

By Valena Beety and Ifeoma Ike

Protecting West Virginia's Innocent

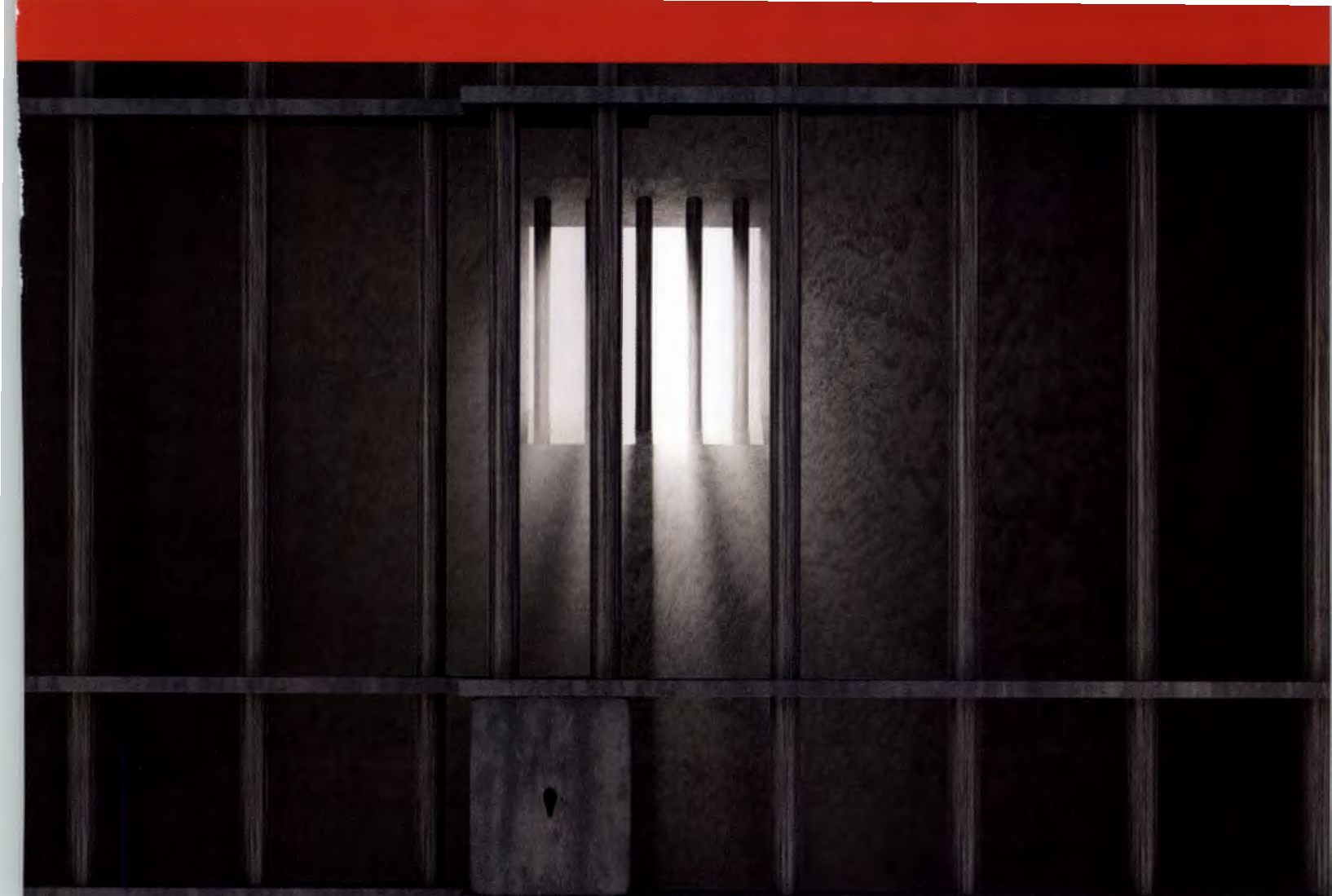
The proliferation of television crime shows has introduced the general public to modern forensic technology. A fairly new method in the criminal justice arena, forensic DNA testing holds particular fascination given its ability to provide irrefutable proof of guilt or innocence in some criminal cases. While early forms of DNA testing were introduced in the mid-1980s, more precise testing methods did not become commonplace for another decade or so.

Cold case detectives have recognized the probative value of preserving crime scene evidence that contains biological material, and have begun to apply DNA testing to help close chapters on decades-old cases that would otherwise remain unsolved. DNA testing has also been instrumental in solving another phenomenon: wrongful convictions. To date, 311 wrongly convicted individuals have been exonerated through DNA testing; each year, that number continues to grow. In West Virginia, six men have been exonerated of crimes they did not commit through DNA testing. These men spent a combined total of 50 years in prison,

losing time with loved ones and forgoing life experiences. Every exonerated innocent person embodies the critical importance of post-conviction access to DNA testing and the need to preserve biological evidence to enable that testing.

The injustices experienced by the wrongly convicted expose flaws in the current criminal justice system. They also provide momentum for significant policy reforms aimed at protecting both the innocent and the general public. The tragic outcomes for these exonorees have instigated substantive research and the creation of preventative measures and best practices – such as improved eyewitness identification procedures and recording of custodial interrogations. The release of every innocent person also highlights the continued need for access to DNA testing and improved technology.

In West Virginia, as in many states across the country, law enforcement professionals, advocates and lawmakers have begun to take a hard look at preventing wrongful convictions. Increased attention has centered



on leading causes of wrongful convictions, including eyewitness misidentifications and false confessions. This article will examine West Virginia's progress in preventing wrongful convictions, as well as areas where continued reform is necessary in order to truly protect the innocent.

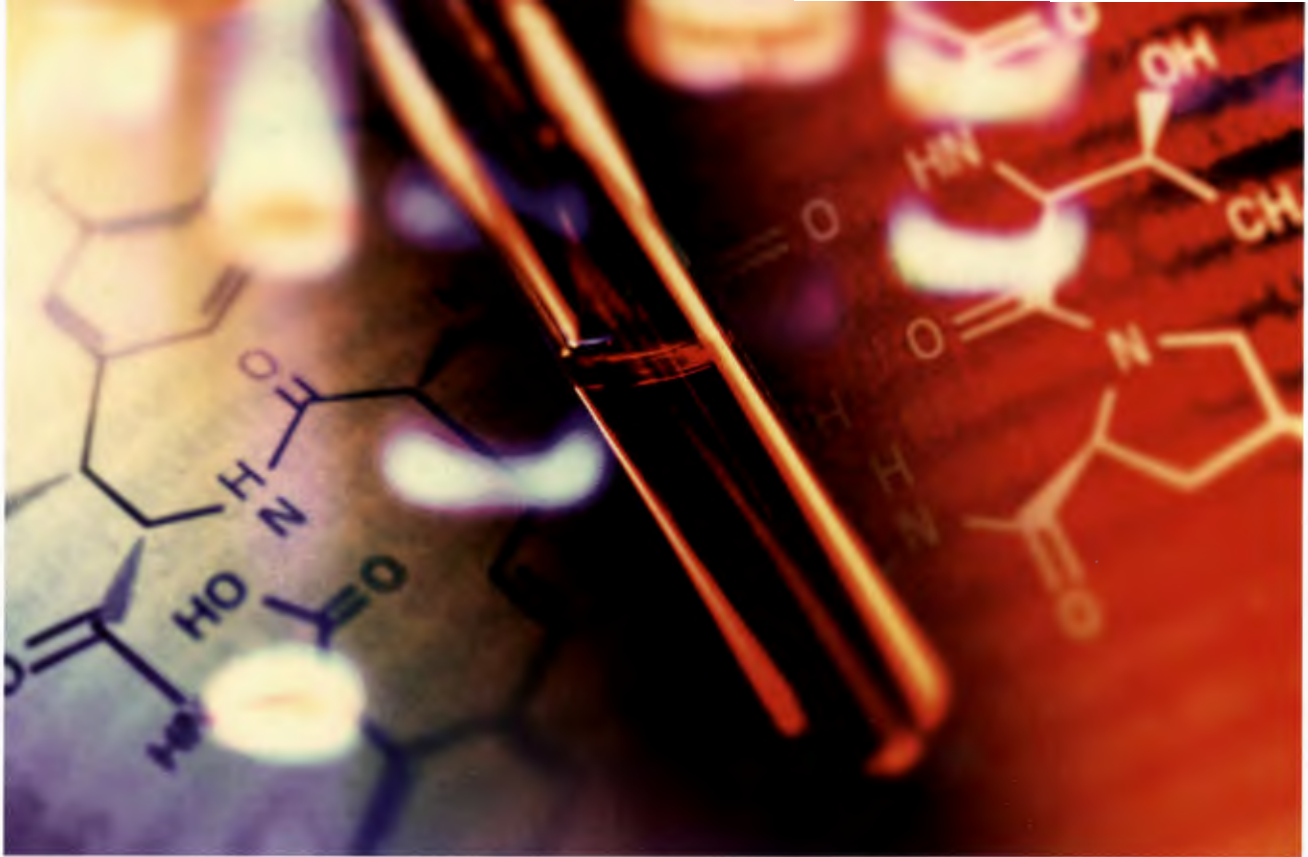
I. Progress in West Virginia: Eyewitness Identification Reform

In January 2013, Charleston police arrested 22-year-old Roland William Willis for stabbing Kevin Clemens, an 18-year-old University of Charleston football player, outside of a nightclub in downtown Charleston. Willis was arrested and charged after several witnesses picked him out of a photo lineup. Two days later, Charleston police detectives released Willis and dismissed all charges after further investigation showed that Willis did not, in fact, commit the crime.

How is it that so many witnesses picked the wrong guy? Willis's case represents the power of eyewitness

accounts and how an investigation can be derailed by a misidentification. Fortunately for Willis, the Charleston Police Department continued their investigation and determined Willis was innocent. In many other instances, however, misidentification by eyewitnesses has contributed to the wrongful conviction and imprisonment of innocent people. In fact, eyewitness misidentification is the most common factor in all wrongful convictions later overturned by DNA evidence. Nearly 75 percent of the 311 people to be exonerated by DNA evidence across the country had at least one eyewitness mistakenly identify them as the perpetrator. Of the six West Virginian men to be wrongfully convicted, five were mistakenly identified as the perpetrator by an eyewitness.

West Virginia was an early leader in improving law enforcement techniques to reduce the likelihood of misidentifications and ultimately wrongful convictions. In 2007, the West Virginia legislature enacted the "Eyewitness Identification Act," which mandated the use of certain scientifically-supported best practices



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shown to enhance the accuracy of identifications. The statute also created a task force to examine other best practices where consensus could not be reached. West Virginia became one of the first states in the country to take such an initiative, but the task force ultimately disbanded before releasing recommendations about how to move forward in two key areas: the blind administration of identification procedures and the sequential presentation of subjects during a lineup, two crucial protocols shown to reduce suggestiveness and the ability of an eyewitness to employ relative judgment. Such efforts were the building blocks for the passage of SB200, sponsored by former Fayette County Sheriff, Senator William Laird, and Delegate John Ellem. The bill passed unanimously in the Senate and with only one opposing vote in the House. The new law requires all law enforcement agencies to have a written eyewitness identification policy, and highly recommends the following evidence-based best practices:

- **Blind Administration of lineups:** A blind lineup is one in which the administrator does not know who the suspect is. This practice prevents the administrator of the lineup from providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect;

- **Sequential Presentation of lineups:** Sequential, or one-by-one, presentation of lineup members — as opposed to the simultaneous presentation, where all lineup members are shown at once — has been shown to eliminate the use of relative judgment, whereby the eyewitness chooses the lineup member that most resembles the perpetrator by comparing the lineup members to each other, as opposed to comparing each lineup member to his or her mental image of the perpetrator;

- **Proper lineup composition,** with non-suspect photo or live member selections (fillers) that match the witness's description of the perpetrator: Lineups are commonly comprised of fillers that match the police suspect instead of the witness's description of the perpetrator. If the suspect is not the perpetrator, using fillers with his or her likeness could focus investigative efforts on the incorrect person and waste valuable time. To reduce the likelihood of an incorrect selection, non-suspect photographs should resemble the description provided by the eyewitness, and the suspect should not unduly stand out among the other fillers;

- **Instructions to the eyewitness prior to the lineup administration,** including that the perpetrator may or may not be present: To prevent the eyewitness from feeling compelled to make a selection, a series

of statements – or “instructions” – are issued by the lineup administrator, including the recommended directive that the suspect may or may not be present in the lineup;

- Confidence statements, in the eyewitness’s own words, at the time of an identification: Immediately following the lineup procedure, the eyewitness should provide a statement in his or her own words that articulates the level of confidence he or she has in the identification. Confidence is malleable and can inflate during the time between an investigation and trial with confirming feedback from law enforcement and non-state actors. Obtaining a confidence statement provides fact-finders with a clean statement from the eyewitness at the point in time an identification was made.

The passage of SB200 was a huge step in the right direction toward protecting the innocent – and the public at large – during criminal investigations. All indications show cooperation on the part of law enforcement in meeting the January 2014 deadline for adopting a written eyewitness identification protocol. The new standards are consistent with the current national trend evidenced in legislation, court decisions, litigation practices and updated policies nationwide.

II. Current Reform Efforts: Recording of Custodial Interrogations

In 1994, while working on a high-profile murder case, D.C. detective Jim Trainum was interrogating a suspect – named Kimberly – whom he believed to be guilty of a homicide. After several hours of interrogation, Trainum left the interrogation room with what he felt was a solid confession. He didn’t scream or threaten her. He didn’t coerce her into confessing. The detective simply used standard interrogation techniques used to elicit information, and ultimately, to get the bad guy to confess. He felt confident that the confession helped confirm her guilt. However, in the following days as he continued his investigation, Detective Trainum came across signature logs from the homeless shelter where Kimberly lived that provided fairly concrete evidence that she could not, in fact, have committed the murder.

Despite this clear alibi, Detective Trainum remained suspicious. Kimberly did, after all, confess to the crime. It wasn’t until Trainum reviewed a recording of the interrogation that he discovered how he had

been inadvertently feeding Kimberly details of the case, which she then repeated back to him as part of her confession. Fortunately for Kimberly, Trainum discovered her alibi and this mistake in time to prevent her from receiving a likely, and wrongful, first-degree murder sentence.

Kimberly’s case raises a perplexing question: why would someone confess to a crime they didn’t commit? It would seem safe to assume, at the least, that false confessions are rare, and that Kimberly’s case was an anomaly. Surprisingly, however, false confessions are quite common. Of the 311 wrongful convictions later overturned by DNA, 26 percent involved some form of a false confession. Several factors contribute to this phenomenon, including: real or perceived intimidation or use of force by law enforcement towards the suspect; compromised reasoning due to illness, substance abuse, fatigue, limited education or other reasons; and the fear that not confessing will result in an even more negative unforeseen consequence, such as harsher punishment. False confessions can also occur even with the most standard and seemingly innocuous of interrogation procedures – such as in Detective Trainum’s case – suggesting that some interrogation techniques are so effective that they elicit confessions not only from the guilty, but from the innocent as well.

The tool that saved Kimberly from facing the loss of her liberty was the recorded interrogation. Since this case, Detective Trainum has become a nationally recognized advocate for the recording of interrogations as a means to safeguard against false confessions. Through experience and research, many advocates, public officials and members of law enforcement have reached the conclusion that recording interrogations in their entirety is the only way to create an objective record of what transpired during the course of the interrogation process. To date, 20 states and the District of Columbia have adopted recording policies, as well as at least 850 jurisdictions across the country.

While the recording of interrogations has not yet been adopted statewide in West Virginia, a number of law enforcement agencies have voluntarily adopted the practice, including the Monongalia County sheriff’s department, and the Morgantown, Charles Town and Wheeling police departments. Retired Putnam County Judge O.C. “Hobby” Spaulding is one of West Virginia’s champions for recording interrogations. Much like Detective Trainum, Judge Spaulding recognized the importance of recorded interrogations over a decade ago, and even educated fellow judges

and justices in using it as a factor to determine admissibility of confessions. Currently, he is working with the West Virginia Innocence Project, law enforcement, the legal community and lawmakers in standardizing the practice to ensure that the innocent are uniformly protected; the best evidence is preserved and presented at trial; and that law enforcement are protected from untrue allegations of brutality and coercive practices.

III. Additional Reform Efforts: Improving Access to Post-Conviction DNA Testing & Ensuring Preservation of Biological Evidence

This past spring, Oklahoma became the 50th and final state to pass a law granting access to post-conviction DNA testing. West Virginia passed a similar law back in 2004. While every state in the country now has a standing DNA testing law, many of these statutes have limitations that still deny access in certain instances. In West Virginia, for instance the following limitations currently exist:

- **Incarceration Requirement:** In West Virginia, an individual must be currently incarcerated to have a statutory right to post-conviction DNA testing. This means that an innocent individual on probation or parole does not have access to the technology that could prove innocence and restore dignity by clearing his or her name. At least 32 of the 311 DNA exonerees had already been paroled by the time they were exonerated. Without testing access, these innocent individuals would still be subject to the eyes of the state through probation and parole, as well as suffer permanent collateral consequences, such as being listed on sex offender registries.

- **No Right to Appeal.** Currently, applicants for DNA testing in West Virginia are not able to appeal a decision denying them access to testing. Several of the current 311 DNA exonerees were able to gain access to the testing that proved their innocence on appeal.

- **No Requirement to Preserve Biological Evidence.** Of course, DNA testing cannot be performed if crime scene evidence is not preserved by our government. Most states have passed laws compelling the preservation of evidence to enable cold case detectives to solve old crimes and litigators to settle claims of innocence. However, West Virginia currently has no such statute. At the federal level, a national Technical Working Group (TWG) was formed and funded by the Department of

Justice to provide federal-to-state guidance on how best to enable justice in this area. The TWG issued a report earlier this year recommending that evidence custodians preserve biological evidence connected to adjudicated cases in the following crime categories: homicide; felony sexual assault; felony assault; kidnapping & robbery. The report also issued recommendations for biological evidence retention related to unsolved cases. While some states include biological evidence retention requirements in a stand-alone law, others choose to embed such provisions in their existing post-conviction DNA testing statutes. Regardless of the legislative approach that is ultimately taken, it is critically important that West Virginia address this existing shortcoming as it considers the other issues related to access to post-conviction DNA testing.

Making the necessary fixes to West Virginia's existing post-conviction DNA testing access law is another major step towards protecting the innocent and restoring life, liberty and dignity. The West Virginia Innocence Project aims to continue educating the public about the importance and necessity of this reform, and will work with lawmakers to improve the state's DNA testing law in the coming years.

Advocates, lawmakers and members of law enforcement in West Virginia, like those in many states across the country, are grappling with the reality of wrongful convictions, and actively seeking to implement the necessary reforms to help protect the innocent. West Virginia has already made significant progress, particularly in the area of eyewitness identification reforms. In the coming years, advocates hope to maintain West Virginia's position as a leader in the innocence movement by achieving additional reforms, such as the recording of custodial interrogations statewide and improvements to the state's post-conviction DNA testing statute. **WVU**

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