THE SUPREME COURT ON TRIAL

How the American Justice System Sacrifices Innocent Defendants

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THE UNIVERSITY OF MICHIGAN PRESS

ANN ARBOR

First paperback edition 2011

Published in the United States of America by
The University of Michigan Press
Manufactured in the United States of America
♾ Printed on acid-free paper

2014 2013 2012 2011 5 4 3 2

A CIP catalog record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Thomas, George C. (George Conner), 1947–
The Supreme Court on trial : how the American justice system sacrifices innocent defendants / George C. Thomas III.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-472-11618-8 (cloth : alk. paper)
ISBN-10: 0-472-11618-5 (cloth : alk. paper)
1. Judgments, Criminal—United States. 2. Judicial review—United States. 3. False imprisonment—United States. 4. Criminal justice, Administration of—United States. 5. Due process of law—United States. 6. Law and fact—United States. I. Title.
KF9685.T48 2008
345.73'05—dc22 2008011483

ISBN 978-0-472-03483-3 (pbk. : alk. paper)
ISBN 978-0-472-02608-1 (e-book)

THE SUPREME COURT ON TRIAL

TO ALL THOSE WHO HAVE SPARKED MY CURIOSITY,

BEGINNING WITH MY GRANDFATHER, THOMAS IRVINE

ACKNOWLEDGMENTS

I owe large debts to many people for help during the seven years that this book percolated in my brain and on my computer. I seek here to acknowledge some of these debts. Paul Axel-Lute, a law library faculty member at Rutgers University School of Law in Newark, spent countless hours locating obscure historical material for me. And due to the disorganized way I work, he sometimes had to find it more than once!

Mike Mulligan, one of my best research assistants, played a pivotal role in the early stages. He provided excellent advice, encouragement, and even some language for an article that started me down the road to the book. The book evolved in a different direction from the article, but Mike's help on the article and the initial book proposals helped me shape the idea.

Other excellent research assistants helped very much as the book reached its final stage: Juan Abreu, Kegan Brown, Cassandra Cantwell, Ben Davis, Brian DeBoer, Mike Gadarian, Leigh-Ann Mulray, Dorollo

Nixon, Robert Ulon, Jennifer Virella, and Stefan Wolfe. I also thank those who helped in smaller ways or whose help I have unfortunately forgotten in my years of work on this project.

Many others read parts or all of the manuscript and I thank them for their comments. I benefited particularly from comments by Robert Bartels, Susan Brenner, Joshua Dressler, Peter Henning, John Leubsdorf, Suzanne Goldberg, Nick Humez, Richard Leo, Renee Lettow Lerner, Erik Luna, Daniel Medwed, Paul Marcus, Sam Pillsbury, and Lloyd Weinreb. I thank Gregory Maggs for help with the American military justice system and Kent Roach for information about how Ontario provides counsel to indigent defendants. I thank Daniel Givelber for his provocative article that appeared in 1997 and first created doubts in my mind about how well our adversarial system protects innocent suspects and defendants ("Meaningless Acquittals, Meaningful Convictions," *Rutgers L. Rev.*). When I read his article, I began, in effect, writing this book.

I wish also to acknowledge that some of the ideas presented here have appeared in articles that I published while working on this book. I thank the following journals for permission to reprint: "When Lawyers Fail Innocent Defendants: A Radical Proposal for Change," 2008 *Utah L. Rev.* (forthcoming); "Bigotry, Jury Failures, and the Supreme Court's Odd Response," 55 *Buffalo L. Rev.* 947 (2007); "'Truth Machines' and Confessions Law in the Year 2046," 5 *Ohio St. J. Crim. L.* 215 (2007); "The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence," 3 *Ohio St. J. Crim. L.* 169 (2005); "Terrorism, Race, and a New Approach to Consent Searches," 73 *Miss. L. J.* 525 (2003); "When Constitutional Worlds Collide: Resurrecting the Framers' Criminal Procedure," 100 *Mich. L. Rev.* 145 (2001).

Perhaps my greatest debt is to the two readers of the manuscript I submitted to the University of Michigan Press. Susan Bandes and Andy Taslitz said nice things about the project, thus giving me the energy to do what they independently suggested—make substantial revisions in the last chapter. They were then kind enough to reread the last chapter and make additional comments. The book is much better because I took much of their advice.

CONTENTS

INTRODUCTION

For thousands of years, Western philosophers have sought an epistemology that reveals the truth. Many late-twentieth-century philosophers essentially gave up on the notion of truth, arguing that everything is subjective and thus an ultimate truth simply does not exist. Whatever the value of that philosophy when speaking of abstract truths, justice systems cannot avoid making an attempt to uncover the truth about the past. Various justice systems approach the truth quite differently. The continental justice systems take, as a given, that it is possible to know the true facts about the crime. In the American system, on the other hand, "truth seems elusive and reality, like the muses, seems always to have another veil."[1]

The notion of "elusive truth" helps explain why American criminal appeals are almost exclusively about procedural errors rather than whether the convicted defendant was guilty of the crime. If truth is elusive, who can say that the jury was wrong? But in conti-

nental justice systems, "getting the facts right is normally one of the preconditions to realizing the goal of the legal process."[2]

Mistakes about past events in criminal cases result in convictions of the innocent, well documented now in light of DNA exonerations. I will argue that the prime directive of a criminal justice system is to protect the innocent, at a reasonable cost. The American criminal justice system has both a moral and a legal duty to take reasonable steps not to convict the innocent and to review convictions with an eye toward correcting wrongful convictions. The moral duty comes from the principle that the state can justify imposing sanctions only on proof that the defendant threatens the orderly functioning of society. A false accusation of crime does not provide that proof.

The legal duty to avoid convicting the innocent comes from the right to due process in the U.S. Constitution. The state and federal governments cannot deprive anyone "of life, liberty, or property without due process of law."[3] As Donald Dripps has demonstrated, due process forbids any procedure that creates "an unacceptably high risk of an erroneous decision."[4] Whatever "due process" entails at the margin, its core protection is against the unjustified taking of life, liberty, or property. When government takes life or liberty for a crime that the defendant did not commit, it has violated both its moral and its legal duty.

I should be clear about the limited nature of my project. As to scope, I originally intended a comprehensive review of all the literature, legislative initiatives, and cases on wrongful convictions, but I quickly realized that the volume of material makes a comprehensive review literally impossible in a single-volume work. Thus, the book presents my selective review of a dynamic and continually evolving area of the law. As to substance, I wish to show that the Due Process Clause requires governments to provide reasonable protections against the detention, prosecution, and conviction of innocent persons. Uncovering truth—vindicating the innocent *and* convicting the guilty—is a broader goal but not my goal. Two works have recently sought to advance truth about both guilt and innocence—an ABA monograph, *Achieving Justice: Freeing the Innocent, Convicting the Guilty,* and William Pizzi's book, *Trials Without Truth.*[5]

I will argue that a deeper value than truth is the protection of the

innocent. My central thesis is that Sir William Blackstone was correct when he said in 1769 that "the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."[6] A few years later, Benjamin Franklin framed the question as whether "it is better [that] 100 guilty Persons should escape than that one innocent Person should suffer" and concluded that it "is a Maxim that has been long and generally approved; never, that I know of, controverted."[7]

Over half a century ago, Jerome Frank said that the conviction of an innocent person is defensible "only if everything practical has been done to avoid such injustices. But, often, everything practical has not been done."[8] We are still not doing everything feasible "to prevent avoidable mistakes."[9] Erik Luna's evocative metaphor is that there are "'ghosts' in the machinery of criminal justice—the men and women who investigate, litigate, and adjudicate cases—and their erroneous decisions haunt the system."[10]

We know much more than Jerome Frank knew about the failings of the American justice system, thanks largely to Barry Scheck and Peter Neufeld, of Cardozo Law School, who started the Innocence Project at Cardozo in 1992. As of September 13, 2007, 207 prisoners, many convicted of murder and some waiting to be executed, had been exonerated by the Innocence Project. Lack of confidence in the criminal process led Illinois governor George Ryan in 2003 to commute all of the state's 156 death sentences to life in prison.[11]

But with a few exceptions like Ryan, we seem supremely unmoved by the failures we see. The British and Canadians have long been much more concerned about their justice failures. In a book subtitled *The Collapse of Criminal Justice,* David Rose wrote in 1996 that "English criminal justice is in a crisis without precedent, its solutions uncertain and its effects deeply damaging."[12] Three years earlier, a royal commission was "struck by evidence of a disquieting lack of professional competence in many parts of" the English justice system.[13] In Canada, the realization that a single defendant was wrongly convicted of murder led the Manitoba justice minister to commission an inquiry that made an exhaustive study of what went wrong in the case.[14]

Yet Pizzi notes our justice system's "self-confidence, bordering on complacency."[15] The reasons why we don't seem to care about

wrongful convictions are many and complex—and probably have much to do with the racial and class makeup of the men and women in our prisons. Governor Ryan asked the right question, "How many more cases of wrongful convictions have to occur before we can all agree that the system is broken?"[16] The reason to write this book is to add to the call for reform of a system that is broken. The problem is not a discrete set of erroneous inputs but a "systemic failure in criminal justice."[17] Andrew Siegel recommends shifting focus of the wrongful conviction scholarship "to broader questions about the structure and administration of the justice system."[18] That is the goal of this book.

The modern Supreme Court has done little to help, and quite a bit to harm, innocent defendants. The core of the problem is that the Court has been satisfied with a procedural focus in its criminal justice doctrine. Pizzi calls American lawyers and judges "procedure addicts."[19] William Stuntz has identified the underlying problem with the focus on process: "more process may actually mean less accuracy, because it encourages defense lawyers and courts to shift energy and attention away from the merits and towards procedure."[20]

The Supreme Court has created a labyrinth of procedural requirements that substitute for substantive justice. Was the suspect given his right to remain silent; was he given counsel if he asked for a lawyer; was he provided a jury; did his lawyer show up and not sleep through the trial? If the answer to all procedural questions is yes, then it does not matter that he was innocent. If the defendant is "procedurally" guilty, his substantive innocence is quite beside the point.

I suspect the reader thinks that I engage in hyperbole here. I wish that were the case. In 1993, the Supreme Court told us that a federal court need not hear a claim of innocence made by a state prisoner whose conviction had been affirmed in the state courts. According to the Court, "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal . . . relief absent an independent [procedural] constitutional violation occurring in the underlying state criminal proceeding."[21] Leonel Herrera made no claim that he did not get proper procedure. His claim was that the jury made a mistake *and* that he now possessed newly discovered evidence of his innocence. The Court rejected his

claim. In other words, because Herrera got the procedure that was due him, his innocence of the murder was beside the point.[22]

Leonel Herrera was executed on May 12, 1993. His last words: "I am innocent, innocent, innocent. And make no mistake about this. I owe society nothing. . . . I am an innocent man. And something very wrong is taking place tonight."[23]

CHAPTER ONE

INNOCENCE IGNORED

Our mode of trials is often most unfair. It will . . . continue to be, until everything feasible has been done to prevent avoidable mistakes.

—JEROME FRANK

AMERICAN JUSTICE FAILED RAY KRONE

At 8:10 in the morning on December 29, 1991, a female bartender was found, dead, in the men's room of the C.B.S. Lounge in Phoenix. She was nude. The killer left behind no physical evidence save bite marks on her breast and neck. The victim had told a friend that Ray Krone was going to help close the bar that night. Based only on that evidence, police asked Krone to make a bite impression. An expert witness prepared a videotape that purported to show a match by moving Krone's bite impression onto the marks on the victim. According to the Arizona Supreme Court, the videotape "presented evidence in ways that would have been impossible using static exhibits."[1] Although defense counsel had been given the opportunity to examine the dental expert, counsel was not informed of the existence of the videotape until the eve of trial.[2]

The only other evidence against Krone was that he was "evasive

with the police about his relationship" with the victim.[3] Of course, without the bite mark identification, being "evasive" about a relationship is practically worthless as evidence. The case thus turned on the bite mark, and the court-appointed defense expert had no experience in video production. Accordingly, counsel moved for a continuance to obtain an expert who could evaluate the videotape. Alternatively, counsel moved to suppress the videotape or to allow testimony about an earlier case in which the same expert's testimony was successfully challenged as not sufficiently scientific. The trial court overruled all defense motions. The prosecution expert used the videotape in his testimony without challenge from a defense expert. The jury convicted Krone of murder and kidnaping. The trial judge sentenced Krone to death.

On appeal, the Arizona Supreme Court held that the trial judge had acted improperly in refusing to allow a continuance. The jury had not yet been selected when the motion was made, the court noted, and the state would have suffered little prejudice.[4] If substantial prejudice would have been caused, the right course of action, according to the supreme court, was to preclude use of the videotape. What the trial judge could not do was what he did—allow use of the tape without giving defense counsel ample opportunity to prepare a defense.

So far, so good. The case was remanded for a new trial, the defense secured an expert, and the jury convicted again. This time, though, the judge sentenced Krone to life in prison, "citing doubts about whether or not Krone was the true killer."[5] This borders on the unbelievable. A trial judge who had "doubts about whether or not Krone was the true killer" *sentenced him to life in prison.* Krone served over ten years in prison before DNA testing conducted on the saliva and blood found on the victim excluded him as the killer. The DNA matched a man who lived close to the bar but who had never been considered a suspect in the killing.

Ray Krone's case is an example of how the current system fails innocent defendants. Police seized on the first plausible suspect and looked no further. The prosecution built a case on a Styrofoam bite impression and mumbo-jumbo scientific evidence. That the case was so weak perhaps explains why the prosecutor did not want the defense to be able to challenge the videotaped "expert" testimony. If

true, that violates the first rule of prosecution—to do justice rather than try to win cases. "Doing justice" in Ray Krone's case meant allowing the defense to challenge the prosecution's expert testimony.

The first trial judge failed to give Krone a chance to demonstrate his innocence, and the second one sentenced him to life in prison even though he had doubts about his guilt. These are fundamental failures. To be sure, some parts of the system worked. Krone received what appears to have been effective representation by his counsel, and the Arizona Supreme Court recognized the errors of the first trial judge. Nonetheless, despite these successes, Ray Krone would have spent the rest of his life in prison for a crime he did not commit were it not for DNA testing and the Innocence Project founded by Barry Scheck and Peter Neufeld.

What has gone wrong? In a work published in 1713, Matthew Hale acclaimed the English common-law jury trial as the "best Trial in the World."[6] Several commendable qualities that Hale noted have truth as the goal, and three mention truth specifically. For example, Hale said that having witnesses testify in person—subject to being questioned by the parties, the judge, and the jury—was the "best Method of searching and sifting out the Truth."[7] Today, as chapter 2 will seek to show, any rational system of justice should care more about protecting innocent defendants than any other value. But DNA testing has made plain that our modern adversary system isn't very good at protecting innocent defendants. Or, to be more precise, DNA has made plain that the state adversary criminal systems are not very good at protecting innocent defendants. One of the little-noted features of the DNA revolution is how it is almost completely limited to state convictions.

THE FEDERAL SUCCESS STORY?

All of the 207 exonerations accomplished by the Scheck-Neufeld Cardozo Innocence Project benefited state prisoners. All 340 exonerations uncovered by Samuel Gross and his coauthors were of state prisoners.[8] The Northwestern Center on Wrongful Convictions lists two federal exonerations but provides no details as to either.[9] The Cardozo Innocence Project reports no wrongful convictions in cases