

Of the first 18,000 prime suspects whose DNA was tested by the FBI and other crime labs, 5,000—more than a quarter—were excluded before trial.



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The exoneration of Robert Clark

CONVICTIONS of the innocent are catastrophic for the justice system because they break people's faith

"OUR PROCEDURE has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of the crime." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y., 1923). So held Judge Learned Hand, who is generally recognized as one of the greatest American judges never elevated to the United States Supreme Court.

Similarly, in dissenting from *Jackson v. Virginia*, the leading case dealing with the amount of evidence needed to sustain a criminal conviction, Justice John Paul Stevens—that notorious liberal activist—wrote, "This Court's new rule is adopted to forestall some hypothetical evil that has not been demonstrated, and in my view is not fairly demonstrable." 443 U.S. 307, 328 (1979).

Well, the ghosts walk among us. And the hypothetical evils are real.

Robert Clark: The wrong man

Robert Clark's ghost story began in July 1981, when Tony Arnold forced his way into a woman's car in Atlanta. Arnold drove her to a remote location in Cobb County where he stripped, beat, bound and raped her. Then he drove off in her car. The victim made her way to the highway and flagged down a passing car. The driver who rescued her gave her two T-shirts to wrap around herself.

She was taken to a hospital, where a rape kit was created. Later, she gave a description of her assailant: 5'7" and 120 pounds. (The victim herself is 5'6". Robert Clark is 6'1". Tony Arnold is about 5'5" to 5'6".) She looked at a police mug book and identified someone other than Clark as resembling her attacker.

A few weeks later, her car was spotted and Clark was arrested for possession of

that car.

It is a trope of horror stories that the protagonist commits a relatively small sin and then pays a grotesquely exorbitant price. Robert Clark lied to the investigating officer, Detective R.B. Kelly. In a misguided effort to protect Tony Arnold, Clark claimed that he had obtained the car from a dancer. Later Clark confessed that lie and told Detective Kelly the truth. But it was too late.

A few days after Clark's arrest, the victim was shown his photo in a photo array. She selected it as looking very much like the person who attacked her. A day or two later, the victim identified him positively in a lineup.

At the time of trial, the cotton swabs from the rape kit could not be found. As a result, blood typing, which was the state-of-the-art at that time, could not be done. Two heat-sealed slides were still in the rape kit, and a prosecution expert was able to testify that they contained sperm. So the state's theory at trial was that the sperm on the slides was Clark's.

On cross-examination, Detective Kelly acknowledged that he had refused to follow up on Tony Arnold. Clark had lied once, and the detective saw no reason to waste any time on anything else Clark had to say or to investigate any possibilities other than Clark's guilt.

A defense witness testified that, in August 1981, she saw Tony Arnold driving a car that looked like the victim's. She also testified that Arnold is about 5'5" to 5'6" and 115 to 120 pounds—in other words that he matched the victim's initial description of her assailant much better than did the 6'1" Clark.

But on May 26, 1982, a Cobb County jury convicted Clark of kidnapping with bodily injury, rape, and armed robbery. He was sentenced to life in prison.

Twenty-one years later

On Dec. 18, 2003, the New York Innocence Project filed a motion for DNA testing. The New York Innocence Project had begun investigating the case before the Georgia Innocence Project was formed, so the Georgia Project acted as local counsel.

The motion relied upon O.C.G.A. 5-5-41 (c), which was added in 2003 to the statute providing for extraordinary motions for new trial and provides for DNA testing. The district attorney responded Feb. 5, 2004, with a two-sentence “Opposition to Defendant’s Motion For Post Conviction Relief.”

At a March 5, 2004 hearing in Cobb Superior Court, the DA argued against testing. Among those arguments was that the sperm on the slides from the rape kit—which at trial the DA had attributed to Clark—might have come from a previously unknown consensual sex partner.

The Superior Court ordered testing. Because of the technical difficulty of testing the material on the slides, the court ordered that the T-shirt the victim had wrapped around her waist when she was rescued be tested first. Some confusion about which shirt was to be tested led to a couple of months’ delay. Ultimately the report came back: there was no testable material on either shirt.

So the Innocence Projects moved to test the slides. Because the slides were more than 20 years old and heat-sealed, they presented a difficult technical challenge. DNA can be consumed in the testing process, so the stakes were high. The Innocence Project moved that the testing be performed by Dr. Edward Blake.

Blake is the preeminent expert in the field. Between 1986 and 1991, he was the only scientist in the world performing such tests in criminal cases. He has testified all over the country, for both the defense and the prosecution. He has repeatedly testified in Georgia with the consent of both parties.

But this time, consent was not forthcoming. The DA filed no formal response, but wrote a letter to the judge opposing “use of the defendant’s expert” and asking for a hearing. The issue was accreditation. The statute authorizing testing provides that the test may be performed at a laboratory that has been subjected to a specified peer review process.

The difficulty is that Blake has no peers. He is the unquestioned leader in the field, and—unfortunately for Clark—he declined to condescend to be accredited. But the language in the statute about accreditation is permissive rather than mandatory. And there were two slides. So the trial court ruled that one slide would be tested by Blake and the other by whomever the DA selected.

Appeal and error

The DA, who had control of the slides, was given five days to comply. Instead of complying, the DA filed a notice of appeal. At that point my limited involvement in the case began.

Because the case was still pending in the trial court, I was initially confident that the DA would not be permitted to appeal without the trial judge’s permission. The general rule in Georgia is that a case cannot be appealed while it is still pending in the trial court unless the trial judge promptly certifies that an immediate appeal should be allowed. In addition, there is a long-established rule that the DA’s statutory authority to appeal must be construed narrowly.

So we filed a motion urging the trial judge to enforce her order. We argued that the DA’s attempt to appeal without the trial judge’s permission was a nullity. A hearing was scheduled for November 5, 2004, in the trial court. The district attorney filed an emergency motion in the Court of Appeals. Much competitive faxing ensued.

The upshot was that the Court of Appeals issued a stay on the evening of Nov. 4. I reached New York counsel in a cab on her way to the airport and told her to turn around.

Appellate briefs were filed. The Court of Appeals held oral arguments April 6, 2005. As to jurisdiction, the state’s argument read like a treatise on appellate practice. They argued virtually every exception in Georgia law to the rule that non-final orders cannot be appealed without a certificate from the trial judge—including a specialized rule for orders sealing case records.

The one remotely plausible argument that the DA did not make was that the testing order was a final order. Having persuaded the Court of Appeals to block a hearing in the trial court, the DA may have felt that an argument that the case was no

longer pending in the trial court would fail the red-face test.

But that is the argument the Court of Appeals adopted. In a decision handed down May 9, 2005, the Court of Appeals asserted jurisdiction and accepted the DA’s argument that Blake’s preeminence was no substitute for the accreditation mentioned in the statute.

Our motion for reconsideration was denied. The New York office decided not to petition the Georgia Supreme Court for certiorari. So my substantive role in the case was at an end.

A happy ending

Fortunately, our fears about the difficulty of testing the slides were not realized. Test results established, first, that the sperm on the slide had not come from Clark. At that point the district attorney returned to his phantom ejaculator theory and suggested a plea bargain.

But then the results were input into the FBI’s Combined DNA Index System, and the results implicated Tony Arnold—the man Clark had been pointing to all along. And the results implicated Arnold, who was in prison but about to be released, in two other unsolved crimes.

At that point the motion to vacate Clark’s conviction became a consent motion, and the hearing on the motion evolved from an adversarial proceeding to a formal celebration.

The hearing was set for the afternoon of Dec. 8, 2005. Although my substantive role was over, I decided to take most of the day off and go along for the ride.

That morning, the Georgia Innocence project set up headquarters in the law office of supporter Michael Syrop, which is a block from Marietta Square. There, Clark’s family and friends were made available for a series of television interviews. Meanwhile the lawyers from the New York Innocence project met with Clark at the county jail.

About an hour before the hearing was to be held, we trooped over to the courthouse. The hall outside the small courtroom was crowded. Reporters from a variety of organizations were there, including CNN and all of the local television stations. Volunteer lawyers from Alston & Bird and others who had agreed to help Clark reintegrate into society were there. A number of people who had worked on

Clark's case in New York had flown down. One former intern had come from Pennsylvania, where she now works as a public defender.

When the courtroom was unlocked, I claimed a seat at the counsel table. Judge Dorothy Robinson took the bench and called Clark's case. He was brought in, and I laid eyes on him for the first time.

Peter Neufield, one of the founders of the New York Innocence Project, made the motion. He took the opportunity to focus on the cause of Clark's wrongful conviction. He called the refusal to investigate Tony Arnold—or any possibility other than Clark's guilt—the worst example of tunnel vision he had ever seen.

Next an assistant district attorney talked about how cooperative his office had been all along. Then the judge asked if we had an order.

An awkward silence followed. No one had thought of that. Thinking I was just along for the ride, I had left my briefcase 20 feet away in the crowded pews.

But I was the only Georgia lawyer at the table. So I stood and asked the judge if she would accept a handwritten order. With what I suspect was well-concealed relief, she said yes. I borrowed a legal pad and scrawled out an order while the judge made her remarks, which were in the nature of a benediction.

I presented the order to the assistant district attorneys for their approval and then to the judge for her signature. That small ceremony is a routine part of the practice of law. But performing it on that occasion was an experience I will never forget.

Court was adjourned. The New York lawyers helped Clark lead a gaggle of reporters outside the courthouse where they could answer questions. Later, along with Clark, we regrouped in Syrop's law office, and then traveled to an undisclosed location, Steak & Ale, for dinner.

The next morning, Clark, along with one of the New York lawyers, conducted a series of television interviews. The Innocence Project and others will help him with the extraordinary challenges of reintegrating into society after 24 years. But my role in his case is finished.

It is a role I will never forget. But it was a small role that I played for only a short time. And I deserve none of the credit for

the outcome. Robert Clark's case does not haunt me. But there are other cases that do haunt me.

Clark's story begs the question, how many more ghosts are there? How many innocent persons have been sent into Georgia's prisons? Well, I know about at least two, Jack McGarity and Lorraine Champion. And their stories do haunt me.

Jack McGarity: Unchallenged quackery

Jack McGarity's case has been the subject of a story on Channel 11's evening news program. A text version of the story still is available in the archives on its Web page. McGarity was convicted in 1991 of molesting his small daughter. His convictions were for touching with his hands, so there is no possibility of DNA evidence shedding light on the case.

The charges arose during divorce and custody litigation between McGarity and his second wife. His first wife testified at McGarity's criminal trial. She said that his second wife had confided an intention to do whatever was needed to do to prevent McGarity from ever seeing their daughter again.

The case against McGarity rested on the testimony of a then-master's-level therapist named Yvonne Pennington. Pennington claimed the ability to determine whether a child had been molested by looking at the toys she selected. Pennington's written report and taped interviews disclose fanciful reasoning and outrageously coercive questioning of a 2-year-old.

McGarity's trial counsel had retained a well-known forensic psychiatrist. The psychiatrist was dismayed by Pennington's conduct, and he urged trial counsel to allow him to rebut Pennington's testimony. But trial counsel did not even return the psychiatrist's calls. Nor did trial counsel even look at the videotapes of the interviews.

McGarity turned down a plea bargain that would have entailed no jail time. He was convicted and sentenced to 15 years, with 10 to serve.

I was hired in 1996 after McGarity's trial and his appeal of right were over. I learned that, after McGarity's conviction, Pennington went on to make strikingly similar charges against three other men.

In those cases, however, other

professionals rebutted Pennington's claims. The result was not only that there were no convictions but that there were no criminal trials. Ultimately, civil suits followed and Pennington settled for amounts totaling in the middle-six figures.

I've shown Pennington's work to nearly a dozen other therapists, and the reaction is uniform. They do not merely disagree. They are outraged and disgusted. One therapist who had trained with Pennington compared what she had done to prostitution.

Once a conviction has been upheld on appeal, there are two remaining remedies in the Georgia courts: habeas corpus and an extraordinary motion for new trial. Venue for a habeas petition is in the county of where the petitioner is being held. A habeas court can consider violations of constitutional rights, including the right to effective assistance of counsel. Venue for an extraordinary motion for new trial is in the trial court. A trial court hearing an extraordinary motion for new trial can consider newly-discovered evidence.

I pursued both remedies in succession. To the habeas court, I argued that it was ineffective assistance for trial counsel to fail to even return telephone calls from the forensic psychiatrist. To the trial court I argued that Pennington's three subsequent misadventures constituted newly discovered evidence. But I urged both courts to look at the case holistically.

They declined. The habeas court and the trial court each held that McGarity's remedy was in the other court. The experience brought back unpleasant childhood memories. It reminded me of being back on an elementary school playground, watching bullies toss my hat back and forth over my head.

Once McGarity's state court remedies had been exhausted, we started over in federal court.

A federal habeas court also can consider violations of constitutional rights, including the right to effective assistance of counsel. But a federal habeas petitioner must overcome the doctrines of bar and waiver. That is, a habeas petitioner can be denied relief on the basis that his arguments are barred because they had already been sufficiently considered in state court or, conversely, waived because the petitioner did not raise those them in state court when he had the chance.

McGarity's answer to bar and waiver was his actual innocence. Actual innocence can be considered in a federal habeas proceeding, not as an independent basis for relief, but as a gateway through the doctrines of bar and waiver. I argued McGarity's actual innocence entitled him to consideration on the merits of his claim of ineffective assistance of counsel.

But the federal magistrate and the federal district court adopted elaborate and convoluted reasons for refusing even to address McGarity's gateway actual innocence argument.

The United States Court of Appeals for the Eleventh Circuit disagreed. It held that McGarity was entitled to have his actual innocence claim considered. But instead of remanding so that his innocence claim could be heard, the appellate court weighed and disposed of it in a three-page analysis. Meanwhile McGarity completed his 10-year sentence shortly before the federal appellate court handed down its ruling.

It gets worse. Upon his release, McGarity learned to his dismay that Pennington had kept her hooks in his daughter.

The lawsuits Pennington had settled included claims in the names of the children whose lives she had disrupted. McGarity's daughter telephoned him, and they spoke once. She regurgitated new charges, including satanic rituals, which had not surfaced at the time of trial. And she reported that—shortly after becoming 18—she had signed a waiver releasing Pennington from any claims.

Lorraine Champion: Empty boxes

Lorraine Champion had worked for a number of years as head accountant for flooring company in Dalton. When the owner began taking steps to merge it with another of his companies, she correctly anticipated that her job would become redundant and that she would be demoted or fired. So she resigned.

The trial record established that the owner had pulled political strings to get the GBI to investigate Champion. The first line of the GBI report announced that the GBI agent had been assigned to investigate Champion. Not to investigate the flooring company or the possibility of theft from the flooring company—just to investigate Champion. The investigation and prosecution proceeded with the same tunnel vision.

The evidence at trial established that half a warehouse full of flooring was missing. But the DA's theory made no effort to account for the missing material.

Instead, the prosecution theory focused on missing records. Champion had surrendered those records years earlier when she resigned her position. Instead of taking custody of those records, the prosecution had returned them to the flooring company. When Champion and her trial attorney went to the company to inspect them, they were presented with empty boxes.

Champion was acquitted of 50 of the counts against her and convicted of only three. As a result, she faced a term of incarceration measured in months rather than decades. But she was the sort of person for whom a traffic ticket would have been upsetting. The prospect of prison terrified her.

On appeal, we argued that the convictions were founded on circumstantial evidence insufficient to sustain a conviction.

We also relied on the rule that lost evidence is a bar to conviction if the prosecution is at fault for allowing it to become lost or if the defendant was prejudiced by its loss. The decision of the Court of Appeals subjected the legal authority on which we relied to a narrow and hostile interpretation and affirmed Champion's convictions. A divided Georgia Supreme Court denied certiorari, and Champion went to prison.

How many ghosts?

The Clark, McGarity, and Champion stories are the best stories about innocent persons convicted that I can tell from my own professional experience, but they are not my only stories. My experience may be atypical. I have a mostly civil appellate practice. So I may attract a somewhat different class of criminal client than I would if I concentrated more in criminal law.

So the question remains: how many ghosts? How many innocents convicted?

- At latest count, there have been 173 DNA exonerations nationwide. There have been five in Georgia.

- Last year, then-Virginia Gov. Mark Warner ordered random DNA testing of forensic samples from old cases in the state's files. Of the first 31 reviewed, DNA established the innocence of two men who

had finished serving long prison terms for rape. That is 6.5 percent. Is that random sample representative?

DNA now is tested before trial. Of the first 18,000 prime suspects whose DNA was tested by the FBI and other crime labs, 5,000—more than a quarter—were excluded before trial. How many of those cases would have been investigated with the same sort of tunnel vision that characterized the Clark, McGarity and Champion cases? How many of those prime suspects would have become—or remained—sole suspects if DNA evidence had not cleared them? How many would have become defendants and then convicts?

DNA cannot help in every case. It is a candle in a cave. It illuminates a small part of a dark expanse. In another ongoing case, the Clayton County DA allowed Georgia Innocence Project volunteers and employees to search her evidence room and they found the critical DNA evidence in the wrong box. Most of the time—as in the McGarity and Champion cases—DNA evidence cannot shed any light at all.

So how many ghosts? How many innocents convicted? I do not know. But I fear, to paraphrase Albert Einstein, that the truth is not only more terrible than we imagine, but more terrible than we can imagine.

Recurring patterns

The cases upon which DNA evidence sheds light enable us to draw inferences about the cases that it does not directly illuminate. Reoccurring patterns have immersed in the false convictions that DNA evidence has brought to light.

Eyewitnesses often are mistaken. Contrary to a popular, and appealing, misconception the stress of a violent crime does not sharpen memory. On the contrary, victims often focus on an assailant's weapon and not on his face. Eyewitnesses are suggestible; it is easy to inadvertently distort their recollection. Children are especially suggestible. An eyewitness' expressed certainty about an identification is no predictor of accuracy. In Clark's case, the victim was certain of her identification—even though she had initially described her assailant as six inches shorter than Clark.

Snitches lie. Prosecutions based on the testimony of prisoners who stand to gain by reporting the alleged incriminating

statements of fellow prisoners should be treated with extreme skepticism.

Forensic fraud and junk science are fertile sources of false convictions. Junk psychology stole 10 years of McGarity's life.

Bad defense lawyers often get innocent clients convicted. That was another of McGarity's problems. Recently Georgia has taken major strides in that regard. But bad lawyering cannot be eliminated completely.

Investigators with tunnel vision often get it wrong. That was a problem with all three of the cases I have discussed.

There are reforms that can be adopted to address all of those patterns. But there is a more fundamental problem.

Time to wake up

More fundamentally, a common thread running through the Clark, McGarity and Champion cases is that the courts are resistant to arguments that rest, ultimately, on a claim of innocence. There is nothing malicious in that resistance. Several of the appellate judges who rejected the arguments I made in these cases have warmly congratulated me on the ultimate result in Clark's.

The late Chief Justice Charles Weltner put his finger on the problem when he wrote, "Too much of our limited judicial resources are consumed in looking for real or imagined errors in the convictions of people who are plainly guilty ... But we must not become so engrossed in the searching out of procedural faults which sometimes intrude in convicting the guilty that we forget the core purpose of the writ [of habeas corpus]"—and I would add of the criminal law generally—"which is to free the innocent wrongfully deprived of their liberty." *Valenzuela v. Newsome*, 253 Ga. 793, 796, 325 S.E.2d 370 (1985).

Our judicial system is still dreaming along with Judge Hand, still imagining that conviction of the innocent is a hypothetical evil. It is time to wake up.

Lost in the deluge

The Georgia appellate courts should reconsider their approach to meritless

appeals in criminal cases. Privately paid lawyers who are hired to handle criminal appeals owe their clients a frank assessment of costs and chances of success. In the federal courts, a lawyer appointed to represent an indigent criminal defendant on appeal who concludes the appeal has no merit can move to be relieved. But the Georgia appellate courts do not allow such motions; they require appointed counsel to go through the motions of a meritless appeal.

In practice, that often means a rote assertion that the evidence is insufficient. So the Georgia appellate courts continually are deluged with insufficient-evidence arguments that are obviously meritless—often to the point of absurdity.

Insufficient-evidence claims that do have merit can get lost in the deluge. Upon joining the Court of Appeals, at least one judge was advised never to grant oral argument in a criminal case where the only issue was sufficiency of the evidence.

Oral argument was not allowed in Champion's case. I often wonder if, given a chance, I could have made an argument strong enough to save her.

Innocence commission

Georgia should form an innocence commission. When wrongfully convicted people are exonerated, hard questions should be asked.

Convictions of the innocent are not simply acceptable byproducts of the adversary system. They are not simply prosecutors' hard won victories in tough cases. They are catastrophes.

They are not only catastrophic for the person wrongfully convicted. They are catastrophic for the subsequent victims of real criminals who remain at large.

And they are catastrophic for the justice system itself. When an innocent person is convicted, there is usually a circle of family and friends who know that a travesty has occurred. That circle of people usually enters the process with a measure of faith in the criminal justice system. "Faith" is consistently the word they use. Convictions of the innocent break that faith. Those circles of broken faith are a cancer upon

the justice system.

When other catastrophes occur—when a worker is killed on the job, serious medical malpractice takes place, a plane crashes, or a train is derailed—there is an investigation. Agencies like the National Transportation Safety Board look for causes and make recommendations. Such agencies are effective because they have expertise and independence. In many cases they have subpoena power. They ask the hard questions: whether the cause was a systemic problem, an individual's mistake, or official misconduct. They ask what changes should be made to assure that another similar catastrophe does not occur.

An innocence commission should be formed to ask the hard questions that need to be asked when it comes to light that an innocent person has been convicted.

Some of the answers may present policy-makers with tradeoffs between convictions of the innocent and acquittals of the guilty. If so, those choices should be made with open eyes, not in the dreamland where the criminal justice system errs only in favor of the accused.

In 2002 the North Carolina Supreme Court created an innocence commission. In the 2003 the Connecticut legislature did the same. Georgia should join them.

A guttering candle

The matter is urgent. DNA acquittals are illuminating failings of the criminal justice system that would otherwise remain hidden. But that light will soon fade. The DNA testing, if feasible, is now performed at the start of criminal investigations. That is good news for innocent suspects who are quickly cleared. But it means that the era of DNA exonerations is coming to a close, and closing with it is the opportunity to learn broader lessons from those exonerations.

Twenty-one years after he dismissed "the ghost of the innocent man convicted" as "an unreal dream," Hand got it right. In a famous speech at New York's Central Park he said, "The spirit of liberty is the spirit which is not too sure that it is right." ☞