed. When the concept of bad faith is applied, too much attention is paid towards *why* a person did something instead of concentrating on simply *what* they did. Analyzing intent is, for the most part, a fruitless endeavor. The legal system leverages intent to assess the crime according to the applicable code sections and to distribute punitive consequences to those found guilty *after* a crime has been committed and *after* the defendant has been charged. However, bad faith holds in it a diabolical irony.

Imagine that a detective, a police officer, prosecutor or crime scene processor loses evidence collected at the scene of the crime. Even though the evidence lost may be critical to a defendant trying to prove his innocence, ill intent must be proven *before* these law enforcement

professionals would ever be charged with a crime; even the crime of negligence. This preferential treatment for law enforcement personnel is harmful to the defendant who is forced to mount a weaker defense. To use an earlier example, the defendant enters the court metaphorically missing one arm.

When harm is done by law enforcement personnel, the consequences are not placed on the perpetrator, but rather on the defendant. And in most cases, a jury will never hear that there was missing evidence that may have helped the defendant's case. In most cases, the jury will never hear there was evidence collected by law enforcement officials, placed in official custody and that this evidence mysteriously vanished. This most important point will be addressed later in this book.

A person accused of a crime will always have a heavier load to bear because in our society it is easy to make an accusation, but nearly impossible to prevent one. This makes it vital for the accused to have everything at his disposal to mount a robust defense because at risk are his life, his career and his freedom. Often, the only difference between a murderer going home or going to the electric chair centers on what his intent was at the time of the

crime. Our legal system is designed to investigate and punish based on the ill intent of a criminal, but this does not equally apply to law enforcement personnel.

THE POWER OF ENVIRONMENT

In the noble environment of a courtroom, a defendant has one strike against him simply for being there. While no juror will readily admit this, a defendant is often assumed to have done something, even if it is not the crime for which he has been accused.

Let's review the role of accusation in our justice system.

- Weak accusations are often held together by truth.
- An accusation holds the power to shape how a juror sees a defendant, even if the accusation is patently false.
- An accusation can unfairly bias a court and jurors to see validity in otherwise marginal evidence.
- An accusation is a form of soft evidence.

Reasonable doubt is dangerously subjective. Society provides each person reasons to believe certain people are more likely to commit a crime over another based on

personal life experiences.

Injustice goes far beyond race. Most people do not know that being rich, being white, being young, being old, being conservative, being liberal or even being religious can paint you as "probably guilty" long before the accused ever steps foot into the courtroom. The smart attorney or the smart prosecutor knows exactly who to accuse of what to grease the path between accusation and conviction. Right or wrong, society grants the benefit of the doubt to some, while granting the assumption of guilt to others.

Harm is cold. Harm is indiscriminate. Harm pays no attention to intent.

CHAPTER SIX

MISSING EVIDENCE

"A bite, a bullet, a gun barrel and a broken heart. That's the evidence that will prove to you that defendant Stephanie Lazarus murdered Sherri Rasmussen." ~ Deputy District Attorney Shannon Presby

Much of the argument to grant a new trial to Scott Davis centers around the lost evidence in his case. Several high profile cases have made clear the damaging nature of missing evidence.

On February 24, 1986, the body of Sherri Rasmussen was found in the Van Nuys, California apartment shared with her husband, John Ruetten. Rasmussen had been

beaten and shot three times following a struggle. Police assumed the liklihood of a botched robbery to be the cause of her death. That was the obvious reason. The perpetrator was never found, at least not for 20 years. Rasmussen's father, Nels Rasmussen, always believed the police should look into one of their own, an officer named Stephanie Lazarus—who happened to be the former girlfriend of John Ruetten. But with no evidence, no one pursued that far reaching option. After all, everything comes down to evidence. Doesn't it?

Even after Ruetten was engaged to Sherri Rasmussen, Stephanie Lazarus repeatedly stopped by the couple's house for various trumped-up reasons. Lazarus even went to Sherri's office to tell her she and John were still involved, actually saying, "If I can't have John, no one else will." Despite this history, the police were sticking with their original theory of the slaying being the result of a botched burglary, but this was never convincing to Nels Rasmussen. There was a real struggle involved. Sherri had a bite mark on her arm, which is much more typical in fights between women, but police were convinced the burglar was a man. That was the most likely perpetrator. It was odd that the only things taken

from the residence were Sherri's BMW (obviously used as a getaway vehicle, according to investigators) and the couple's marriage license. There was a pile of electronics equipment at the top of the stairs, left presumably in the act of being stolen when Sherri interrupted the burglary. So why would the burglar, in a frenzy to get away, take the time to make off with a marriage license? For Nels, the answer had always been very clear—the woman who felt spurned was Stephanie Lazarus. But she was a rock-solid police officer, and the police simply refused to follow up on any details so clearly pointing to her. In fact, when Nels pressed detectives again in 1987 to look into John's police officer ex-girlfriend, he was told, "You watch too much television." Nels felt both enraged and helpless.

BITE MARK

The bite mark on Sherri's arm was significant enough to warrant a swab by criminalist Lloyd Mahany when he examined the body at the crime scene. But in 1986, DNA testing was a brand new technology, far from being widely available. In fact, it was only seven months after Sherri's murder when the first DNA evidence was used

in a criminal investigation in the United Kingdom.

The English police were trying to find a potential serial killer who had raped and murdered two teenage girls in the area around Leicester. Police were aggressively investigating a 17-year-old boy who seemed highly suspect, but initial blood-type testing didn't match to him. Then investigators learned of an area geneticist named Alec Jeffreys who had figured out how to do a kind of genetic fingerprinting, as he called it, based on DNA molecules. At the request of the police, Jeffreys worked up DNA profiles from both victims. They matched each other exactly, confirming everyone's worst fears—the same person killed both girls. But the more immediate shocker was how the profiles were clearly not a match with the primary suspect.

In an unusually bold move, police requested all males in the area between the ages of 17 and 34 to submit blood samples for DNA testing. Obviously, anyone who refused would become a lead for further investigation. After a few months of this process, a local bakery employee overheard a fellow employee mentioning he offered up a blood sample on someone else's behalf, which prompted her to inform the police. The boy who took the surrogate

test quickly revealed who had asked him to do the test, a man who immediately confessed to both killings, which were confirmed by DNA evidence. The world of criminal investigations would never be the same. But only if you could get investigators to do the DNA testing in the first place.

Nels had started pushing for DNA testing in the early 1990s. He was convinced the swab taken by Mahany back in 1986 held the key to identifying his daughter's murder. He even offered to pay for the testing himself. The detective he met with refused and told the Rasmussens to move on with their lives. Nels felt like asking the detective if he had any children who had been murdered. *Move on with my life? Not on your life. I'm going to keep pushing until I find out who killed my daughter.*

What Nels didn't know was how the LAPD and District Attorney's office got together to form a Cold Case Homicide Unit in the early 2000s. The new unit wasted no time in starting to work through the backlog of cases it deemed as potentially solvable due to the forensic evidence available for DNA testing. Sherri Rasmussen was

among the list of 1,400 cases to work on. It wouldn't be until late 2004 when the first test would be performed by criminalist Jennifer Butterworth. She tested the swab and came up with two DNA profiles, one matching the victim and the other presumably belonging to the killer. She ran it through the FBI database but came up with no matches. What she did notice, however, and which seemed odd to her given what little she knew about the case, was the gender clearly identified in the profile—female. The killer was not a man as police has assumed all those years. Her report was submitted to the cold-case unit in February 2005.

A NEW LOOK AT OLD EVIDENCE

The report didn't do much for the cold-case unit without any clear suspect to give the whole thing context. The case file ended up back on the shelf for several more years and was eventually sent back to the Van Nuys Division from which it had originated. In February 2009, Van Nuys detectives Pete Barba and Jim Nuttall were looking for a cold case to solve, and here it was. What immediately struck both detectives was the DNA report identifying the assailant as female, which was clearly at

odds with the original theories about the case.

When Nuttall and Barba went back through the entire case with this new information in mind, they came up with five potential female suspects, including Stephanie Lazarus. Both detectives were stunned at the thought of a police officer potentially being involved. As a testament to the enduring conflict of interest whenever police investigate their own, Lazarus was listed as suspect number five, meaning the least likely suspect of all.

Three of the five were quickly eliminated from the list for lack of sufficient motivation, leaving just two, Lazarus and a fellow nurse with whom Rasmussen sometimes argued. She was also eliminated through DNA testing of a surreptitiously collected sample. Nuttall and Barba had no choice but to fully investigate Lazarus, but they were careful to do so in total secrecy as to prevent any word getting back to her about being a suspect. It was hard for them to even engage in this part of the investigation. By this time, Lazarus was a hugely successful detective on the Art Theft Detail, with a golden reputation and spotless record. She was a highly unlikely suspect.

But the details just kept falling into place one by one. Back in the 1980s, most LAPD officers carried a .38 as

either a backup or off-duty gun—the same caliber of the weapon used to kill Rasmussen. Records showed Lazarus had one, but it was reported stolen 13 days after the murder. The murder weapon, if it was in fact her gun, would clearly not be part of the case moving forward. It was gone forever.

Nels was stunned when he got a call in 2009 from Nuttall and Barba. They wanted to know everything he knew about the relationship between Stephanie Lazarus and Sherri Rasmussen. Finally, here were detectives who could see what really happened years earlier. He told them everything he could think of about Stephanie Lazarus and her disturbing presence in his daughter's life.

Meanwhile, Nuttal and Barba knew they would have to eventually turn this case over to the Robbery-Homicide Division, an elite unit that handled the biggest cases, but they wanted to make sure it was as complete as possible, which meant getting a DNA sample from Lazarus on the sly. A surveillance unit was put on her trail, following Lazarus as she ran errands. When she discarded a cup and straw from which she had been drinking, they grabbed it from the trash. On May 29,

2009, the results came in. It was a match.

Nels was grateful and relieved to find out that Lazarus was arrested for murdering his daughter. Of course, the arrest was only the beginning of the long and arduous journey through the criminal justice system, and one that would not reach its conclusion until March 2012.

DISCARDED EVIDENCE

The fateful swab taken by Lloyd Mahany all those years ago in 1986 held the key to unlock the identity of Sherri Rasmussen's killer. It sat in its test tube in the back of a freezer at the coroner's office for more than 18 years before it was tested, but even then the results were ignored. The mysterious thing about evidence is this: It only matters when someone is willing to recognize its significance and follow up on its implications. It was another five years before fresh eyes were willing to look at the swab, put it all together, and make sense of it.

Lazarus was convicted of first-degree murder with a sentence of 27 years to life in prison. She will be eligible for parole in 2039.

Nels eventually learned that back in the early 1990s, when he was pushing for DNA testing of any forensic

evidence related to the case, a detective named Phil Morrill went to the coroner's office and signed out all the Rasmussen evidence being held there. Apparently it was the routine transfer of evidence to the LAPD; however the evidence couldn't be found in the LAPD files—a clear indication that it was perhaps intentionally "lost." Fortunately, Detective Morrill missed a piece of evidence. It was shoved way back in the freezer and was overlooked. The piece of evidence he missed was the fateful swab from the bite mark. As chance would have it, this one bit of remaining evidence was enough to solve the case.

CHANCE

This whole morass left Nels with the disturbing prospect that much of the criminal justice system comes down to chance. Since when should justice in a homicide case come down to the mere chance of evidence being properly preserved? Why should justice hinge on the chance occurrence of a botched attempt to do away with critical evidence, and which might lead to blame for a crime being placed squarely on a police officer?

Nels also learned that Jennifer Francis (she was

Jennifer Butterworth when she first tested the swab back in 2004) was actively redirected away from her own suggestion that Lazarus be looked at more closely as a potential suspect. She particularly noted how the case file mentioned a "third-party female" having allegedly harassed the victim at her job and residence before the murder. Her supervisor at the time, however, responded by saying, "Oh, you mean the LAPD detective," and went on to say she was obviously not part of this. Nearly 25 years later, he found out she was.

CAMERON WILLINGHAM

Cameron Todd Willingham was executed in 2004 for the arson murder of his three young daughters in Corsicana, Texas. On December 23, 1991 Willingham's house caught fire, killing his one-year-old twins, Karmon and Kameron, as well as his two-year-old daughter, Amber. His wife, Stacy, was at work at her brother's bar, the only source of income for the family because Willingham was an unemployed mechanic.

Fire investigators found clear evidence of a liquid accelerant. The fire had been intentionally set, with the accelerant clearly poured in the twins' bedroom (even

under their bed), out in the hallway outside the room, and all the way to the front door. As the only person besides the children known to be present in the house at the time the fire started, Willingham became the prime suspect.

When questioned, everything Willingham said about the fire simply didn't match up to the evidence collected by the fire investigators. Willingham wondered if a space heater in the twins' room could have started the fire, but investigators noted the switch was in the off position when they investigated four days after the fire. Given the burn patterns on the floor, there was no way Willingham could have been running up and down the hallway in his bare feet without them being severely burned, and they were unscathed. He was soon arrested and put in jail.

It's true that Willingham came from a tough background. He drank too much, beat his wife occasionally, and had committed a number of small crimes. Somehow, assistant prosecutor John Jackson blew that up and painted Willingham as a sociopath who was more concerned about drinking beer and throwing darts than being a father to three little girls. Although personally opposed to the death penalty, Jackson's

District Attorney boss insisted the crime was heinous enough to justify and he eventually came to agree.

When another inmate informed authorities how Willingham had told him about squirting lighter fluid around and starting a fire, prosecutors were confident they had an airtight case. Several of Stacy's relatives, however, still wanted to avoid the spectacle of a trial, even though they all agreed he was guilty. Even Willingham's defense attorneys were convinced of his guilt, which is why they were surprised when Jackson offered a deal. If Willingham pleaded guilty, the state would recommend a life sentence instead of the death penalty. They told Willingham he should accept the deal, but he refused. His parents tried to convince him as well, but he remained resolute. He would not plead guilty to something he didn't do.

During the trial, many witnesses who were on hand during the fire testified how they thought Willingham seemed too "in control" of what was happening, as if he were playing a staged part. In addition, there were the more than twenty different indicators of arson presented by the fire investigators. The trial lasted only two days, and the jury barely deliberated for an hour

before returning a unanimous verdict of guilty.

Elizabeth Gilbert was the only person who, seven years later, bothered to get to know Willingham. A friend of hers who worked for a group opposed to the death penalty persuaded her to become a pen pal with an inmate on death row. After corresponding with him, she decided to visit, and after several visits she decided to take a look at the trial records. What she saw there were lots of contradictions. As a third party approaching this information for the first time, it was clear Willingham *was* trying to save his babies, and it was only after police started speaking about him as the likely murderer/arsonist when suddenly witnesses started spouting more accusatory testimony. These were people who in their initial statements to authorities described Willingham as hysterical and devastated by what was unfolding before him, and how he had to be physically restrained several times to prevent him from trying to go back in the house to save his babies.

It's a well-known fact how witness' testimonies tend to change as they are given new information. When all the authorities are talking about how guilty he is, suddenly everyone starts to subtly go along with it, changing what

they remember to fit the new story.

Gilbert continued to visit and talk to Willingham about the fire. He continued to maintain he was innocent. In fact, unlike the picture the prosecutors painted, in the months before the fire he had really settled down and was no longer the hoodlum they made him out to be. As Gilbert began talking to various people involved in the case, she found many who were still convinced he was a killer, but probably just as many who had serious doubts that he was capable of such a horrible crime. Among those was his former wife, Stacy, who had divorced him after he was put on death row. When Gilbert sat down with her over coffee, Stacy particularly mentioned the space heater would surely have been on during a cool winter morning, a part of the fire investigators' testimony striking her as inaccurate. Two-year-old Amber had more than once been caught putting things too close to the space heater, and Stacy always wondered if the toddler had possibly put something too near or in it.

Gilbert also found it interesting how Jackson relied on two "expert" witnesses, a psychologist and a forensic psychiatrist, both of whom actively characterized Willingham as an incurable sociopath, even though

neither one had ever met or evaluated Willingham.

And then there was the damning testimony of inmate Johnny Webb, who said Willingham confessed to setting the fire. Webb claims to have had this conversation through the food slot of Willingham's cell, which would be right next to the speaker system through which corrections personnel listen to inmate conversations. Would Willingham have been stupid enough to have such a conversation where it could be overheard? Webb also said that Willingham told him Stacy had hurt one of the babies and the fire was meant to cover up the crime, but autopsies revealed no trauma to any of the children beyond burns. They all died of smoke inhalation. And since when is testimony from inmates looking for deals to reduce their sentences reliable? Studies have shown that jailhouse and police informants who lie are the leading cause of wrongful convictions! And there was another inmate who was prepared to testify that Webb spoke of getting his time reduced for his testimony, but this testimony was ruled inadmissible as mere hearsay. Perhaps not surprisingly, Jackson did get Webb out early on parole. Even more surprising, however, is that in March 2000, a few months after Gilbert spoke with

Webb, he sent Jackson a Motion to Recant Testimony, claiming Willingham was innocent of all charges. Willingham's lawyers were never informed of this, and Webb soon thereafter recanted his recantation.

Gilbert eventually came to the conclusion Willingham might very well be innocent, but his original defense lawyers were of no help. Even a new court-appointed attorney tried but simply didn't have the resources to do much of anything. Willingham was reaching the end of his options for legal redress. In December 2003, the date of his execution was pronounced for February 17, 2004. His last chance was to seek clemency from then-governor Rick Perry.

This was when Gilbert found out about Dr. Gerald Hurst, an acclaimed scientist and fire investigator. Hurst had been speaking out openly about the poor qualifications of most fire investigators, many of whom have only a high school diploma and a 40-hour training course with a written exam. Most of what was passing for fire investigation was not based on anything close to science. And without science, the fire investigation, in his view, was little more than a witch-hunt.

With only a few weeks left before the execution

date, Hurst agreed to look over all the arson evidence. He found it extremely wanting, full of inaccuracies and misguided conclusions. In short, they were simply wrong. But not just a few of them were wrong; essentially every conclusion they reached, every indicator of arson they came up with, were all easily refutable by science, demonstrations, and key fire investigation case studies such as the Lime Street experiment. *All of them*. Some were no better than old wives' tales, and certainly not something you would want to rely on when determining whether a man will live or die.

Willingham's feet were unscathed because the fire hadn't yet reach the point of "flashover," which would cause it to quickly spread from the twins' rooms down the hallway. Hurst realized a man who lost his three children, not to mention everything else in his life by sitting in prison for 12 years, was about to be executed because of what he called "junk science."

The Board of Pardons and Paroles denied Willingham's request for clemency. He died by lethal injection at 6:20 PM.

Later in 2004, three top expert fire investigators reviewed the evidence and concurred with Hurst. Every

single original indicator of arson was scientifically proven invalid. In 2005, a Texas commission was investigating cases of misconduct and error in forensic evidence. Fire scientist Craig Beyler was hired to review Willingham's case. He was appalled. There was no science to back up any of their conclusions, and plenty of science to contradict their theories.

It is sad but not surprising to find out how Jackson, the prosecutor in the case, was formally accused of misconduct by the State Bar of Texas. He obstructed justice by hiding evidence favorable to Willingham, and also made false statements. The accusations begin with his repeated interventions on behalf of Johnny Webb in exchange for his damaging testimony about Willingham confessing to him. Those interventions also included threatening Webb with additional time if he didn't cooperate. There's even talk that Webb received thousands of dollars of pay-off money as well.

The Willingham case continues to haunt Nels. It's one thing to work for years to bring a person to justice who you were sure all along murdered your daughter, but it's another thing entirely to put a man to death for a crime he didn't commit. It shouldn't happen, but it can

and does. Nels is less obsessed with such cases these days, but the mystery of evidence persists.

CHAPTER SEVEN

WHY SCOTT DAVIS DESERVES A NEW TRIAL

This chapter presents a detailed review of the primary reasons warranting a new trial for Scott Davis:

- False assertions of incorrect or immaterial facts not supported by the record.
- Ignoring material facts about due process violations related to misconduct by the State.
- Lost evidence and the bad faith of the state.
- Use of false evidence.
- Withholding of exculpatory evidence.
- Ineffective trial and appellate counsel.

The above legal justifications for a new trial are all illustrated through the following three primary facets of the case:

- The police interviews and recordings.
- The fingerprints from the victim's car.
- The mishandling of other evidence by the state.

By examining each of the above within a legal framework, it becomes abundantly clear a new trial must be granted to a man who has already spent nearly 10 years in prison for a crime he did not commit.

POLICE INTERVIEWS AND RECORDINGS

Detective Rick Chambers testified that the tape recorder used to record the interviews of Davis at the APD's homicide offices was "just a basic cassette recorder." The tape admitted as evidence during the trial, and which the prosecution relied upon heavily, was a microcassette and not a standard cassette. This was an initial indication something was amiss. Had there been *two* different recording devices in use? Davis himself was not aware of a second recording device, but

it's easy enough to conceal a small recorder that uses microcassettes.

INEFFECTIVE ASSISTANCE COUNSEL: FAILURE TO ANALYZE TAPE

From the beginning, Davis has claimed the recording was stopped and started several times, and it was during these pauses in recording that Chambers repeatedly threatened Davis, especially with the death penalty. Davis repeatedly made this claim to his own lawyers, asking for an expert analysis of the recording to determine its validity. His lawyers never complied with this request, which is the source of the most serious claim of ineffective assistance counsel (IAC). In spite of this clearly ineffective representation, in various post-trial proceedings, the court claims Davis did not inform anyone of the presence of a second recording device, which is somehow construed to be grounds to decline any requests made on that basis. This statement is true, but only because *Davis was unaware of it at the time*. It was only in subsequent analysis of the tape by an expert such a discovery could be revealed. The defense counsel had clearly asked for any and all recordings of interviews

with Davis be made available to them, but no second tape was ever mentioned or produced.

The court acted as if Davis never adequately requested a review of the tape in question. The court record itself, however, contains a different story. Bruce Morris, one of the lead defense attorneys, initially stated it was Davis himself who made the decision *not* to analyze the tape. However, Morris later signed an affidavit withdrawing his testimony because Davis had in fact requested the tape be analyzed by an expert. In addition, two of his other attorneys testified about his request for analysis, and there is also a letter from Davis himself to his trial attorneys requesting an analysis of the tape. One of the attorneys was Don Samuel. During the habeas hearings, Samuel was questioned about the claims Davis had made about the recording and had this to say:

"I cannot remember details other than that subject matter was discussed with some—I don't want—I don't want to say with some frequency, but he was adamant that the tape was started and stopped, and perhaps that the transcript did not accurately reflect what was actually said. And I don't mean that the transcript and tape aren't identical, but there were issues, I guess is the

best way I can describe it."

In spite of these claims, Samuel never listened to the tape. Yet, when questioned as to why Davis wanted the tape analyzed, he said, "Because it was either altered or repeatedly started and stopped—stopped and started."

Even attorney Morris admits how strongly Davis claimed the tape was stopped and started, as clearly shown in the following exchange during the habeas hearings:

Mr. Morris:	*"Mr. Davis was emphatic, I don't remember how many times, Mr. Davis was emphatic that Detective Chambers stopped the tape and threatened him while the tape was not on."*
Habeas Counsel:	*"And Mr. Davis told you that prior to the trial?"*
Mr. Morris:	*"Absolutely."*
Habeas Counsel:	*"He told you that back in 1996, correct?"*
Mr. Morris:	*"Yes."*
Habeas Counsel:	*"So if Mr. Davis was correct, that would have been a pretty crucial thing*

to prove, correct? Is that right?"

Mr. Morris: *"Yes. I think we did prove it."*

This is the crux of the ineffective counsel claim. How could Morris think the defense counsel had proven the police misconduct around the tape recordings without ever having the tape analyzed by a forensic expert? It's unthinkable. The only way to prove the tape lacked continuity would be through expert testimony, which was never sought by the defense. Had this analysis been completed prior to trial, the evidence used against Davis would clearly have been impeached. Failing to present impeachment evidence is ineffective assistance of counsel.

Here is how the habeas attorney summed up the situation:

"And I want to point back to Don Samuel's testimony because Don not only is brave enough to get up on the stand and say, you know, I screwed up. Scott Davis did ask me to have the tape analyzed and I just didn't do it.

He also says something that is really, really important, which is—and I want to quote him—that if the tape had been altered, it would be, quote, the very definition of bad faith. I like that. It is not acceptable for the police to erase parts of the evidence and say here's an authentic copy."

DUE PROCESS VIOLATIONS REGARDING EVIDENCE: THE TAPE(S)

The above offers a smooth transition from the grounds for a new trial based on the aforementioned IAC claims, but also because of *due process violations* around falsified evidence (the tape admitted as evidence in the trial) and withheld evidence (the missing second tape). When Davis was finally able to have the tape in question analyzed, the results were clear. It was not authentic and did not represent the actual content of the interviews.

Forensic audio expert James A. Griffin conducted the analysis. With nineteen years of audio engineering expertise at the time of the analysis, he had testified in approximately thirty different cases, sometimes for the government and sometimes for defense counsel as to the analysis and authentication of audio recordings. He used a physical microscope to look at the tape as well as

peer-accepted audio software to analyze a digital copy. Griffin was admitted to the court as a "tape expert in the area of forensic audio analysis" without any objection whatsoever.

Because the original recording was claimed to have been made on a kind of dictation device, some pauses occur automatically, with recording beginning anew with voice activation. However, Griffin's analysis revealed multiple stops, which are clearly distinguishable from such automatic pauses because a button must be pressed to cause a full stop, and another button must be pressed to resume recording. Griffin found not only multiple stops, but also erasures and over-recordings. In fact, evidence for there being a second recording is present in the tape analyzed as follows:

Audio Expert Griffin:	*"At 17:21 I discovered a stop, and immediately after the tape was resumed, the detective in the room said, 'Turn the tape over.'"*
Habeas Attorney:	*"What did that mean to you?"*
Audio Expert Griffin:	*"It suggested that there was another tape recorder being used. And following the detective's words "Turn the tape*

	over," there was some fumbling, handling, mechanical noise which was consistent with the operation of the tape recorder."
Habeas Attorney:	*"What does the term 'authenticity' mean?"*
Audio Expert Griffin:	*"A tape is authentic if it is shown to be original, continuous, and unaltered."*
Habeas Attorney:	*"Is this tape authentic?"*
Audio Expert Griffin:	*"No."*
Habeas Attorney:	*"Is it continuous?"*
Audio Expert Griffin:	*"No."*
Habeas Attorney:	*"Has the tape been altered?"*
Audio Expert Griffin:	*"Yes, it has."*

There it is—indisputable, scientific expert evidence that the tape admitted as evidence by the prosecution is not authentic or continuous and also has been altered. If one expert's opinion isn't enough, another also weighed in. Although Henry Howard was not permitted to give a separate expert opinion, his experienced conclusion is consistent with Griffin's expert conclusion. Howard testified the following:

"The interview would be going along, they would say, 'I'm going to stop the tape now,' either to take a break, or at one point they stopped the tape to turn it over, and you actually hear the button pushed to stop the other recording, you heard the tape removed, turned over, inserted, and then that recorder put back into the record mode."

In other words, you're hearing one recording device being changed and those sounds are being recorded on a *second* device—another affirmation of two recordings and two tapes—and it is the latter tape that was admitted into evidence at trial. Griffin concluded there were two stops in addition to the switching of the tape, two significant deletions or erase-overs on the Scott Davis portion of the tape but none on other portions of the tape unrelated to the Davis case. This expert opinion clearly proves the tape should never have been admitted into evidence. It should have been inadmissible at trial due to being altered and not accurately representative of the actual content of the interviews.

The second tape, the one heard being manipulated on the evidence tape, has never been produced and is

considered missing. The one admitted into evidence shouldn't have been, for it fails to meet all legal requirements under state law for admissibility. Instead, the court chose to focus on what could or could not be proven as having taken place when the recording was stopped, which, of course, is a fool's errand because it wasn't recorded.

Georgia state law is very clear on the criteria that must be met for an audiotape to be admissible as evidence. Any such recordings must meet the following standards:

- The mechanical device was capable of recording a statement.
- The operator was competent.
- The recording is authentic and correct.
- No changes, additions, or deletions were made.
- The manner of preservation.
- The identity of the speakers.
- The statement was not elicited through duress.

The tape used so heavily by the prosecution clearly fails to meet the third and fourth standards, as was proven by expert scientific analysis and testimony.

The tape formed a central and very damaging part of the prosecution's strategy in the trial, especially in its very prejudiced closing statements, where the tape was either quoted or played *more than thirty times*. In every case, it was used in such a way to accuse Davis of lying to police, whether about his location at the time of the crimes or knowing how the victim died. All these claims by the prosecution are based on a tape recording which was tampered with, altered, and does not fairly or accurately represent the interviews. Thus, a piece of evidence which should have been inadmissible was the foundation of the State's prejudicial closing argument and the conviction of the defendant.

The clarity with which the tape has been shown to be faulty serves to bring into high relief the perjured testimony of Detective Chambers. Defense attorneys repeatedly questioned Chambers as to whether the tape was altered and he clearly denied the tape was altered. When the assistant district attorney asked him if it had been altered in any way, Chambers clearly responded, "No." Simply put, Chambers lied. Expert scientific proof shows how the tape used at trial against Davis was altered, not continuous, and unauthentic.

DUE PROCESS VIOLATIONS REGARDING POLICE INTERVIEWS: MIRANDA RIGHTS AND THREATS

Misconduct on the part of Detective Chambers did not stop at tape tampering and then lying about it. In fact, his testimony throughout the case regarding the interviews repeatedly and substantially changed each time he was confronted with his inconsistencies and contradictions. Attorneys for Davis have challenged the legality of the police interviews. Police interviewing included a written statement (signed by Davis around 3:45 AM), a non-taped interview, and a taped interview. Chambers originally stated Davis was given his Miranda rights around 5:00 AM, and it was after waiving his Miranda rights when both the pre-tape and taped interviews took place. It was during the 3:45-5:00 AM timeframe when the pre-tape interview took place, which means it was before Davis was given his Miranda rights. The 5:00 AM administration of Miranda rights was done in written format, which is standard practice when in an office setting (APD Homicide office). When confronted with the contradiction, Chambers completely changed his testimony, saying he had administered an oral Miranda

warning. In all his previous appearances and testimony, both pre-trial and at trial, Chambers never mentioned an oral Miranda warning, and only did so when it was clear he had violated due process rights by interrogating Davis without giving him his Miranda rights. He was trying to cover his tracks.

Here are two clear instances of Detective Chambers, the lead investigator and star witness of the prosecution, blatantly lying to the court—first about there being only a single and authentic recording of the interviews, and second about giving Davis his Miranda rights. Both sets of falsities should have been something the jury heard about. The tape's alterations and the State's deception qualify as due process violations while the lack of expert analysis of the tape by defense attorneys qualifies as ineffective assistance counsel.

The importance of the above issues cannot be overstated. If the jury had known about the extent of deception and perjury concerning the interviews and recordings, it would have thrown the entirety of Detective Chambers' testimony into question. It was Detective Chambers' lies and deceptions as the chief investigator which resulted in a conviction. It was the

lead homicide detective himself who altered evidence, hid a second tape, and then repeatedly committed perjury about it in court.

Oddly enough, the court seemed to think the testimony of Detective Chambers was somehow worth more weight than the forensic audio expert's opinion, merely because he is a law enforcement officer. Unfortunately, Chambers' testimony was full of blatant lies. Moreover, Chambers is certainly not an expert on forensic tape analysis. His false statement that the tape was not altered and that there was no second tape has nothing to do with science—it was self-serving and false.

FINGERPRINTS FROM THE VICTIM'S CAR

Two or three days before Coffin was murdered, his home was burglarized and his car (a Porsche) was stolen. It was later found burning in Dekalb County on Tuesday, December 10, 1996. Presumably, whoever committed these crimes might also be the person who murdered Coffin. Clearly, this makes any fingerprint evidence related to the burning car very important to the Davis case. As it turns out, there were in fact fingerprints found on the burning car. They were clearly not a match

to Davis and were set aside. The fact those prints did not belong to Davis means they are exculpatory evidence. Whoever those fingerprints belong to might very well have been Coffin's murderer. Unfortunately, we'll never know whose prints they are, because the Georgia Bureau of Investigation destroyed the prints. You might wonder why such evidence, clearly and critically important to an open homicide case, would be destroyed. The only answer making any sense at all is this: Because the evidence might have proved Davis was innocent.

DUE PROCESS VIOLATIONS REGARDING DESTROYED EXCULPATORY EVIDENCE: THE FINGERPRINTS

It's important to understand that these fingerprints were never run through any kind of database to find out to whom they belonged. In essence, the State had no incentive to do so. As far as the prosecutors were concerned, they had their man (Davis), and since the prints clearly weren't his, why bother? In fact, it would probably be better for the prosecution if those prints didn't even exist. It is very convenient how the fingerprint cards were destroyed sometime in 2005 during the lead-up to the indictment and trial of Davis.

For the prints to be checked through an Automated Fingerprint Identification System (AFIS), they have to be of a certain minimum quality, normally referred to as AFIS-quality prints. Standard operating procedures (SOP) at the GBI dictated that any latent prints that were not AFIS-quality had to be identified as such in all official GBI reports. This non-AFIS quality designation was not given to the prints, and GBI Latent Print Examiner Al Pryor admitted this in the habeas hearings. Thus, the prints *could* have been run through an AFIS search. If fact, the prints *should* have been run through an AFIS search, but they never were. This in and of itself was a violation of a number of GBI SOPs.

All unidentified AFIS quality prints are supposed to go to the Unsolved Latent Print File and run through a database check on a regular basis. For *nine years* the State had these prints and didn't run them through *any* AFIS checks as SOP mandates.

As the state prepared its evidence for the grand jury hearing, hoping for an indictment, it occurred to them that if latent prints from the burned Porsche turned out to be the victim's own fingerprints, then they couldn't serve any kind of exculpatory role pointing to some

other suspect than Davis. In early 2005, Atlanta Police Investigator Carter Jackson was trying to do just that. He was trying to compare the crime scene latent prints against the victim's prints he was hoping to obtain from a letter the victim had written. Jackson was unsuccessful in this attempt, but indicated they still had the latent crime scene prints when he did this.

The most egregious thing of all is that the prints were *intentionally destroyed*. This flew in the face of all GBI SOPs in force at the time. The SOP manuals clearly state how crime prints are to be preserved due to their significance to criminal cases because "latent prints are the most dynamic physical evidence available to law enforcement agencies. The preservation, analysis, and documentation of latent fingerprints provide invaluable support to criminal investigations." Another statute-mandated SOP states that "...governmental entities in possession of any physical evidence in a criminal case, including, but not limited to, a law enforcement agency or a prosecuting attorney, shall maintain any physical evidence collected at the time of the crime that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the

perpetrator of the crime..." This would obviously include fingerprints as both biological material and of course being related to the identity of a perpetrator.

It would be one thing if such evidence were routinely destroyed because SOPs mandated such destruction. But the exact opposite is the case here. All the SOPs are clear—these prints should have been preserved and regularly put through database checks. Instead, they were intentionally destroyed just before the trial took place. Because the act of destroying the fingerprint cards was in clear violation of all related SOPs, this meets the bad faith criterion needed to show that Davis' due process rights were violated and therefore he deserves a new trial. The state intentionally destroyed evidence which might exonerate the man prosecutors wanted to be sure went to jail for the crime, whether he committed it or not. Because the prints clearly did not belong to Davis, and because they also couldn't be matched to the victim, they became a liability to the State, which then made sure they disappeared for good.

To compound the misconduct involved in all this, Al Pryor and the Fulton County ADA also lied in testimony at trial. They testified how the latent prints just

disappeared sometime in the late 1990s, when in fact those same prints were still being handled right up into 2005 when investigator Jackson was trying to match them to the murder victim. It was after this when they were destroyed. All of this adds up to bad faith. Pryor later admitted in the state habeas that he intentionally destroyed what were AFIS-quality prints stored in the Latent Print Case File allegedly due to age, even though this is directly against SOP, not to mention common sense, in an open homicide. The record establishes that he knew their apparent exculpatory value and then intentionally destroyed them when the regulations, which he knew governed his conduct, prohibited that. Under any view of the law, that is bad faith.

MISHANDLING OF OTHER EVIDENCE BY THE STATE

It might be one thing if the fingerprints from the victim's car were the only piece of missing evidence in this homicide case. It is another thing entirely when it is a long list of more than 70 different pieces of evidence in question. They're just gone, mysteriously vanished. Is it merely coincidental how many of those items suddenly went missing or were "lost" around the time an

indictment was handed down and pre-trial hearings were to take place? What if people lied about what happened to the evidence? The role of mishandled evidence is a crucial piece of the puzzle leading to a new trial.

INEFFECTIVE ASSISTANCE COUNSEL: FAILURE TO ADEQUATELY INVESTIGATE LOST EVIDENCE

Davis' attorneys were ineffective in how they handled the missing and lost evidence aspects of the case. Defense attorney Morris testified that he "had the investigator look into it," meaning the lost evidence, and spoke to individuals who had a hand in it. Unfortunately, the people he identified are not the people who had anything to do with the lost evidence. He consulted with the *property* room rather than the *evidence* room at the Atlanta police Department (APD), which was clearly irrelevant.

In fact, Morris never went to see any evidence room, never spoke to any experts on the lost evidence, and never spoke to any person running the evidence rooms or discussed their conditions, which had a direct affect on what was later discovered. Morris never investigated the *chain of custody* of the evidence. He was deceived

about where some of the evidence might be based on a false affidavit from Atlanta Fire Department employee Linda Tolbert concerning what happened to 35 pieces of the most critical and material evidence in the case. This evidence could provide DNA proof of Davis' innocence. There simply is no substitute for it. The fact it is gone forever is inexcusable. In fact, because the disappearance of the evidence coincides with ongoing intentional violations of SOPs, it shows bad faith on the part of the State, which results in a violation of Davis' due process rights. However, the defense attorneys were completely ineffective in proving the bad faith of the State.

His attorneys relied upon a "gross negligence" argument in their due process violation claim, but legal precedents clearly indicate gross negligence isn't enough for a due process violation. Instead, bad faith must be shown. The attorneys called no witnesses who handled the evidence besides Detective Chambers, but he wasn't responsible for the custody or ongoing care of the evidence (and as previously established, he had a tendency to lie in his testimony related to this case). Nor did they present evidence on the *hundreds* of

intentionally violated SOPs that are sufficient to meet the bad faith criterion. The attorneys mentioned only one violated SOP, which was clearly not enough to show bad faith. When the number of SOP violations was revealed to be in excess of 300, it's clear that Davis has a legitimate claim of ineffective assistance counsel.

Even the Georgia Supreme Court (GASC) acknowledges the attorneys' deficiencies in this regard, highlighting how in the crucial pre-trial hearings setting the stage for the trial, pre-trial counsel only challenged a dozen of the more than 70 pieces of missing evidence. During the trial, when trial counsel tried to object to the prosecution's use of missing and lost pieces of evidence, such objections went nowhere because no additional evidence could be presented due to the failure to raise challenges of the evidence during pre-trial hearings. When a state's Supreme Court points out deficiencies in defense attorneys, it clearly bolsters any IAC claim. To attempt to prove bad faith without examining witnesses on their conduct and showing the violations from their actions and violations of SOPs is clearly ineffective assistance counsel. It's almost as if the defense attorneys

thought the bad faith was so obvious they didn't really have to do anything to prove it, but this is what is expected by judges in the courts.

DUE PROCESS VIOLATIONS REGARDING "LOST" EVIDENCE

In the most recent court filing on behalf of Davis by his latest attorney, Marcia Shein, she documents the following (note that Davis is referred to as the "Petitioner"):

"It should be noted that all the evidence at issue here was preserved from 1996 until 2005 just prior to the Petitioner's indictment. The massive amount of evidence lost occurred conveniently just before trial allowing the prosecution to use the evidence tested but unavailable to Petitioner during the pre-trial and trial process."

How can so much evidence just disappear without a trace? It's an important question to answer, because in order to prove Davis' due process rights were violated, bad faith must be shown on the part of the State, as was mentioned in the previous section. The State's bad

faith is clearly shown through an affidavit from a state employee who admitted her affidavit concerning what happened to missing evidence was a lie, as well as the huge number of ongoing, intentional SOP violations in no fewer than five different state agencies coinciding with the missing, lost, or intentionally destroyed evidence.

It's critical to realize that at least half of this evidence being referred to was ruled to be *material*, meaning it's important; it matters. It wasn't just a bunch of inconsequential stuff. When exculpatory evidence is lost and destroyed because of SOP violations, bad faith is shown. This is especially so when there is no comparable evidence to be obtained by reasonably available means. It's interesting to note the case setting the legal precedent in this area involved just *one* piece of missing evidence. The fact that this case is dealing with more than 70 pieces of missing evidence in and of itself makes the task of finding so much comparable evidence impossible.

When it comes down to specific crucial items, the problem becomes even more apparent. The latent fingerprints from the burned car are irreplaceable.

Items in the burned car, such as the gas cans or the bag claimed to be similar to one owned by Davis, are also irreplaceable. The disappearance of the entire burned-out Porsche shows the extent of the mishandled evidence. How do you lose an entire car if not intentionally? Remember how Davis was attacked twice in the days leading up to the murder—there was torn clothing from the assailant collected from the fence around Davis' home, but of course this evidence has disappeared and the State can therefore rest easy in its claim about Davis fabricating the attacks. Both the alleged murder weapon as well as the bullet itself, which killed the victim and all the ballistic evidence, has vanished without a trace.

Granted it can't be proved beyond a reasonable doubt that all 70+ pieces of missing evidence were *intentionally* destroyed in direct violation of SOPs, but this certainly applies to at least a few key items, including the latent fingerprints from the Porsche, the gas can, the shotgun, and all the Dekalb evidence.

As another case (Nebraska Beef v. US, 398 F.3d 1080 (8th Cir. 2005)) noted, "Several instances might merely be sloppy but a wholesale failure to follow customary

procedures equals bad faith." More than 300 specific SOP violations clearly add up to "wholesale failure." This is further supported by the testimony of Cecil Mann, a former APD evidence room custodian. He noted how the condition of the evidence room was deplorable, and that staff knew SOPs were repeatedly violated but did nothing about it. Mann indicated that when he arrived, there was a culture of wholesale SOP violations, no accountability, and evidence went missing on a regular basis. He even supplied photos he took of the APD evidence room, showing how it looked like a trash dump. Mann subsequently reengineered the whole operation, which was what he was specifically hired to do (the APD thereby implicitly admitting it was a mess). Evidence room expert Robert Doran testified at the habeas hearing how the state of the APD evidence room in 2005 and previous years was "one of the worst messes I have ever seen." The deficiencies he noted included the following: insufficient documentation to maintain chain of custody; evidence was maintained in a manner inconsistent with commonly accepted professional law enforcement standards; the disposal of evidence did not comport with commonly accepted professional law

enforcement standards; supervision of the handling and disposition of the evidence did not comport with professional law enforcement standards; and there was a pattern of practice by the APD, GBI, DFD, AFD, and Fulton County District Attorney's Office of failing to follow professional law enforcement standards. That all adds up to bad faith.

"When an agency in charge of the collection and preservation of evidence does not follow its own procedures enacted to protect an individual's Constitutional right to due process and as a result takes from a defendant the opportunity to challenge a criminal accusation or confront the evidence he is deprived of his Constitutional right to due process." – Shorts v. Bartholomew

The alleged murder weapon, the bullet that killed the victim, and all the ballistics testing evidence is among the missing evidence. This is important because the GBI ballistics expert who examined the weapon was Bernadette Davy, who was forced to resign after it was discovered that she falsified information on at least 13% of her ballistics reports. Did she lie about her tests in the Davis case? No one will ever know because it has all been lost. Her testimony played a role in convicting Davis, but

there will never be a chance to verify or refute it with a re-testing.

CHAPTER EIGHT

CORRECTING ERROR

Any system involving human touch will suffer human error. In American jurisprudence, error is not our greatest problem, however. Instead, it is the resistance to correct error. To prove this, one needs to look no further than the Jonathan Fleming case. Fleming's case, like *Davis v. The State*, highlights so clearly the epidemic of prosecutorial and law enforcement misconduct and errors. It also sheds light on the immunity with which stewards of the justice system operate. Even after admitting wrong, there is rarely if ever any consequence for ruining the life of an innocent man. Fleming was convicted of shooting and killing a man in Brooklyn in 1989, but there was only one problem—at the time of the shooting, Fleming was

at Disney World, yes, Disney World. So what happened that caused him to be accused, convicted and sentenced for the murder and then wrongfully imprisoned for nearly 25 years? The answer is simple.

Not only did Fleming have the plane tickets, receipts from purchase made in Florida at the time of the murder took place in Brooklyn, but he also had actual video of him in Orlando at the time. Employees at the hotel even witnessed him there, and at the time of his arrest he had the receipts in his pockets from Orlando showing the time and the place he was. All of his documentation did not matter. A woman said she saw him commit the murder and the rest was history. One may exclaim that something does not sound right, and it doesn't, however there is more. Authorities never gave his defense lawyer the irrefutable evidence showing Fleming was in Orlando at the time of the murder. They also never turned over a letter written by an Orlando police officer proving that those employees of a hotel in Orlando saw Fleming in Florida at the time of the murder in Brooklyn. This evidence was never presented in court because Fleming's defense attorney did not have access to it. New York City has agreed to pay Fleming $6.25

million as compensation for nearly 25 years of wrongful incarceration. Prison destroyed his life. What happened to the law enforcement officials who hid the evidence needed to exonerate Fleming? Absolutely nothing. The problem of correcting error extends even further. Those willing to correct human error have to return to the people who caused the problem in the first place and request their cooperation. This can create a vicious cycle of perspective against perspective, critique against critique, power against power. Those with influence often balk at the thought of admitting they've used their influence inappropriately. Consequently, bad verdicts are all too often allowed to stand, sometimes for decades.

Without an objective justice model to which one can appeal, the search for justice becomes as frustrating as the search for water in the Sahara Desert. Justice must not be a gift given to the lucky.

Human error spans the gamut from honest mistakes to police misconduct, prosecutorial misdealings, bribery, carelessness, and brazen criminal acts from those who stand guard of our criminal justice system. When one looks at the definition of justice this is what is written: "The maintenance or administration of

what is just, especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments." [25]

The operative word here is "just." Without understanding the nature of being "just," one can never argue one has not received justice. Famed French philosopher Emmanuel Levinas offers one of the most widely accepted explanations of the term *justice*. Levinas defines justice as respect for the *Other*. That is, the ability to see others as possessing what we possess in our best self. Implied in his definition is the needed requirement to grant the benefit of doubt to the stranger. Respect for the *other* says that even when finding a man walking out the back door of a store after hours with an unpaid for bag of goods, our society should hold to the proactive assumption of his innocence until a separate proving process requires we change our assumption because the obvious is too often wrong.

Back to the original question; what is meant by the statement "the justice system has dealt with us 'unjustly'"? Those who feel unjustly treated are saying

25 http://www.merriam-webster.com/dictionary/justice

their rights, not as citizens, but rights as human beings have been discounted. Additionally, they are saying that the other party standing in opposition to their claim of innocence has unfairly profited from this diminution of human value. This concept of discounting one's value is not a new concept at all. In fact, it was the original definition of justice.

HISTORICAL PERSPECTIVE

Researcher David Johnston, in his book *A Brief History of Justice*, provides valuable insight into the morphing of the concept of justice over centuries. Justice in the ancient world was a derivative of reciprocity. The Western world has for centuries changed this concept to mean something very different today. In the ancient world, justice was a kind governor of society. It was not meant to change societal order, but rather to reinforce it. Justice was a barometer of who you were, what possessions you owned, and the class into which you were born. In the ancient world, society was viewed as a terrain of mountain and deep valleys. Justice was used to balance out consequences from those living on the "mountain" and those living in the "valley." Now

here's the interesting part: If a family that was wealthy had a disagreement with another wealthy family, justice had little to do with the outcome of a case. Justice was dormant. It was understood that because both families were of similar plight, there was no balancing needed, no justice required because the two wealthy lives were already in equilibrium. However, if there was a dispute between persons of unequal social status, justice was used in a different manner.

The assumption of innocence and good will was always given in larger proportion to the person of higher status. The larger portion of punishment was given to the person of lower status. If this seems to be backwards, it is. The individuals with the least to lose bore the largest loss while the individual with the most was punished the least. This was justice in the ancient world. How much of that concept has survived and still exists in our justice system today? In the ancient world, justice was a judgment. Not a tool of honor, equality or respect, but a natural outgrowth of an aristocratic, hierarchical society.

The idea of justice as reciprocity is nuanced. The idea that those of high society receive more advantages from the system than individuals of low status still reigns. But

the West has attempted to move into a more utilitarian form of justice over the years. First, the West adhered to the idea of equality. The idea that all men were created equally with certain inalienable rights: life, liberty, and the pursuit of happiness. This concept was born from of a nation steeped in Christianity and the ideals found within its biblical belief system. So it makes sense now to revisit Emmanuel Levinas' concept of justice discussed earlier. Respect for the *other* is the outgrowth from changing ideals about justice from the ancient world to our world today. Respect for the *other* allows the poor and the rich man to enjoy the same benefits of honor. To look at each other as equal not because of what they have but because of what they are: human.

COLD AND EMOTIONLESS

How should the law be described? Cold and emotionless is a great start. When one repeats the phrase "the law says," one is really attempting to infuse reason and emotion into something that has neither. But since this is a country of laws, one is left with a tall challenge of achieving the feeling of justice through the unfeeling touch of the law. Justice has now been

established as respect for the *other*, so any decision for guilt or innocence must highlight the lack of bias in its deliberation. Laws are rules based on principles. These principles are positions society has determined are morally best for the whole. We believe it harmful to allow one person to walk up to another and forcefully take his or her belongings. This belief gave birth to laws against robbery, armed robbery, and extortion and so under the "rule of law" one can be imprisoned for violating this. It all seems simple and straightforward. Murkiness enters when one person receives a very different punishment or outcome for the same crime. What is the solution? The solution is a model that holds us accountable for our decisions. In the absence of such a model we must use, to the fullness of our ability, the appellate system to correct wrongs and reinforce proper court decisions. This too can be difficult, as manipulation of the facts remains a constant weak spot within our justice system.

CHAPTER NINE

LEGAL MERIT

It is hard to imagine any reasonable person coming to a conclusion other than Scott Davis deserves a new trial. This chapter focuses on the following legal claims for that new trial:

- Ineffective Assistance Counsel: Failure to Analyze Tape
- Due Process Violations Regarding Evidence: The Tape(s)
- Due Process Violations Regarding Police Interviews: Miranda Rights and Threats
- Due Process Violations Regarding Destroyed

Exculpatory Evidence: The Fingerprints

- Ineffective Assistance Counsel: Failure to Adequately Investigate Lost Evidence
- Due Process Violations Regarding "Lost" Evidence

Scott Davis is a victim of ineffective representation by his pre-trial, trial, and post-conviction defense attorneys. Scott Davis is also a victim of having his constitutional rights to due process being violated through a veritable tsunami of bad faith on the part of the State in the form of misconduct by all five state agencies involved in the investigation and trial. Scott Davis clearly deserves a new trial, just based on the above legal grounds. The reason Scott Davis truly deserves a new trial is because he is innocent, and there's a surprising amount of evidence in support of that claim.

IS SCOTT DAVIS AN INNOCENT MAN?

From prosecutorial misconduct to police misconduct, ineffective legal counsel to the coincidental disappearance of more than 70 critical pieces of evidence and the cover-up, the cards were stacked

against Davis from the very beginning. The entire investigation falls apart because of the massive bad faith and deception on the part the State with so many of its witnesses providing false and misleading testimony, including Linda Tolbert about lost evidence, Al Pryor about the latent prints, Detective Rick Chambers about Miranda rights and the recordings, and on goes the list. Had the jury known of all this bad faith and deception during the trial, it is doubtful Davis would have been found guilty. The state's case would have been thrown into such a negative light as to cause reasonable doubt in the mind of any juror.

The Davis defense attorneys inexplicably failed to prove the concept of bad faith on the part of the State. Note how the following five standards established in *United States v. Beckstead* apply to the Davis case:[26]

1. **The defendant believed the evidence was exculpatory**. Davis certainly felt the fingerprints were exculpatory. In fact, he believed all of the critical missing evidence was exculpatory as he repeatedly and adamantly maintained his innocence. He wanted the evidence examined and tested, but it

26 Court Of Appeals For The Tenth Circuit, Case No. 05-4178 D.C. NO. 2:04-CR-115-02-BSJ

all disappeared without a trace.

2. **The assertion the evidence was potentially exculpatory was supported by objective independent evidence.** The experts who appeared at and testified during the state habeas hearing clearly identified the potential exculpatory value of the lost evidence, and even the trial judge ruled the evidence was *material*, meaning it mattered.

3. **The timing of the destruction of the evidence.** Recall how all the evidence was kept for *nine years* but then just disappeared *right before trial*. The case had gone cold in 1997 and the trial was held in 2006. Most of the evidence disappeared in 2005.

4. **The importance of the evidence to the government's case.** The State used the evidence at trial and deemed it essential in the case against Davis. This included the alleged murder weapon and ballistic evidence, the gas cans, the Olympic bag, other weapons of the victim, fire debris, caller-id box, blood, fibers, and all of the other evidence listed in detail for the habeas hearings.

5. **Whether an innocent explanation existed for failing to preserve the evidence.** Based on

> all the evidence introduced in the state habeas hearings previously discussed, there is no innocent explanation. Lies and deceptions were perpetrated based on Tolbert's false affidavit and no explanation was given for what happened to those particular 35 pieces of evidence she lied about receiving. GBI latent print examiner Al Pryor lied about what happened to the prints at trial and then admitted he destroyed the prints against SOP and logic even though they were of AFIS quality. The more than 300 SOP violations and state of the APD evidence room has no innocent excuse. Alterations of the police interview tape and still withholding a 2nd tape are both crimes.

Is it mere coincidence that the state's most damning evidence was preserved, but all the potentially exculpatory evidence just disappeared in the months leading up to the trial? Again, had jurors known all of this, the integrity and fairness of the entire ten year old prosecution would have been tainted for any fair-minded person. "Even where individual judicial errors or prosecutorial misconduct may not be sufficient to warrant reversal alone, we may consider the cumulative

effects of errors to determine if the defendant has been denied a fair trial" (*United States v. Lopez,* 514 **U.S**. (1995)). "The cumulative effect of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible" (*United States v. Thomas,* 62 F.3d 1332 (11th Cir. 1995)).

In spite of all this, there is still the most important question of all: Is Scott Davis an innocent man? The short answer is *yes*. There's a preponderance of evidence to prove his innocence.

THE ENTIRE CASE AGAINST DAVIS WAS CIRCUMSTANTIAL

The importance of this point cannot be overstated. It consists of two important realizations:

There was *no forensic evidence* implicating Davis.

There was *no eyewitness* implicating him for any crime.

Reviewing the evidence of this case is important because it includes uncorroborated testimony from various individuals, which must be further considered

in light of the $300,000 reward promised to anyone who had information leading to a conviction in the case.

ALIBI FOR THE THEFT AND BURNING OF THE VICTIM'S PORSCHE

The prosecution made it sound like the person responsible for stealing and burning the victim's Porsche must also be the person who killed him. In addition to the latent prints found on the car not matching Davis at all, he also had an airtight alibi for the incident. Here's how this was described in the latest court filings in the case (Davis is referred to as "Petitioner"):

The Porsche was found burning in Dekalb County and reported by Ms. Betty Reynolds at 11:26 AM on Tuesday, 12/10/1996. She did not see the Petitioner present. The Petitioner's former Andersen Consulting co-worker Lee Spitalnick testified that he, along with one other person, met with the Petitioner that same morning in the Georgia-Pacific building in downtown Atlanta at 10:00 AM for about 15-30 minutes to discuss a work assignment. The Petitioner's demeanor was normal.

Subsequently, Spitalnick and the other consultant met again with the Petitioner "a little after 11:00 AM" for about 10-15 minutes to discuss a further project details. The Petitioner did not smell of smoke or gas. Private Investigator Buddy Jones testified that the timeframe it would take to travel directly between the Georgia Pacific building, in downtown Atlanta (Fulton County) where the Petitioner worked, and the location of the burned Porsche many miles away in Dekalb County made it impossible for the Petitioner to have had enough time to burn the Porsche. The round trip between the Georgia Pacific building and the location of the Porsche burning was at least one hour and six minutes. The timing along with the complicated logistics of getting the car to Dekalb, burning it and leaving the scene and so on make it impossible for the Petitioner to have burned the car. So the question is, who did? The only answer has to be, someone else. Had the GBI and the State followed SOP with AFIS and/or not destroyed the latent prints from the Porsche, this might be known.

Regarding the initial burglary of the victim's house and stealing of the victim's Porsche, the State couldn't even prove when the burglary occurred. The times are disputed, but the crime could have allegedly occurred

anywhere from 7:00 PM on December 7, 1996 to noon on December 8 since the victim was allegedly not present at his home during this timeframe. The State noted a call from the victim's residence to the Davis home at 7:20 PM on December 7, arguing this was Davis himself calling his own home, or perhaps an alleged accomplice committing the burglary at this time. *This is all mere speculation*. Davis was at his parents' home during the timeframe of the call, and visited with them from approximately 6:30 PM to 7:45 PM. Davis has always maintained this was his ex-wife calling his house to leave a message concerning conflicting holiday party issues.

There is also no way a single person on their own could get to the victim's house, steal a number of large items, and drive the Porsche off as well. Once again, the State could only speculate about an accomplice, and never proved anything about how Davis supposedly did this, whether on his own or with help. If the State truly believed there was an accomplice, it seems reasonable to conclude investigators would have run the latent prints found on the Porsche through AFIS, but they didn't. The State was only interested in going after Davis and Davis alone, which is why the prints eventually became a

liability to the case and were destroyed against standard operating procedures.

The State has never proven exactly when the murder of the victim occurred. Prosecutors speculated it could have happened on Monday evening December 9, 1996, but *there is no proof of this*. The last known telephone call by the victim was at 6:00 PM on December 9, but the body was not found until approximately midnight on Tuesday, December 10. The autopsy of the victim showed a blood alcohol content of .22, which is extremely high, and the blood was also positive for cocaine. Testimony from the forensic chemical expert, Dr. James Woodford, concerning the victim's blood alcohol content supports the death occurring later on December 10, when it would have been impossible for Davis to be responsible. Either way, *there is no evidence* Davis was ever at the victim's residence.

Concerning the fire at the victim's house on Tuesday, December 10, 1996, Davis presented evidence on how it would have been very difficult, if not impossible, for him to have started the fire based on his known whereabouts, the alleged fire analysis by the State, and the analysis of the victim's burned watch. There is no evidence to prove

Davis was ever even in the vicinity of the victim's house at any time, much less when a crime allegedly occurred.

KNOWLEDGE OF HOW THE VICTIM DIED: SHE SAID, HE SAID

The state's case hinged in part on claiming the only way Davis could have known the victim had been shot before the police themselves discovered this was because he was the murderer. Davis always claimed it was his wife, Megan Bruton, who told him Coffin had been shot. During the police interviews with Davis, he was only repeating what his wife had told him. Below is a detailed summary from the latest court filings:

Evidence showed Bruton made a call at 12:18 AM to the Petitioner's house from the victim's next-door neighbor's house before the Petitioner's interview with police. In this call the victim's close friend, Craig Foster, testified he heard Bruton tell the Petitioner the victim had been "shot." Craig Foster testified he told Fulton County Investigator Bernadette Hernandez that Megan Bruton told the Petitioner and her friend Jennifer Jenacova the victim had been shot. He also in fact testified he told Det.

Chambers, at the APD Homicide office that first night of the case, that Bruton made this statement earlier that night of the fire and discovery of the victim's body. Jennifer Jenacova (Bruton's close longtime childhood friend), her husband Michael Jenacova, and Mr. Jenacova's mother, Jane Jenacova, testified that Bruton called them from the victim's neighbor's house at 12:08 AM on the night of the victim's house fire and told her that the victim "had been shot in the head," an added specific detail the Petitioner was never even alleged by police to have said. This call also occurred ten minutes before Bruton called the Petitioner at 12:18 AM. Jane Jenacova took a contemporaneous note of the Jenacova couple's recollection of this call from Bruton as the Jenacova couple was troubled with Bruton's knowledge of these facts about how the victim was "shot in the head."

All of this evidence contradicts Bruton's already questionable, uncorroborated and changing testimony that the Petitioner told her the victim had been shot. As well, no one ever heard the Petitioner tell Bruton that the victim had been "shot in the head" despite numerous witnesses being right next to the Petitioner on the phone. The State's claim that the Jenacovas

somehow made up this evidence or altered it because of some bias against Bruton does not ring true. The Jenacovas could not have known what was really going on that first night and had no way of knowing that night that the time of the 12:08 AM call by Bruton was so material to the case because it was ten minutes before the call Bruton made to the Petitioner. To claim that they started some conspiracy including Mr. Jenacova's mother in real time that evening to make Bruton look guilty is beyond believability. This is especially true since Mrs. Jenacova was one of Bruton's closest friends from childhood and bridesmaid in her wedding.

Even Fulton County District Attorney Paul Howard admitted in pre-trial testimony how this idea about Davis knowing the victim had been shot and therefore must be the killer was not strong. He testified, "I found out that Megan (Bruton) indicated that she might have in fact made that statement to Scott Davis, and so, therefore, I concluded that that was not the pillow of evidence that it might at one time have been thought to be."

Since the first night of the case in 1996, Bruton's story has repeatedly changed concerning her knowledge of the victim having been "shot in the head." Initially, she

told detectives she did not know how the victim had died. As the Jenacova and Foster stories came to light, not to mention the $300,000 reward, her story shifted radically to say it was Davis who told her the information. It's important to note how this was *never* a part of her story back in 1996 and 1997. Clearly, she's lying, and the evidence proves it. However, the question still remains: How did Bruton know the victim had been shot in the head well before the police even knew the manner of death?

MEGAN BRUTON: HER PERSONAL VENDETTA AGAINST DAVIS

A passage from the most recent court filings in the case show how vast portions of Bruton's testimony, not to mention her overall character, were and are questionable:

There is also strong evidence from the Motion for New Trial that Bruton was deceitful and biased and therefore her harmful testimony against the Petitioner could have been seriously impeached in front of the factfinder. First at trial, Bruton's overall testimony and honesty was at least significantly impeached by a

taped conversation the Petitioner's father and mother had with Bruton back in December of 1996 right after the arrest of the Petitioner. This tape and Bruton's own words directly contradicted some of Bruton's damaging testimony against the Petitioner. After the tape was played, Bruton was forced to admit that some of her earlier damaging testimony was incorrect and that she told both the Petitioner's parents and the police in 1996 that the Petitioner was neither jealous nor violent. She also had to change her testimony and admit that the Petitioner did not inappropriately show up at her work or residence. She then also admitted that back in 1996 and early 1997 when the events had just happened, she told no one that the Petitioner had allegedly said to her the victim had been shot in the head. This includes the Petitioner's attorneys in a formal interview.

Megan Bruton wanted to make sure Scott Davis was convicted of the murder of David Coffin. In legal terms, this means the witness has *bias* towards the defendant. Her most blatant display of this bias began around the time of the indictment and through the trial and appeals process. This was covered in detail during the Motion for a New Trial hearing as follows:

During the hearings, copies of blog posts Bruton made during trial using seven different false identities along with a number of her personal emails were admitted into evidence. These documents showed a very biased and deceitful Bruton. One year prior to trial, Bruton by email contacted the blogger Steve Huff to discuss the Petitioner's case and her biased opinions against the Petitioner almost immediately after the Petitioner was indicted in November of 2005. During trial, emails showed that Bruton was in constant contact with the blogger (even against the direct order from the trial judge not to discuss her testimony in between days on the stand), and was later constantly posting to the public blog under the seven assumed identities. Interestingly, Bruton's posts discussed (in the 3rd person) her experiences during the events at the victim's house the night of the fire, but these descriptions differed importantly from her testimony. In one long blog post made on December 3, 2006 during trial, Bruton writes the following about herself, "Megan already knew from the fire chief that David had been murdered. I know when I hear the word 'murdered' I usually think 'shot.' So, I don't believe that hearing that David had been shot

was a huge shock to her." This is different than her trial testimony that the fire chief only said the victim did not die from the fire. Her words that she assumed "shot" is also completely different than her dubious claim that the Petitioner told her this. This difference that the jury never knew at a minimum throws further doubt on Bruton's changing story and is impeachment evidence for the jury.

Bruton's blog posts show clearly her bias against the Petitioner. After the verdict, Bruton admits her blog posts to the blog in an email to the blogger Steve Huff. Finally in another email to the blogger on July 17th, 2007, prior to the Motion for New Trial hearings and after receiving a subpoena, Bruton pressures Mr. Huff not to cooperate with the defense on the Petitioner's appeal. This bias from Bruton would have further impeached her and her highly prejudicial testimony in front of the jury and should further show the case against the Petitioner is extremely weak.

"Bias is always relevant in assessing a witness's credibility" (*Schledwitz v. United States*). Bruton's testimony was clearly biased and clearly crucial to

convicting Davis at trial.

MORE UNCORROBORATED AND QUESTIONABLE TESTIMONY: ERIK VOSS AND JAMES DAWS

Uncorroborated testimony also came from a former work friend of Davis named Erik Voss. He testified how Davis allegedly "threatened to kill anyone who had a sexual relationship with his wife." Such a statement certainly appears very damaging in isolation. Voss never mentioned this alleged statement by Davis to anyone, ever, or if he feared anything would come of it. In fact, he remained friends with Davis and even set him up on a date with his female friend. Would anyone do such a thing if they actually thought Davis was a potential killer? No, and it's clear Voss was hoping to get some of the $300,000 reward.

Then there's the testimony of private detective James Daws, who worked for Davis around the time of the killing. Mr. Daws was hired by Davis' divorce attorney to investigate certain aspects of the divorce proceedings, including potential infidelity by Bruton. Daws testified how he investigated potential men Bruton had dated

and tried to obtain their phone numbers and addresses prior to the victim's involvement with Bruton. He also conducted very limited surveillance over the course of a few months on Bruton. Daws testified how Davis called him to obtain the victim's phone number and address. Daws testified how on December 6, 1996, he called Davis and gave him this information. Daws then claimed Davis stated he might do "drive bys" of the victim's house and might call Daws to assist if needed. This testimony was very damaging to Davis because the victim's house was burglarized sometime on December 7 or 8 and the victim was killed a few days later. It's important to note how the most damaging aspects of his testimony were *completely uncorroborated*.

No independent evidence supports the alleged claims of Daws. There are no phone records showing a call to Davis on December 6, 1996, where Daws allegedly provided the victim's address. In addition, none of Daws' paperwork showed he provided Davis with the victim's phone number or address prior to the burglary at the victim's house or the victim's murder. Also, Jonathan Levine, Davis' divorce attorney and officer of the court, testified how he and Daws had a

December 11, 1996 meeting including Davis' criminal attorney, Mark Kadish. They discussed in detail the alleged crimes concerning the victim. Levine reviewed his contemporaneous notes from the meeting as well. Levine testified how at no point during the meeting did Daws claim he had provided the Petitioner with the victim's address or phone number prior to the crimes, or how the Petitioner said he would conduct "drive-bys" of the victim's house.

Here's the clincher. When do you suppose Daws came forward with these startling revelations he never mentioned before? Why, the very day after a $300,000 reward was offered for information leading to a conviction in the case, of course.

If one thing is abundantly clear from the weaknesses in the evidence relied upon by prosecutors, it is this: Scott Davis is an innocent man. He did not shoot David Coffin in the head, set his house on fire, burglarize his home, or steal his Porsche and drive it to Dekalb County and set it on fire. There were fingerprints on the car, latent prints which might very well have pointed to the perpetrator of these crimes, but no one will ever know to whom those prints belong because they were conveniently destroyed

in the months leading up to the trial. The failure to ever run those prints through a database check over nine years, as well as their destruction, were clear violations of GBI standard operating procedures, not to mention common sense in an open homicide case. Withholding material evidence by means of misconduct, obstructive behavior, and repeated intentional violations of procedural requirements in the handling of evidence undermines justice and produces a lack of confidence in the outcome of the trial. And this is only one incident in a long series of bad faith and misconduct on the part of the State which must no longer be blindly excused.

It took the jury *four days* of deliberation to finally reach its verdict in the Davis case. It was clearly not an open-and-shut case for jurors in favor of the prosecution. If all the bad faith and misconduct had been presented to the jury, as it should have been, it is highly likely they would have acquitted Davis.

A conviction obtained through use of false evidence falls under the Fourteenth Amendment.

To find legal justification for a new trial, one can pick

any number of actions. Detective Chambers altering and hiding recordings of police interviews, Bernadette Davy falsifying ballistics test information on her reports, the falsified affidavit by Linda Tolbert concerning lost evidence at the AFD, Al Pryor lying about when the latent prints went missing, or the uncorroborated and highly questionable testimony provided by Megan Bruton, Erik Voss, and James Daws all vying for a portion of the $300,000 reward.

Justice demands Scott Davis receives a new trial.

As of July 2015, US District Judge Amy Mil Totenberg was reviewing the Davis case. Totenberg could order a new trial.

$300,000 REWARD

Family and friends have raised the reward in the Scott Davis case to $300,000. Information in regards to suspects, further police or prosecution misconduct, or any other relevant information is sought. Contact us now at 404-633-3797 with any new information.

Scott Davis Defense Attorney:
Marcia Shein
Phone: 404-633-3797
Email: Marcia@MSHEINLAW.com

For more info:
www.Freescottdavis.org

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