

*The following document is an annotated version of District Attorney Bill Wirskye's article "My Wrongful Conviction" published by the Texas District & County Attorneys Association in November 2017 (original version can be accessed at <https://www.tdcaa.com/journal/my-wrongful-conviction/>). The red text represents comments from Ivan Cantu.*

**"My Wrongful Conviction" by Bill Wirskye, First Assistant District Attorney in Collin County**

I recently discovered that I had a wrongful conviction in my past. But this wrongful conviction was not that of an innocent person sent to prison for a crime he didn't commit. The conviction I'm talking about was a belief—a very strongly held belief I had about prosecution. I now believe I was wrong in this conviction, and I was wrong about wrongful convictions.

As a newly minted prosecutor in the Dallas County Criminal District Attorney's Office in the mid-1990s, it never occurred to me that I could wrongfully convict someone. After all, I had been taught that I was one of the good guys. I worked in the best criminal justice system in the world. We had checks and balances built in to the system to prevent just such a miscarriage of justice. I genuinely believed that if I was an honest and hardworking prosecutor, I would always get the right guy. Everyone I worked with shared these same fundamental beliefs. We all knew our duty under Brady, and we tried our best to comply. That was our office culture. We were proud to be prosecutors and considered ourselves "crime fighters" in the courtroom. Although I'd heard vague stories about wrongful convictions in other states, frankly they didn't seem very real to me, and I certainly didn't consider these stories to be any sort of a cautionary tale for me in my daily work.

But beginning in the early 2000s, Dallas became the epicenter of the DNA exoneration movement. As the number of DNA exonerations began to climb, I was forced to confront both the fallibility of the criminal justice system and the fallibility of my personal beliefs and convictions.

**Ivan Cantu:** The DNA Exoneration movement is interesting for many reasons and it could have affected my case and I will explain why. The murders that were committed in which I was convicted of were on the cusp of Dallas and Collin Counties. Dallas investigated the murders and were looking into me right away. They ignored anonymous tips, they ignored nefarious actions of others, they ignored many things that could have proven that I did not commit this crime. They had tunnel vision and focused all of their attention and built this fraudulent case around me and only me. During this timeframe, knowing that my case was investigated by Dallas, yet convicted in Collin County—someone could have brought this forth and done a thorough review of my case as well. The National Registry of Exonerations shows that there have been a total of 72 exonerations out of Dallas and Collin Counties to date. Only 4 of these were in Collin County, one being Suzanne Wooten, who unseated Ivan's trial Judge, Charles Sandoval who led a campaign alleging bribery amongst other things on Wooten's part. She was convicted and later exonerated.

From what I could tell, we didn't prosecute any differently in Dallas than prosecutors did in the rest of the state, but the media's narrative of that era was that a "win-at-all-costs, convict-them-all" culture in the Dallas DA's Office was to blame for the wrongful convictions. Dallas County prosecutors so valued convictions, this reasoning went, that we would routinely cut ethical corners without regard for whether we actually had the right guy.

This, of course, was utter nonsense. That was not the office culture I knew. The prosecutors involved in the exonerations were good, honest people, genuinely trying to get the right guy the right way. While I can never be sure that some Dallas prosecutor didn't intentionally cut corners in one of those cases, even one or two of these "bad apples" wouldn't explain the sheer number of wrongful convictions. The Innocence Project lists a total of 24 DNA exonerations in Dallas County.<sup>1</sup> So, exoneration by exoneration, I became increasingly aware of the limitations of our system and my own limitations as a prosecutor. It certainly seemed that our shared belief in honesty and hard work, while good, was not enough to prevent all the wrongful convictions occurring in Dallas. And even as I redoubled my efforts to avoid convicting an innocent person, I really had no new strategies or tactics to employ. In truth, I guess I just worried about it more because I was scared it could happen to me.

Probably because of these experiences in Dallas early in my career, I became intrigued with how we as prosecutors could do better. How can we convict the right guy, the right way, the first time? When I returned to prosecution in 2015 after eight years as a defense lawyer, I made a very conscious decision to study wrongful convictions and immersed myself in the world of conviction integrity and actual innocence. Fortunately, my elected DA, Greg Willis, shared my curiosity on the subject, and he encouraged me to follow my interest.

Ivan Cantu: I PRAY that you, Bill Wirskye, Greg Willis, John Rolator, Amy Murphy, et all read the words that Mr. Wirskye wrote over 6 years ago along with my pleadings and please do the right thing. Do it, not only for me, do it for the Mosqueda's and the Kitchen's, do it for my mother, do it for our sisters and brothers, families and friends. This could happen to anyone as this WRONGFUL CONVICTION did happen to me.

I began to attend every seminar and training I could find that dealt with this topic. Oftentimes I was treated as somewhat of a curiosity—a former Dallas County death penalty prosecutor who claimed to have an interest in getting it right and making the criminal justice system better. I'd frequently find myself as the only prosecutor in the room, surrounded by defense lawyers, law professors, and other prosecutorial skeptics who seemed somewhat puzzled I had managed to infiltrate their midst. I learned quickly, however, that despite our differences, we shared a common interest—namely, a strong desire to improve our criminal justice system.

This realization gives me hope that moving forward we can undertake any necessary prosecutorial reforms in a collaborative manner, engaging all the stakeholders in the system. I've met so many

defense lawyers and academics of good will and good conscience that I can no longer reflexively ignore their criticism. Instead, I want to leverage their input as we undertake an exhaustive and collective re-examination of our profession to help find new and better ways to see that justice is done.

While I realize that other actors in the criminal justice system also have a responsibility to prevent wrongful convictions, I think prosecutors should lead the way because justice is our business. Some exciting work in this area has already been done, and some promising themes and solutions are starting to emerge for me. While these may not be entirely satisfying or comprehensive, I do believe they can make us better prosecutors and reduce the chances of obtaining a wrongful conviction.

**Brady sometimes isn't enough, so embrace the Michael Morton Act.**

Ivan Cantu: This is absolutely correct. This is why FOIA and Open Records Requests must be approved. All information pertaining to the case must be available to all parties. [The Morton Act] is a wonderful piece of legislation. However, something very important such as an open file policy should apply to everyone, not just new convictions after the Act passed. Unfortunately, it is not retroactive. Had this act been deemed retroactive, my current attorney could have had open access to the entire case file on 1/1/2014. Especially with a death penalty case. Please allow my attorney to have an open file policy with your office. You, yourself have acknowledged that Brady isn't enough so an open file policy seems reasonable.

I had always assumed that our honest adherence to Brady was the ultimate safeguard for prosecutors against widespread wrongful convictions. The Dallas DNA exonerations proved me wrong. Brady was never meant to be a pre-trial test employed by trial prosecutors to decide what to turn over to the defense. Rather, Brady is a post-conviction harm-analysis test to be used by appellate courts. Applying the Brady test pre-trial requires a prosecutor to make a prospective guess about what is favorable evidence for the defense and whether it will ultimately be material. This can be a trap for unwary or unlucky trial prosecutors. This seems ridiculously clear with the benefit of hindsight, but I know it never occurred to me until the 2014 legislative changes gave me some valuable and overdue perspective on the inherent limitations of Brady.

So now we prosecute in the post-Brady world of the Michael Morton Act. An open file and complete transparency is the law of the land in Texas. This new approach certainly takes the guesswork out of discovery for prosecutors, and for that reason alone, I'm in favor of the Morton approach to discovery, even if I have to burn a few dozen disks in even the simplest of cases. While there's no guarantee that Morton will be a better safeguard, it appears to be an improvement over Brady in preventing wrongful convictions. I guess only time will tell.<sup>2</sup>

**Eyewitness evidence is not the “gold standard” we once thought, so corroboration is the key.**

Like so many prosecutors who came before me, I had always considered eyewitness testimony to be the gold standard of reliable evidence. Eyewitnesses have the power to persuade detectives, prosecutors, and juries, but the DNA exonerations and continued research into eyewitnesses and the process of memory have challenged our understanding of the reliability of this type of testimony. The human eye is no longer compared to a camera and the human memory is no longer analogized to a DVR. It turns out that eyewitness testimony is a far more complicated matter than we initially thought.

Independent corroborative evidence is now the key for investigators and prosecutors to shore up eyewitness identifications. It has helped me to think of eyewitness evidence as trace evidence—that is, memory is malleable and can be contaminated much like the more traditional types of trace evidence. I now believe that an eyewitness’s memory should be treated as the “unseen crime scene”—kept secure from improperly suggestive outside influences. Although the research in this area often seems contradictory, two key takeaways have emerged: Prosecutors must be more cautious of this type of evidence, and we must increasingly rely on corroboration. But because eyewitnesses will continue to play an important role in the investigation and prosecution of crime, it will be incumbent on us to learn the latest research and employ the latest best practices.<sup>3</sup>

**We as prosecutors are not immune to cognitive bias, so beware.**

Cognitive bias<sup>4</sup> is a term for certain subconscious and predictable thinking errors that all humans make. These pose a real threat to prosecutors, and they can take many forms. The well-known bias of “tunnel vision” can infect an investigation or prosecution by blinding police and prosecutors to other alternative suspects or explanations. The related concept of “confirmation bias” is the tendency to search for, interpret, favor, and recall information in such a way that confirms one’s pre-existing beliefs.

**Ivan Cantu: Dt. Anthony Winn clearly had tunnel vision and fixated on me. He accepted the state's witnesses comments/statements at face value and didn't care to investigate the claims. Doing this prevented him from thoroughly investigating the case and laid the foundation for my wrongful conviction. He accepted false and untruthful information to create a fraudulent narrative.**

Consider the common scenario where the police file a case with the local prosecutor’s office and vouch that their investigation has revealed that the defendant is the right guy. How hard is it for us to completely distance ourselves from their conclusion and take a look at the evidence with truly objective eyes? I know I struggle daily with this task, so I frequently try to read the file a second time with a “devil’s advocate” frame of mind to try to control for any bias on my part.

Many prosecutors will “pitch” their case to a group of other experienced prosecutors and investigators to make sure they are not missing some important fact or angle due to bias or tunnel

vision. The theory is that the more eyes on the case and the more brains thinking about it, the less chance something will be missed.

Ivan Cantu: Bill Wirskye mentioned having objective eyes and struggles daily with this task. Would you be willing to organize this recommended "pitch session" to a fresh group of eyes on my case?

The goal here is to seek creativity and not necessarily consensus.

Ivan Cantu: He mentioned that every piece of evidence should be challenged while never assuming guilt. Since this was obviously never done in my case, I wonder if you would be willing to do so at this time.

Every assumption and piece of evidence should be challenged in this meeting while never assuming the defendant's guilt. While this is often done informally in many offices, I like the organized "pitch session" best because it forces attendees to deliberately change their perspective while considering the case.

Although there is no simple fix for the threat of cognitive bias creeping into our decision making, a simple technique like the pitch session can help counteract any potential tunnel vision or confirmation bias.<sup>5</sup>

**Our job has grown increasingly complex, so we must be committed to continual learning.**

Basic advocacy skills and some on-the-job training in the forensic sciences are no longer good enough to be a conscientious prosecutor in today's world. A prosecutor must be a perpetual student, systematically developing a working expertise in the increasingly complex<sup>6</sup> and changing fields of forensic science and technology. We must now be at the very cutting edge of knowledge, all the time, to both exonerate the innocent and convict the guilty.

Ivan Cantu: Please allow me the opportunity to utilize these resources. I feel that all of the ballistic evidence needs to be reviewed by an independent expert to correct the wrongs of the past and make them right.

But is this realistic considering how busy we all are and how tight our training budgets are? The answer is an emphatic "yes" if a prosecutor is motivated, interested, and intentional.

Ivan Cantu: While knowing this, please consider recognizing the outrageous number of exonerations noted above. The evidence supports that the system is broken and the Dallas Police Dept conviction mill was running rampant. Just like my wrongful conviction, the Dallas Police Dept. was responsible for the high number of Dallas County exonerations. The past actions by the Dallas Police Dept. should prompt the Collin County DA's office to thoroughly review my wrongful conviction.

In addition to the wealth of free information available on the internet, most traditional training providers for Texas prosecutors are offering specific courses to address the new need for us to become near-experts in a diverse array of forensic and technological disciplines.<sup>7</sup> Many of these courses are low-cost or no-cost to Texas prosecutors. We must be very intentional in how we plan our own

continuing education. What are the areas in which we are lacking knowledge? What are the dynamic or contested areas?<sup>8</sup> How can we be systematic and comprehensive in learning a desired topic? This type of commitment to continual learning is a sure sign of a professional prosecutor.

**We must study our mistakes so we can learn from them.**

When mistakes are made in the fields of aviation or medicine, the mistake itself is studied for potential lessons to help avoid another error and strengthen the process and system.<sup>9</sup>

Ivan Cantu: While knowing that my conviction is riddled with problems - please consider acknowledging the trial errors to prevent future wrongful convictions. This review will certainly strengthen the process of the system within.

We must adopt this mindset in criminal justice. Each mistake is an opportunity to prevent a future mistake and improve the system. As prosecutors, we no longer have the luxury of ignoring our mistakes.

Ivan Cantu: Please confront the problems surrounding my conviction and provide a thorough review. By doing this, your office will determine that grave mistakes were made and will prove that I have been wrongfully convicted.

We must confront them and then aggressively mine them for lessons learned and best practices. This is equally true of both the intentional bad-apple, misconduct-type mistake, as well as the more common unintentional or negligent mistake.

Ivan Cantu: I strongly implore you to identify the mistakes that were made and please do the needful to correct them. Doing this will absolutely overturn my conviction as you will find truth in your thorough review. The Dallas Police reports and the witness statements indicate that the detectives coached and injected case information. They manipulated the state's witnesses to build a fraudulent case which blinded the police from alternative suspects or explanations. I ask you, Bill Wirsky, to do the right thing in Collin County as the second in command to confront the mistakes in my case.

A method like “root-cause analysis”<sup>10</sup> (also called a “sentinel event review”<sup>11</sup>) is a proven way to investigate an erroneous outcome that may signal a weakness in a complex system. This type of analysis brings together stakeholders to determine, in an objective and blame-free environment, why a mistake occurred.

Ivan Cantu: A thorough review will determine how the conviction/mistake occurred. Instead of pointing fingers at this, please simply correct the mistakes that were made 23 years ago.

This analysis can also be used to investigate a “near miss”—a situation where a mistake is narrowly averted. Root-cause analysis is being increasingly used in the criminal justice system to examine events such as wrongful convictions, forensic lab errors, or even officer-involved shootings, and the lessons learned thus far show great promise.<sup>12</sup>

## Parting thoughts

I will forever be grateful to our crime lab in Dallas for saving all the evidence for future DNA testing. Only because of the forethought of those authorities could such wrongs of the past be righted.

While many things have changed about our profession since I started, some of my fundamental convictions about what it takes to be an effective prosecutor have not. For instance, I still believe that being an honest and hardworking prosecutor is a prerequisite for success. But one of my early convictions about prosecution was wrong: I thought then that honesty, hard work, and Brady were enough to guard against a wrongful conviction. As it turns out, this mistaken belief was a wrongful conviction on my part. I now have a new and hard-earned humility about the potential fallibility of both the system and myself. I hope this humility makes me a better prosecutor. I think it does.

Ivan Cantu: I totally agree. Collin County, please I beg of you to consider hitting the pause button to thoroughly review my case with a fresh set of eyes. Not just as prosecutors but as human beings applying common sense as Mr. Wirskye has suggested.

## Endnotes

<sup>1</sup> <https://www.innocenceproject.org>.

<sup>2</sup> I believe that anyone who works in the criminal justice system should study the Michael Morton case for lessons learned. I recommend his book *Getting Life: An Innocent Man's 25-Year Journey from Prison to Peace*. Simon & Schuster, 2014. The Texas Monthly archives also contains a wealth of information on the case, and they can be accessed at <https://www.texasmonthly.com/category/topics/michael-morton/>.

<sup>3</sup> Two eyewitness evidence must-reads for prosecutors are *Eyewitness Evidence: A Guide for Law Enforcement*, National Institute of Justice, 1999, found at <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf> and *Identifying the Culprit: Assessing Eyewitness Identification*, National Research Council, 2014, found at <https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>.

<sup>4</sup> For an overview of cognitive bias and decision-making, read Daniel Kahneman's *Thinking Fast and Slow*, Farrar, Straus, and Giroux, 2011, and *The Invisible Gorilla: How Our Intuitions Deceive Us*, Crown Publishing, 2010. D, by Christopher Chabris and Daniel Simons. Kim Rossmo's excellent *Criminal Investigative Failures*, CRC Press, 2009, covers the dangers of cognitive bias in criminal investigations.

- <sup>5</sup> For more information on the concept of an organized “devil’s advocate” approach to combat cognitive biases, see Bryce G. Hoffman’s *Red Teaming: How Your Business Can Conquer the Competition by Challenging Everything*, Crown Business, 2017.
- <sup>6</sup> Read Atul Gawande’s book *The Checklist Manifesto: How to Get Things Right*, Metropolitan Books, 2009, to explore how failures can result from complexity and volume of knowledge.
- <sup>7</sup> In addition to the great training provided by TDCAA (<https://www.tdcaa.com/training>), the National District Attorneys Association ([http://www.ndaa.org/upcoming\\_courses.html](http://www.ndaa.org/upcoming_courses.html)) and the Association of Prosecuting Attorneys (<http://www.apainc.org/upcoming-events>) also offer training specifically for prosecutors. The Center for American and International Law ([www.cailaw.org/Criminal-Justice/index.html](http://www.cailaw.org/Criminal-Justice/index.html)), too, provides criminal justice practitioners training in actual innocence.
- <sup>8</sup> For an idea of the latest criticisms in the dynamic world of forensic science, see *Strengthening Forensic Science in the United States*, National Research Council, 2009, found at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> and *Report to the President Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, the “PCAST Report,” President’s Council of Advisors on Science and Technology, 2016, found at [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_forensic\\_science\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf).
- <sup>9</sup> Matthew Syed’s *Black Box Thinking: Why Most People Never Learn From Their Mistakes—But Some Do*, Portfolio/Penguin, 2015, and Gawande’s *Checklist Manifesto* both explore this process.
- <sup>10</sup> See National Commission on Forensic Science, *Directive Recommendation: Root Cause Analysis (RCA) in Forensic Science* found at <https://www.justice.gov/archives/ncfs/page/file/641621/download> for an explanation of the principles of root cause analysis in the forensic science context.
- <sup>11</sup> See the National Institute of Justice’s Sentinel Event Initiative web page at <https://www.nij.gov/topics/justice-system/Pages/sentinel-events.aspx> for further study.
- <sup>12</sup> In 2015, the National Institute of Justice and the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School collaborated on a multi-stakeholder sentinel event review involving a notorious crime. The resulting report can be found at <https://www.law.upenn.edu/live/files/6850-lex-st-report>. This report is an excellent example of mining mistakes to make the criminal justice system better.