

Prosecutors Reinvestigate Questionable Evidence

Dallas Establishes “Conviction Integrity Unit”

BY TERRI MOORE

Establishing Dallas’ conviction integrity unit signifies a new and improved approach to prosecuting crimes. The purpose of the unit is to reexamine questionable convictions to determine if the defendant is really guilty. The process is fairly easy in cases where DNA evidence answers the question of culpability. More difficult are the cases where technology does not answer the question of guilt and reexamination must be by other means. But in any case, before that process of reexamination can begin, two things have to happen: First, the evidence must exist, and, second, the district attorney must be willing to test the evidence.

Among the catalysts for establishing the conviction integrity unit was the recognition by prosecutors of the numerous shortcomings in the criminal justice system, including an admission that human beings are not infallible. It required wisdom on the part of the prosecutor to see:

- that the prosecutor’s office often functions as a rubber stamp of the police with very little independence, a place where young lawyers may get so caught up in the horrific brutality of a crime that they employ a lesser standard of care in reviewing the evidence against an accused individual;
- that crushing prosecution caseloads demand speedy review of the evidence that may result in mistakes;
- that in some jurisdictions, politics play a role and judges win reelections based on a campaign platform of delivering swift justice that does not allow the defense adequate time to investigate the case;
- that often the wrongly convicted are not “pure”—they have committed other crimes—yet may be innocent of the crime they were accused of committing;
- that there is ineffective assistance of counsel within

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JUSTICE
DERAILED

our system and the adversarial approach does not always produce the truth.

In summary, the idea of a conviction integrity unit was borne out of the cynical knowledge that our judicial system has many faults, yet an idealistic desire to restore justice to those who were wrongly convicted. For such an idea to have come from the prosecution rather than the defense has created its own set of issues and challenges that will be discussed later in this article.

In the Beginning

The original idea was to have a prosecution team working shoulder-to-shoulder with a defense lawyer and a group of law students who would review prosecution files and trial transcripts and then write a memorandum describing whether or not, in their opinion, the case was worthy of review. It was thought that including students would offer valuable experience in the justice system and prep them for their future as prosecutors, defense lawyers, and judges. Working with a defense lawyer in a cooperative rather than an adversarial relationship while reinvestigating the facts would help prosecutors gain additional insight and keep an open mind for interpreting the facts. In the event the facts of the reinvestigation appeared to affirm the guilt of the convicted individual, then the adversarial relationship would resume.

Dallas was the perfect location to start the controversial unit for several reasons. First, the newly-elected district attorney had the political courage to try it, and, second, the crime laboratory had hoarded biological evidence dating back to the late 1970s.

As for political courage, the landscape of Dallas County had historically been conservative, white, and Republican. But in 2006 the courthouse overwhelmingly became filled with Democrats, including the new DA, Craig Watkins, the first African-American district attorney in the state. When I first presented him with the idea of establishing such a unit he knew it would create controversy. After all, he had just defeated a traditional prosecutor and the hand-picked successor to the district attorney's office. Watkins became district attorney in an office of 245 lawyers, 75 investigators, and 110 support staff—most of whom had taken an active role in campaigning for his opponent. Of the 60-plus police departments within the county, the new district attorney was certainly not the candidate of choice. So establishing a program that looks at the forgotten cases and reinvestigates old convictions to expose the facts of what went wrong in those cases was counterintuitive to political survival. Yet Craig Watkins had the courage to attempt it because it was simply the right thing to do. He had, after all, campaigned on being “smart on” crime and not

the traditional “get tough” approach. Once he started the process for setting up the conviction integrity unit, his own staff warily watched their new boss while the police openly expressed their disdain.

Finding the Funding. The process of establishing the unit was grueling. First we had to seek funding from the county through the commissioner's court in order to hire staff. The unit was designed to work with two assistant district attorneys, the chief prosecutor, an additional investigator, and a paralegal. It would cost \$388,773.

To secure funding we met with the five commissioners individually, lobbying for the necessity of unit. The court was composed of three Republicans and two Democrats; we required a simple majority of three votes. We thought we could count on the two Democrats, but we needed to persuade at least one of the Republicans to support the unit. Two of the Republicans were lawyers. One had been an assistant district attorney during the era of many of the wrongful convictions, and he proved the most antagonistic, shouting from the dais as he ultimately voted against it. The other commissioner was civil, though he, too, opposed the idea. While I argued the merits of the unit, he responded that it was the job of the defense “to get the guy off.” I pointed out that it was the prosecutor's job to see that justice was done and that is why the law gave us tools to get at the truth, such as the ability to subpoena individuals to the grand jury and the ability to grant immunity. The defense, I argued, is not given those tools under our system. I never knew if he just didn't get it or if it was pure politics and he was not going to support a newly-elected Democrat. Whatever the reason, he politely voted against it. The third Republican commissioner was from the upscale district that included Highland Park. She stated that it was important to give the new district attorney the opportunity to carry out his program, but only as a “pilot project.” To be fair, one of the Democrats did not like the idea either, but was in a no-win position if he voted against it because the citizens in his district supported the proposal.

After meetings with the individual commissioners and the budget director, the request was placed on the commissioner's court agenda.

The courtroom was filled with people waiting to see if this request would be approved. DA Watkins made a passionate request, but I believe it would not have passed despite our lobbying efforts if it had not been for an exoneree named Billy Smith. I was seated next to the man, but had no idea who he was. As Watkins made his plea to the court, I could feel Smith stir next to me. He wanted to speak, but felt awkward. He spoke to himself in a whisper, praising Watkins as the district attorney pleaded for the funding. I nudged Smith and urged him to approach the microphone and tell the audience how he felt. When

he did, he spoke so compellingly of his own incarceration and the importance of the proposed unit that as he finished I knew we would get the funding. I also believe that it did not hurt that the newly elected DA had the advantage of not yet having offended anyone on the court.

Staffing. Once the court order establishing the unit was signed and the formalities completed, it was time to staff the unit. It was critical that the right people be selected. The position of the chief prosecutor required a unique lawyer—someone with at least 20 years' experience, skilled in the courtroom, proficient in appellate work, and experienced in writ work. It required a lawyer with tremendous integrity and a strong work ethic. I knew just the person. Michael Logan Ware had spent his career as a criminal defense attorney in Fort Worth

tions and did his best to make our intrusion as painless as possible under the circumstances. The reinvestigation required a new buccal swab from the victim for DNA testing, and often the victim was left feeling devastated when it turned out that the wrong person had been convicted and incarcerated. But with Hammond's help we ministered to our victims as best we could.

The Victims. For the incarcerated individuals whose guilt was confirmed by DNA testing, I really resented that they put us in the position of having to harm the victim all over again. I wanted them to suffer consequences for asking for the DNA test when they knew they were guilty. We were unsuccessful in our attempt to get a bill before the legislature that would have deprived the guilty parties of their good conduct time for

Establishing a program that looks at old investigations and forgotten cases is counterintuitive to political survival.

and possessed all the requisites for the job. Ware saw the opportunity to make an indelible, positive impact on our flawed system and left his thriving practice to serve the greater good. But as dedicated as he is, he could not accomplish much without the help of support staff. Paralegal Jena Parker is a bulldog. She tore into cases savoring every detail and freely offering her views of the evidence. The investigator, James Hammond, a real policeman, committed to getting at the truth because to do otherwise means leaving a guilty person free to do it again. In other words, we staffed the unit with a dedicated team of open-minded individuals with a will to see justice done. To date, they have delivered justice by exonerating 26 (22 DNA and four non-DNA) wrongly convicted men; the longest sentence served being 30 years.

The Cases

The majority of these exonerations were sexual assault cases where the biological evidence had been preserved. They were typically single-witness cases with the victim of a traumatizing crime being the only witness to identify the perpetrator. When reviewing the cases we always asked the question: "How did the defendant become a suspect?" The answer was not always available. Any review of the case included finding the victim of the offense and reopening old wounds. We didn't relish the idea, especially if the results turned out to confirm the defendant's guilt. So, we utilized our top-notch investigator for the job. James Hammond was perfect in his approach to victims. His demeanor and character demonstrated kindness, compassion, and dedication to seeking the truth. He was prepared to discuss counseling op-

lying. Although we lost the fight for those crimes where the statute of limitations barred prosecution, we did get legislation passed that would make such an individual's history as a sex offender part of his or her permanent record. This aids the police in the event the offender shows up as a suspect in another case.

Backlash

For a while, the exonerations were coming fast and the courthouse was abuzz with a flurry of news crews and publicity. Public sentiment was with us in our efforts to correct the wrongs of the past. But there were plenty of critics, too. The police opined that it was our job to put criminals in jail, not get them out; the exonerees, they reasoned, had committed other crimes. Prosecutors worried that the publicity would hurt their ability to convict the guilty. The lawyers on both sides of the case who were participants in the wrongful convictions worried about their reputations, as did the judges who had presided over those trials. Common threads began to emerge from the exonerated cases, such as *Brady* violations and bad police procedures that included questionable lineup techniques. The district attorney created a legislative agenda to correct some of the problems. Jealousy and resentment were forming as mistakes were exposed—including jealousy on the part of some members of the defense bar where some lawyers did not like it that the prosecution was getting credit for freeing innocent men. The unit was viewed by some as the equivalent of the unpopular internal affairs unit at a police department. Yet lessons were being learned from the mistakes that had been made, and it was important to teach police, pros-

ecutors, and defense lawyers what we had discovered.

The Brodie Case. One case in particular caused us a lot of angst. In the *Brodie* case, the perpetrator had entered a residence during the night while the family slept and crept throughout the house until he reached a bedroom where a young girl was asleep. He carried her out of the house while she slept, took her across the street, sexually assaulted her, and finally released her. There had been a number of similar cases in an area that crossed boundaries between the Dallas and the Richardson police departments. The media and the public dubbed the perpetrator the “North Texas molester.” For reasons that remain inexplicable to this day, Richardson police settled on a young deaf student, Stephen Brodie, as their suspect. They arrested and questioned him—making numerous tactical errors in dealing with a deaf person. After several days of intense interrogation, Brodie confessed to the crime. But it would prove to be a false confession. Meanwhile, a Dallas police officer questioned Brodie about similar crimes that had occurred in the Dallas department’s jurisdiction and the young man confessed to these crimes, too. But the savvy Dallas officer went one better—he concocted a fictional crime scenario and presented it to Brodie. The young man promptly confessed to this crime, as well as another crime that police knew he could not have committed. The Dallas officer informed the Richardson police that they had the wrong man. Undaunted, Richardson police proceeded with prosecution, and Brodie was convicted of raping the child. Years later, the conviction integrity unit reinvestigated the case and found that a fingerprint on the window screen had been preserved as evidence. When sent in for comparison, it came back as a match to a known sex offender. Although there was no DNA evidence in the *Brodie* case, DNA evidence had been preserved in the other sexual assault cases. When it was tested, it came back as a match to the same man to whom the fingerprint belonged. Neither the fingerprint nor the DNA was a match for Brodie. It was apparent that he had not committed the crime for which he was convicted.

Yet as we made plans to release Brodie from prison, the Richardson Police Department continued to insist that its officers had arrested and charged the right man. It was to be the second exoneration of an individual arrested by that department, and we believe the chief of police was worried about the department’s image. The Richardson police chief interfered with our ability to communicate effectively with the child—now a young adult living with her parents—which contributed to the parents’ alienation towards us. (They went so far as to go on television and insinuate that we had mistreated them.) Despite this, we strove to keep them informed and included them in every step of the process. In a case of unfortunate timing, the district attorney was running

for reelection at this time and his opponents made use of the bad publicity. His political opponent mocked the work that we were doing, while other detractors of the program hinted that some of the exonerees were in fact guilty. As it turned out, most of the critics who were responsible for fueling the seeds of doubt about the reality of wrongful convictions were former prosecutors fired by the DA when he first took office.

But the worst was yet to come. We had been invited to teach an actual innocence seminar at the Center for American and International Law in Plano, Texas. Despite nearly 25 years as a lawyer—all but five as a prosecutor—*Brodie* was the first case of false confession I had seen. There was so much to learn and teach from the case that the prospect of sharing the information was exciting. But when Richardson’s chief of police discovered the *Brodie* case was one of the topics on the agenda, he met with the facility scheduler and asked that we not be allowed to speak about it. The scheduler called me and asked that we drop discussion of *Brodie*. When we disagreed, DA Ware received a call from a judge on the Texas Court of Criminal Appeals who was in charge of the grant money to sponsor the seminar. The judge also asked that we not discuss the *Brodie* false confession case at the seminar. We were appalled that a sitting judge lacked the courage to publicly examine a case of wrongful conviction because it might ruffle the feathers of local law enforcement. We withdrew from the program.

Non-DNA Exonerations

Although the extraneous cases had preserved the biological evidence, no DNA had been preserved from the crime for which Brodie was convicted, making the reinvestigation more difficult. In fact, we have had several non-DNA exonerations and each one was more difficult for lack of DNA evidence. Basically, we had to start from the beginning and reinterview every witness and reexamine every piece of physical evidence. In one non-DNA murder case where we discovered the identity of the real killer, we had taken the investigation as far as we could but needed the assistance of a homicide detective at the Dallas police department to interrogate the suspect. When we held a meeting with the department about what we had discovered and asked for help, the detectives were extremely skeptical about the program. Luckily, the lead homicide detective was a dedicated guy who did not subscribe to the “leave well enough alone” philosophy or “let sleeping dogs lie.” Although he, too, was cautious, he poured himself into the reexamination of the case. He even asked for and received the assistance of the homicide detective who originally worked the case. They came to the same conclusion we had reached—that Claude Simmons and Christopher

STATEMENT OF OWNERSHIP, MANAGEMENT, AND CIRCULATION

Scott had been wrongly convicted of murder. They were more than happy to support the exoneration of these two individuals and their release from prison. It was very moving to see the emotion of the original homicide detective who worked the case. After police concluded their part of the reinvestigation, the real killer was indicted for murder and is awaiting trial.

Still there were other non-DNA cases that were reinvestigated thoroughly and the conviction was not disturbed, as the evidence withstood the test of time and confirmed the defendant's guilt. But it is important to learn from the all the mistakes that were made and implement changes to prevent them from happening again. District Attorney Watkins implemented an open-file policy in our office that opens the file to the defense so all of the information is available to both sides. Basically, the defense is given a copy of the prosecution file. We have opened the file on postconviction matters to include the trial prosecution's work product. We e-mail case law to prospective hires and ask them to be prepared to discuss the cases. (*See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Ex parte Johnson*, No. AP-76153, 2009 WL 1396807 (Tex. Crim. App. May 20, 2009) (putting an emphasis on the prosecutor's basic constitutional responsibilities).) Watkins supported a legislative agenda to require preservation of evidence, to videotape confessions, and to require the administrator of photo spreads be an individual with no information about the identity of the suspect in the case.

Conclusion

The work is hard and has its obstacles. Regardless of the obstacles, anticipated and unanticipated, working for the establishment and success of the conviction integrity unit has been hugely rewarding. To create a novel prosecution team whose sole purpose is to ensure that there is integrity in the conviction and that justice was done is one of the greatest contributions to our criminal justice system.

Despite the obstacles, the general public gets it. Juries in Dallas continue to convict guilty people. Newly licensed, eager, positive lawyers apply to our office because of the conviction integrity unit. Other district attor-

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ney offices across the nation and even in Texas have followed the example in Dallas. DA Watkins won his reelection bid and is proud of defining what it means to be a prosecutor. Policies and practices have been put in place

to prevent the problems that contributed to the wrongful convictions. But the work is not done. We will continue to reinvestigate claims of innocence until we have exhausted our ability to do so. ■