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ADVOCATING FOR THE INNOCENT

BY
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Mark Godsey and UC law students have made a national reputation in freeing 16 wrongfully convicted people

Antonio Zuñiga was serving a 20-year sentence in Mexico for murdering a man he never met, largely because his public defender had been practicing with a forged license. Three years later, he was exonerated. In three more years, he was the guest of honor at the first Innocence Project International Conference, hosted by the UC College of Law at Cincinnati's Freedom Center.

The instant Melinda Elkins caught sight of a SWAT officer sprinting past her picture window with a gun drawn, she stopped breathing. Before she had a second to react, a deputy sheriff showed up at the front door ordering her and her 12-year-old son, Brandon, to move onto the porch where they could not see what was happening on the other side of the house.

Out of sight, her 15-year-old son, Clarence Jr., was handcuffed, lying on the ground, surrounded by officers pointing guns at him. When his father came running from the back door, the officers realized they had cuffed the wrong person and immediately turned on Clarence Sr. Amid the chaos, the younger Clarence heard his mother screaming and dashed for the house with one handcuff still dangling.

In the yard, officers were arresting Elkins Sr. for brutally raping and murdering his 58-year-old blind mother-in-law, Judith Johnson, and raping his 6-year-old niece, Brooke. On the porch, a deputy was explaining to Melinda how she had just lost her mother, had nearly lost her

niece and was about to lose her husband.

That was June 1998. For seven and a half years, Clarence Elkins sat behind bars, serving a life sentence for a crime that both he and his wife steadfastly maintained that he had not committed.

He would still be there today if UC College of Law professor Mark Godsey had not gotten involved. In 2004, Godsey brought in law students to learn techniques for proving Elkins' innocence and saving his life.

In 2005, Godsey had DNA testing done. As director of the Ohio Innocence Project, which operates out of UC's Rosenthal Institute for Justice, he firmly believed that the results excluded Elkins from the crime.

Getting prosecutors and judges to agree, however, was going to be particularly difficult, the students soon discovered.

Resistant to admitting mistakes

The criminal justice system is normally good at administering the law — locking up a murderer so he doesn't endanger anyone else, for

instance. Boosting society's confidence in law and order is a good thing.

Those in the field point out that the work is harder than it looks on TV. Police put themselves in dangerous situations. Prosecutors work long hours to win cases. And judges hand down verdicts, confident that they have considered all the evidence.

But sometimes the system can be so focused on an end result that justice falls short of being just, and "wrongful convictions" are the outcome, say Barry Scheck and Peter Neufeld, who founded the Innocence Project in 1992 to free such people pro bono.

Unfortunately, they say, overturning a conviction requires a new trial, and no prosecutors or judges want to be second-guessed or have work reversed. Certainly no one wants to claim responsibility for careless mistakes. A new trial could reveal all of that.

"People can convince themselves that they are doing the right thing to the extent that they can no longer see the evidence neutrally," Godsey explains. "The criminal justice system is resistant to admitting mistakes.

"Some prosecutors and judges kick, scratch and claw to keep an innocent person in prison. We're capable of doing horrible things and being in denial about it. That's what human beings are capable of. It's a knee-jerk reaction.

"But prosecutors who unreasonably oppose post-conviction innocence claims," Godsey continues, "are not doing so because they are corrupt or are attempting to keep innocent people in prison. Rather, I believe that they suffer from tunnel vision."

He should know. At one time, he had the same condition.

For years, he made a reputation prosecuting federal crimes, including cases such as political corruption, hijacking and organized crime in New York. He also supervised FBI investigations, argued federal appeals and received a Director's Award for Superior Performance from then U.S. Attorney General Janet Reno.

Innocence Project finds Godsey

Godsey gave it all up to move back to his hometown in Cincinnati for a criminal law professorship. Because he knew such positions only become available every 10 years or so, he grabbed the area's first opening at Northern Kentucky University's Salmon Chase College of Law.

What he did not expect to grab was the

Kentucky Innocence Project. "The professor who had supervised it was taking a sabbatical," Godsey recalls, "and I think they asked me to take it over because of my investigative background from being a prosecutor."

He said "yes," but still clung to a serious skepticism, reinforced the day students excitedly returned from meeting a prisoner, whom they claimed to know was innocent by the look in his eyes. "The look in his eyes?" he questions. "I was cynical, and I still am, about being able to tell innocence by looking in someone's eyes."

It did turn out he was innocent, and as time went on, Godsey admits, "I had my eyes opened to the reality of wrongful convictions of innocent people."

In 2003, the UC College of Law needed a criminal law professor, and he packed his books. He also grew excited when he met people who had been working with the dean trying to create the Ohio Innocence Project (OIP).

Cincinnati City Councilman John Cranley and Godsey ended up co-founding the OIP with others that year. Soon Lois Rosenthal, Bus '60, HonDoc '08, and her husband, Richard, HonDoc '08, began giving gifts that would total more than \$2 million to endow the Rosenthal Justice Center and support the OIP.

Most states have an Innocence Project, usually located at a major law school, which is how the organization started. Ohio's only Innocence

"THE TRUTH IS HUMANS ARE ERROR PRONE, BUT DNA ISN'T. WE MAKE MISTAKES, BUT SCIENCE DOESN'T."

— Matt Katz, JD '11, former OIP fellow

photo/Dorrie Stover



Mark Godsey (left), OIP director, poses in front of the Ohio Statehouse in 2011 right before the state legislature passed a law promoted by the OIP to expand DNA use in criminal forensics. With Godsey are Clarence Elkins (center) and Robert McClendon, both freed by the OIP with DNA testing, after serving a combined 24.5 years in prison for murders in which both were innocent.

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“Mark Godsey has a brilliant legal mind and is an excellent writer,” says Jim Petro, former Ohio attorney general and former chancellor of the Ohio Board of Regents.

Project is at UC, where the staff normally comprises director Godsey, two full-time staff attorneys, one part-time attorney, one administrative director and 16 to 20 students (called fellows), who work full time in the summer and part time during the school year, primarily conducting research to identify Ohio inmates who are innocent.

“I worked on 40 or so cases, looking for evidence,” says Matt Katz, JD ’11, who chose UC because of the Ohio Innocence Project. “We also tried to keep up inmates’ spirits with phone calls and visits.”

He remembers a 2010 visit with inmate Raymond Towler at the Grafton Correctional Institution two months before Towler was exonerated. “His court date was that close, and I still wasn’t sure if we had the evidence we needed.

“He remained upbeat, but was getting frustrated because he had been down the road several times over nearly 30 years in prison. It was hard for me to leave him that day not knowing what would happen.”

Katz is now a public defender in Indianapolis. “The one thing from OIP that I use every day is the realization of how precious the investigation is. I look under a lot of rocks that I normally wouldn’t have looked under, but I know some piece of evidence is going to be found in a place no one would have expected. That is where we found evidence in the Ohio Innocence Project.”

Approximately 50 students apply annually for a one-year OIP commitment, but OIP attorneys

can only oversee 20 at a time, says administrative director Jodi Shorr. The workload is heavy in that thousands of inmates have reached out for OIP assistance in the last 10 years, she says.

Consequently, the staff is very selective in taking cases. All clients go through extensive screening to determine if innocence seems likely and if enough new evidence would warrant a new trial.

A staggering .004 percent

The best “new” evidence, experts say, is DNA that was not previously tested. To consider it requires a new trial.

Luckily for defendants, DNA analysis is much more sensitive than 15 years ago. “Very small and degraded DNA samples can be tested successfully,” explains Julie Heinig, assistant laboratory director of DNA Diagnostics Center, the world’s largest DNA-testing provider and one that provides free unlimited testing for the OIP.

The easier DNA becomes to test, the easier it is to convict guilty criminals, exonerate the falsely convicted and highlight sloppiness that creates havoc in the field. “Some courts and attorneys are very accepting of DNA testing,” notes Heinig, one of the top DNA experts in the world, Godsey says. “Others don’t want to admit that a mistake was made in their courtroom. It’s very frustrating at times.”

In all, 6,650 inmates have sought OIP assistance during its 10 years of existence, and the staff determined they could potentially prove innocence for only 24 cases — a staggering .004 percent of the total. The rest were turned away. Nationally, such percentages are typical.

Of those 24, the OIP helped 16 get released from prison. Collectively, those 16 had served nearly 250 years incarcerated. Towler had served the longest, nearly 30 years — more than half of his life.

Although 16 were released on grounds of innocence, not all were exonerated, which would have meant they were officially declared not guilty and had their convictions expunged. Those who did not get to grasp that cherished prize had to settle for something less, such as a pardon, parole or a plea — in which case, their sentences were reduced or eliminated, but their convictions still stood.

In most states, a convicted felon cannot vote, possess a firearm, obtain certain professional licenses, serve on a jury or establish eligibility for government assistance, including welfare and federally funded housing. Felony records can further hinder employment, entering a contract to rent housing and the ability to do business with some banks. If the conviction carried any type of sexual misconduct, the person may have to publicly register as a sexual offender.

Because people working in the field are reluctant to upend the judicial system, exonerations



are incredibly difficult to obtain, Godsey says. In some states, they can be impossible to obtain.

Eighteen states, including Indiana and New York, for example, have no evidence-preservation laws, according to the Innocence Project. Usually, that means an inmate's innocence cannot be proven years after a conviction because the evidence has been destroyed, lost or contaminated, IP documentation shows.

"There are innocent people in jail right now because their evidence has been destroyed," says public defender Katz. "It's sad, but there's not much we can do for them."

For those few who do get exonerated, some of them can apply to the state for remuneration for lost wages. The ones who win have to fit a narrow range of criteria and follow a complicated legal process. Of the OIP cases, only three have received financial compensation.

First exoneration

In December 2005, Clarence Elkins was OIP's first exoneration based upon DNA testing.

OIP took the case in January 2004 because Elkins had no prior convictions and not one piece of physical evidence linked him to the barbaric crime. No fingerprints. No blood. No particles of fabric. No fragments of nails or hair.

Court documents reveal that the prosecution relied solely on conflicting confessions from his niece, Brooke, a traumatized child who had been badly beaten, raped and left for dead. She had mercifully passed out during the act. The next morning, the 6-year-old awoke to find herself in horrible pain and "covered from head to toe with blood," as her mother would later tell NBC news.

Looking for help, she found her grandmother dead in a pool of blood. She dialed a friend to call for help, but had to leave a message, which was preserved as evidence: "I'm sorry to tell you this, but my grandma died, and I need somebody to get my mom for me. I'm all alone. Somebody killed my grandma."

Desperate, the child wandered the neighborhood in her bloody nightgown until she located a neighbor at home. Curiously, this neighbor did not let the swollen-faced child into her house. Instead, she left her on the porch for about 30 minutes before driving her home, as Brooke explained in a CBS "48 Hours" interview.

The neighbor also failed to call an ambulance for the obviously injured child or call the police when the girl related her grandmother's murder. Equally odd was that after the visit with the neighbor, Brooke's story changed from "Somebody killed my grandma" to "Uncle Clarence killed my grandma." Uncle Clarence was convicted.

In 2002, Brooke, 10 years old by then, recanted her testimony, saying she had never been sure that Uncle Clarence was her attacker.



Elkins' lawyers tried to get a new trial or hearing, but the judge denied both.

By then, Elkins' wife, Melinda, was on the brink of bankruptcy, having lost her job and their house, as well as borrowing \$100,000 to try to get her husband out of jail early. In 2004, she called OIP asking for help.

The next year, OIP had more extensive DNA testing done on crime scene evidence that the coroner had already tested, but had never been presented in court, Godsey explains. The results showed that skin cells from underneath the deceased's fingernails, as well as two pubic hairs found on Judith's body and in Brooke's underwear, all belonged to one man, but it was not Elkins. In March 2005, Godsey argued for a new trial.

"Lawyers are told to not get personally involved with clients," OIP director Mark Godsey admits. But something happened between him and his first OIP case in 2003, Roger "Dean" Gillispie. Godsey invested thousands of hours of work and more than 40 visits to prison to get Gillispie released in 2011 after 20 years in prison. "When you go through something like this, it's a spiritual experience of connecting yourself to another when no one else listens. It's a very big bonding experience. This has been one of the most rewarding relationships in my life."

Wrongfully convicted people OIP helped free

1. **Gary Reece** (freed 2005, served 25 years)
2. **Clarence Elkins** (freed 2005, served 7.5 years)
3. **Chris Bennett** (freed 2006, served 4 years)
4. **Bruce Paul** (freed 2008, served 14 years)
5. **Robert McClendon** (freed 2008, served 18 years)
6. **Joseph Fears** (freed 2009, served 25 years)
7. **Nancy Smith** (freed 2009, served 15 years)
8. **Willie Knighten Jr.** (freed 2009, served 12 years)
9. **Ray Towler** (freed 2010, served 29 years)
10. **Teddy Moseley** (freed 2010, served 10 years)
11. **Walter "Wally" Zimmer** (freed 2011, served 12 years)
12. **David Ayers** (freed 2011, served 11 years)
13. **Roger "Dean" Gillispie** (freed 2011, served 20 years)
14. **Bryant "Rico" Gaines** (freed 2012, served 9 years)
15. **Glenn Tinney** (freed 2013, served 20 years)
16. **Douglas Prade** (freed 2013, served 15 years)



"Hands" is the name of this drawing done by exoneree Timothy Howard, whose work was displayed in a global art exhibit at the Innocence Network International Conference, hosted by the OIP.



Photos/Dottie Stever

“The pain and frustration of wrongful conviction and incarceration often manifests itself in incredibly meaningful forms of artistic expression,” Godsey says. “The wrongfully convicted have important things to say, and it is clear that art is a particularly powerful and effective way for them to say it.” Above, the exhibit of exonerees’ art was part of the OIP’s Innocence Project International Conference in 2011. Below, law students look over paintings done by OIP exoneree Raymond Towler.



It was denied, “meaning that Elkins would have to spend the rest of his life in prison for a crime that I knew he did not commit,” the exasperated professor says. “This defeat was hard to fathom.

“The job can be agonizing. It’s amazing when someone gets released, but for every one of those, there are dozens who didn’t. It’s a very difficult job when you are going against bull-headed people who won’t admit that a mistake has been made. That’s when it gets depressing.”

In the meantime, Melinda, who had become something of a super sleuth over the years, began contemplating the neighbor’s fishy response to her niece. Further investigation revealed that, at the time of the crime, the neighbor’s common-law husband had been Earl Mann, who was serving time, in the same prison as Elkins, for raping three girls in ’02.

Once Melinda informed her husband, Elkins knew it was up to him to get a DNA sample from Mann. The big moment came when Elkins saw Mann, all alone, extinguish a cigarette in a clean ashtray and walk away.

Elkins nervously slipped the butt into a clean tissue and hid it inside his heavy 1,900-page “Strong’s Bible Concordance.” He waited another two weeks to obtain a new Ziploc baggie so he could mail the butt to his lawyer uncontaminated. All the while, he tried to remain inconspicuous because he suspected his action was against prison rules.

A few months later, in September ’05, Godsey received a phone call confirming the saliva on the butt matched the unidentified DNA found on both victims.

Fearful of the system

“When I got that call, I was ecstatic,” Godsey recalls vividly, “but soon, I grew concerned. The previous March, prosecutors had been so close-minded and arrogant in their beliefs that Elkins was guilty that I sensed they would never change their minds no matter what type of evidence we produced.

“The Elkins conviction had been a trophy of sorts for them, it seemed, and they appeared personally invested in making sure the case was not overturned. How Elkins sat there in his chair at the hearing and stayed calm while the prosecutors repeatedly pointed at him and loudly called him a murderer and rapist, I could not imagine. I could barely sit still myself.”

When Godsey received the DNA results in September, he contacted then Ohio Attorney General Jim Petro to discuss his options. Petro spent a few weeks examining the case in detail, decided Elkins was innocent and expressed shock that the prosecution blocked his release.

Petro had no authority to overturn the case, but he quickly joined OIP in filing briefs on Elkins’ behalf and “supporting his innocence.”

Godsey says. “He used his position as attorney general as a bully pulpit to pressure local prosecutors into doing the right thing. And that is exactly what happened next.”

Petro held a press conference. He admits it was a radical thing for the state’s top law enforcement official to do, basically “butting heads” with one of the prosecutors he would normally be supporting. “I didn’t understand the shortsightedness of the county prosecutor,” he says, “so I decided to go public.”

Things must have looked clearer then because Elkins was released in December 2005. In 2007, Mann was indicted. In 2008, Mann pled guilty to aggravated murder, attempted murder, aggravated burglary and rape, then was sentenced to life in prison without parole.

“I know of no other attorney general in the United States who has taken on an entrenched local prosecutor to fight for an innocent inmate,” Godsey says in quiet awe.

Petro returns the compliment: “Working with Godsey on the Elkins case was a pivotal experience for me. The absolute innocence of Clarence Elkins — a family man with no prior criminal record, who was wrongfully convicted and sentenced to life in prison — introduced me to a national nightmare.”

Changing the law, then the system

After Petro left office, he worked pro bono for the OIP, leading the effort to push a new Innocence Protection Act through the legislature and implementing eyewitness identification reforms, a DNA-preservation law, police incentives for the recording of interrogations and expansions in the original DNA law.

Those basic categories create avenues to reduce the majority of ways a wrongful conviction takes place. “It has been called a ‘national model’ and ‘one of the most important pieces of criminal justice legislation in Ohio in a century,’” Godsey says. “It will prevent an untold number of future wrongful convictions that we will never hear about because they will be prevented from happening in the first place.”

The OIP is recognized as one of the most active and successful Innocence Projects in the country, a point not overlooked by Innocence Project founder Barry Scheck. “The Ohio Innocence Project has become one of the premier projects in just 10 short years,” he says. “The number of people they have freed and the legislative reforms they have been able to get passed in Ohio have made them a national model — actually, an international model — for success.”

“We’re at the very beginning of reforming the criminal justice system,” adds Godsey, who serves on the national Innocence Network board. “It’s a civil-rights movement. In 50 years, it will be widely recognized as an international

human right. True justice is a search for truth, requiring constant vigilance, and is ultimately the responsibility of every citizen.”

To promote the cause worldwide, Godsey often travels abroad to help scholars and attorneys set up Innocence Network organizations in their own countries, including India, the Czech Republic, Poland and Italy. In 2011, the OIP hosted the Innocence Network’s first international conference to consider global human rights related to wrongful conviction. Hundreds of people attended from four different continents, including a group of 100 representing the world’s largest gathering of exonerated persons.

Law Dean Louis Bilonis applauds the efforts of OIP staff and fellows: “The Ohio Innocence Project is transforming the way people think about our criminal justice system. Thanks to its work, more and more people are recognizing that our system is imperfect — that it makes mistakes and can produce injustices.

“And thanks to the Ohio Innocence Project’s leadership, people are coming together to confront the system’s shortcomings and weaknesses, admit and rectify its errors, and take lessons to avoid them in the future. The Ohio Innocence Project quickens consciences, raises consciousness and carries us all closer to justice.”

No one is more grateful to the Ohio Innocence Project than the 16 people who are now free. Clarence Elkins sums it up nicely: “When I was in prison, seeing how hard the OIP students worked on my case inspired me and gave me hope, something I had not had for years. Whenever they came to visit me in prison, it was a blessing.

“I’m not much on words, but I speak from the heart. I just want to say thanks to everyone. They changed my life.” ■

Although many people have contributed to the Ohio Innocence Project, Godsey is quick to point out, “No single family has done more for any Innocence Project in the world than Lois and Richard Rosenthal have done for us.” “The Rosenthals were so incredibly generous,” adds former fellow Matt Katz. Because OIP work is pro bono, gifts are necessary. In 2011, exoneree Clarence Elkins began giving \$5,000 a year to the Ohio Innocence Project to establish the Clarence Elkins Fellows Scholarship, an annual award to the OIP team that “has worked the hardest and most diligently on its cases” — just as “the OIP fellows did on my case years ago,” he says.



photo/Dorrie Stover

Raymond Towler’s artistic expression also came out in the form of music, as part of a band of all exonerees, performing at the international conference.

Sources for the article: “False Justice,” by Jim and Nancy Petro, 2011; “False Justice and the ‘True’ Prosecutor: A Memoir, Tribute, and Commentary,” by Mark Godsey, 2012; “Illustrated Truth: Expressions of Wrongful Conviction,” special edition of the Freedom Center Journal, 2011; court transcripts; the National Registry of Exonerations; the Innocence Network; the Innocence Project website; the Ohio Innocence Project’s annual report (2011), plus 11 interviews.

UC Visit www.magazine.uc.edu/extra for details of each court case, Matt Katz’s OIP story, surprising statistics, reasons for wrongful convictions and false confessions, Jim Petro’s “Eight Myths that Convict the Innocent,” and a PDF of a colorful 276-page book of inmates’ artistic expressions.