

## WRONGFULLY CONVICTED: A NO-WIN SITUATION FOR THE VICTIM

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In the early morning hours of Sunday, November 3, 1996, my life as I knew it changed forever. Like so many victims of violent crimes who receive a telephone call or a knock on the door that forever changes their lives, I was called by my sister-in-law, who advised me my brother, Howard, had been shot. He was sitting in his car, waiting for his buddies to show up for their weekly Sunday morning basketball game. My brother was an educated husband, father of two (a nine-year-old daughter and a sixteen-year-old son), son, brother, and friend to many. We later learned that Howard was shot by two gang members at point-blank range, thrown out of his car, and left to die. The perpetrators saw him sitting in his vehicle and never thought for a second about who was behind the wheel—only that they wanted the car. He died about eight hours later from his injuries. Why would someone who did not even know Howard take his life in such a violent way for no reason? Unfortunately, we are left with no answers to our questions.

I experienced firsthand the harsh reality of what it is like to lose a

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This Essay is presented from a crime victim's point of view. It gives the reader a sense of the impact a wrongful conviction can have on a crime victim and what the victim and his or her family may face. Faced with the knowledge that the perpetrator may still be free, balanced with the conflicting feelings of thinking the right person had been convicted, the crime victim must find the strength and courage to understand the justice system is not always fair. However, for the crime victim, he or she has already faced the reality that life is not fair just by the reality of becoming a crime victim. The goal of this Essay is to educate the reader on some of the concerns a victim of crime can face after the exoneration of a wrongfully convicted individual.

loved one to murder. My family and I at least know that the people who were responsible for Howard's murder are being held accountable for their actions in prison. In my work with violent crime victims, I know that, for many, the outcome of the criminal proceedings is important for several reasons. First, and perhaps the most obvious, is that it holds perpetrators accountable for the heinous crimes they committed against their victims. Second, and perhaps a more subtle reason, is that it allows for a certain amount of "judicial closure." Although appeals may linger for many years, at least the perpetrator is incarcerated during that time. Third, it allows victims to begin to construct a "new sense of normal" in their lives in the aftermath of their victimization. Because most of my experience is in dealing with victims' families who have lost someone to murder, my perspective will mainly be based my experience with these victims and their feelings when convictions were ultimately overturned.

One must gain some sense of the ordeal through which homicide victims' families go. Every death brings to its survivors the one nonnegotiable moment that hurts forever. After that one moment, there is no returning home. Just as the dead have crossed a point of no return, those left behind to live must cross a similar point when that first wave of grief divides everything we know into a before and an after. The waves of grief that follow remind us as dependably as the dawning of the sun that we cannot have what we miss the most. In an instant, life as we once knew it disappears, and the future becomes a struggle between moving on and hanging on. Survivors are left to contend with this struggle and find a balance that allows them to emerge from their most painful and vulnerable moments with newfound strength and reasons for living. Although the struggle with grief is part of every death, murder is darker than death, and so is the road to surviving and healing. Murder devours innocent lives with a cruelty that is absent of reason, values, and compassion. Murder breaks all the sacred rules, knows no fairness, and can never be compensated for or undone. It provokes fear and rage and tempts us to battle it on its terms instead of our own. Murder drives even the most loving and compassionate people to the edge of that fine line that separates our respect for life from fulfilling our violent potential. The aftermath of murder takes us straight through hell, where we stand eye to eye with the evil that hides behind human faces. What we do in the face of that evil defines us for what lies ahead. The aftermath of murder is nothing less than a full-blown emotional and spiritual struggle. So much is out of our control, including the criminal justice process and the potential for the wrongful conviction of an individual. For survivors who have worked for years to deal with the murder of a loved one, to be dealt the terrible blow that the wrong person was convicted can, and does, thrust the victims into

an incredible spiral. For a growing number of crime victims, the harsh reality of learning that the person who was convicted of the crime was wrongfully convicted is a pain that, thankfully, few of us will ever know.

According to the Death Penalty Information Center, 113 people have been exonerated from death rows in the United States since 1973.<sup>1</sup> Although we are by no means talking about the majority of cases, it is enough to warrant significant conversations to ensure we are dealing with the issues and concerns victims endure as a result of exoneration. For those victims who do learn of this miscarriage of justice, it catapults them back into a system they thought was long behind them. To use the term “victim,” one must have an understanding of how the law formally recognizes a victim. In Arizona, as in thirty-three other states, we have a Victims’ Bill of Rights in our state constitution, which defines a victim as “a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person’s spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.”<sup>2</sup>

It should be noted that the feelings and concerns expressed in this Essay are based on conversations over the years with both victims of crime whose cases were not overturned and with allied professionals who have worked with victims whose cases were overturned because of wrongful convictions. Out of respect for those victims whose cases resulted in the release of the individuals wrongfully convicted, I have channeled these feelings and concerns through my own perspective so as to avoid breaching the victims’ “sanctity” of privacy.

In a general sense, the most common reactions range from outrage to fear to empathy for the person who was wrongfully convicted. Outrage is directed at a system that wrongfully held someone for years and would allow—in the worst cases—someone who murders or rapes to still possibly be free. However, we must keep in mind that for murder victims’ families, their loved ones are still murdered, and for rape victims, they forever lost a part of who they were that might never be recaptured. Victims want the assurance that their cases will still be pursued with the same vigor they once were. Will time detract from the prosecution pursuing the “justice” victims are seeking? Does the use of DNA in exonerating someone always mean that person was not part of the crime? Could he or she not have left

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1. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2 (Apr. 26, 2004), available at <http://deathpenaltyinfo.org/FactSheet.pdf>.

2. ARIZ. CONST. art. II, § 2.1(C).

DNA at the scene? Could he or she not have been a lookout? These questions and many more linger for victims.

No victim I have ever met wants the wrong person to be convicted, but at the same time, we cannot inject unreasonable delay into a system that is already overwhelmed by delay when the defendant is clearly guilty. Will the media still focus on the loved one who is no longer here and what the victim's family is going through? I think not. The media and the community will focus on the innocent person being released. Is this right? I do not know. I think the victims' families should still be part of the focus. Hopefully, the person being released will hopefully understand the victims' families are going to have endured yet another complex set of dynamics with the release. I hope both sides can respect each other enough for the victims' families to acknowledge that this was not the person who committed the crime and to be sorry for the wrongful imprisonment, and for the person being released to understand the complex emotions being dealt with by the victims' families.

Homicide survivors gear up to withstand the long, exhaustive aftermath of homicide, which starts with the reality of the event by a knock on the door or a phone call that forever changes their lives, and extends throughout the criminal justice process. When the offender is exonerated, family members are left with the frustration of a failed attempt. Another concern victims have is their safety. Will the supporters of the person being released come after the victim to retaliate, take revenge, and further inflict pain on family members either financially or physically?

My colleague and friend, Ellen Halbert, who is the Victim Services Director for the Travis County, Texas District Attorney's Office, shared with me her experience in working with a rape victim. The person convicted for the rape, who the victim had picked out of a lineup ten years earlier, was exonerated. Ms. Halbert told me how she had to drive to a small town about sixty miles away, because one of the things victims need is to have the message of exoneration delivered in person. If the victim has moved, the original district attorney's office should make sure the victim gets help from the district attorney in the victim's new county. The district attorney's office should be aware of as much information as possible about the case and should have the necessary people available to answer the victim's questions. It is also very important that victims be made aware of any possible exoneration proceedings before they happen. The message should be delivered in person by a team made up of a prosecutor, a police officer, and a victim advocate, all of whom should be educated about the case. Professionals who work with victims need to ensure that the victim gets to meet with an expert in the DNA field. If the victim is too far away,

a conference call should be made between the DNA expert who worked on his or her case, the district attorney who tried the case, and the victim. This should happen within the first few days of the exoneration, or whenever the victim chooses. I believe it is enormously helpful for victims to talk to the experts so the experts can explain how they came to their conclusions. Victims may not believe what they hear, and we need to be careful not to make the victim out to be a liar. In the case Ms. Halbert shared with me, the victim put her hands on Ellen's shoulders, looked her in the eyes and said: "Ellen, I know who I saw. I was this close to him."

I think the prevailing feeling among my colleagues in victim services is that victims need support and time to process what they are feeling. Another concern and reaction is victim vulnerability. Regardless of the length of time associated with the eventual exoneration, a victim's vulnerability to psychological trauma continues. Survivors of homicide often describe the aftermath of murder as peaks and valleys, the ebb and flow of the tides, running a marathon race that never ends, merely existing, or a dimmed view of light.

Victim's experience fear of having the case resurrected once again for public consumption, fear of re-experiencing the uncertainty of each day, and fear of dealing with issues associated with young children in the family and their understanding of events. Surely, there is a failed sense of justice. While on a cognitive level, victims recognize that those who work in the criminal justice system are doing their best despite great odds, victims are still left with regrets, confusion, disbelief, anger, and dissatisfaction with the criminal justice system. It is important to prepare them for the possibility of exoneration by incorporating any available literature on cases and examples of offender exonerations and the issues and conditions that prompted the decisions. There is always a need to have legal clarification and explanations available for victims, regardless of where the case is in the process (e.g., investigation, prosecution, sentencing, penalty, re-entry, or exoneration).

There is no doubt that victims want to feel they have a role in the entire process. The victims should be given information about what is going on and should be notified of key proceedings leading up to the exoneration. Victims should not be notified by a letter from Federal Express that may or may not arrive in time to notify them prior to a national press conference telling the world that the person convicted of the crime in their case now has a fate different from that which the court decided. I think a victim advocate could help victims understand the process and proceedings, and I think victims need to be given appropriate referrals for support to help them address any mental health needs or

concerns related to their safety in cases of wrongful convictions. There are over 10,000 victim assistance groups in the United States that can help with this.<sup>3</sup> From a victim's perspective, a wrongful conviction does not always mean "innocence" to them. It may mean the processes or procedures were the "wrongful" part that resulted in a different outcome.

For victims, we need to ensure we are using all the tools available to ensure we are convicting the correct person. In instances of rape and other violent crimes, the establishment of state-specific DNA databases may help. For instance, North Carolina has developed a statewide database.<sup>4</sup> It is expensive but has come in handy in solving some crimes. For example, consider the following possible scenario. Suppose North Carolina has a database of convicted sex offenders, and a rape occurs in Georgia. Georgia sends a DNA analysis to North Carolina, and there is a match to a former North Carolina convict's sample. In addition to state DNA databases, I feel we need a national DNA database. That way, states could just go to one source instead of sending the analysis to states that have such databases and hoping for a match.

The long-term nature of victim trauma and loss in homicide cases usually means that victims are still struggling with the murder of their loved ones years down the line, when exoneration may occur. When someone is exonerated because of DNA, this can have at least three meanings: (1) the person is indeed innocent; (2) there is no DNA evidence to prove that person's guilt, which does not always equate to innocence; or (3) in cases with multiple offenders, no one really knows whether or not the person is guilty.

Nevertheless, victims must cope with the exoneration, whether their feelings are right or wrong. In cases in which their testimony contributed to what is perceived as a "wrongful conviction," victims must cope with this, as well as the actual exoneration. Victims must also deal with the trauma of being notified of DNA testing and exoneration proceedings (assuming they get that courtesy, which is not always true) in the first place.

When DNA identifies the actual offender, it is a far better outcome than cases in which it merely shows that the wrongfully convicted person's

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3. OFFICE FOR VICTIMS OF CRIME, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, PUB. NO. NCJ 170600, *NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY* ii (1997), available at <http://www.ojp.usdoj.gov/ovc/new/directions/pdf/txt/direct.pdf>.

4. See generally N.C. DEPT OF JUSTICE, ATTORNEY GENERAL ROY COOPER: USE DNA TO CONVICT CRIMINALS IN NORTH CAROLINA 2, available at <http://www.jus.state.nc.us/in/press/DNA1202.pdf> (last visited May 17, 2004).

DNA was not found at the crime scene. When this happens, it raises the question of the real killer's identity, which brings up trauma and safety issues for victims. Of course, DNA does not prevent bad outcomes or errors; it only proves they happened. That is why the Innocence Protection Act and similar legislation is so important. We need to prevent the mistakes that DNA finds and also prevent the countless more that DNA cannot find because none is ever left at the scene. The single best way to do this is to improve the quality of lawyering. Defense lawyers need to be held to higher standards of conduct; prosecutors need to be punished if they cheat; and everyone needs to be given only the amount of work they can handle.

The one thing that seems clear to victims is that a trial is a product, a contained thing with a clear beginning, middle, and end. It produces a verdict and then moves on, like a machine that punches out widgets. Being a survivor is a process. It starts but does not stop and start again anew with a schedule or weekends off. Wrongful convictions disrupt the process of healing unnecessarily. They are evidence of a bad "product" that has to be made again, which is cruel to victims. It is like having to have your wisdom teeth pulled every year because the dentist is more interested in billing you than healing you. The justice system has to recognize what happens to families when there is a question of a wrongful conviction. Only when everyone in the system acknowledges that they have to get convictions right because families, moms, dads, bothers, sisters, and kids are at stake will we get it right. Victims must continue to demand to have a seat at the table and demand that they always be treated with dignity and respect.

For many victims, courts are these odd things that seem to be in the middle of, yet removed from, the cities and crimes they are in the middle of, like islands of unreality in an otherwise personal and painful sea. Crime victims just want to be sure their voices are heard and not be silenced. As the great Nobel Prize-winning author and holocaust survivor Elie Wiesel said, "We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented."<sup>5</sup>

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5. Elie Wiesel, Nobel Acceptance Speech (Dec. 10, 1986), *available at* <http://www.pbs.org/eliewiesel/nobel/index.html>.