CHAPTER TWO

Official Misconduct: A Deliberate Attack on the Truth

The [prosecutor] is the representative not of an ordinary party to a controversy, but
of a sovereignty whose obligation to govern impartially is as compelling as its
obligation to govern at all. . .[and] whose interest, therefore, in a criminal
prosecution is not that it shall win a case, but that justice shall be done. . . . It is as
much his duty to refrain from improper methods calculated to produce a wrongful
conviction as it is to use every legitimate means to bring about a just one.

United States Supreme Court in Berger v. United
States (1935)¹

I. Introduction: Tilting the Scales of Justice

The stakes in capital cases are high – not only for the accused and defense counsel, but
also for police officers and prosecutors. Rightly or wrongly, prosecutors in Texas often rely
heavily on their record in capital prosecutions, or their zeal in being willing to prosecute for
death, to appeal to the electorate. Similarly, police officers feel intense pressure to solve capital
crimes and to help prosecutors succeed in the prosecution of capital crimes. The cumulative
pressures to get convictions and death sentences and have executions carried out in capital cases
all too often push prosecutors and police officers away from the prosecutorial principles
expressed in Berger v. United States or in the contemporary statement of the same principles
contained in the Texas Code of Criminal Procedure. While it is “the primary duty of all
prosecuting attorneys . . . not to convict, but to see that justice is done,” and “not [to] suppress
facts or secrete witnesses capable of establishing the innocence of the accused,”² the political
pressures squeezing in on law enforcement officials in capital cases often make these duties hard
to honor.

Caught in the vise of political pressure, police and prosecutors have left a record that no
one should be proud of. In one case, for example, an innocent man was repeatedly tried on
flimsy evidence and fabricated testimony. In another, a police officer obtained a dubious
confession through threats of torture to the defendant’s family, then lied about his knowledge of
this scheme at trial. In yet another, police and prosecutors pursued an innocent African
American, despite evidence that showed that one of the defendant’s white co-workers was the
killer.

¹ Berger v. United States, 295 U.S. 78, 88 (1935), overruled on other grounds by Stinnett v. United States,
establishing "procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence
which exposes the truth") (internal citation and quotation omitted).
² Tex. Code Crim. Proc. art. 2.01.
Tragically, the cases of official misconduct described in this chapter are not rarely occurring aberrations. Compelling evidence of misdirected prosecutions, police work designed to convict a predetermined suspect, and the knowing presentation of false testimony surfaces all too often in Texas capital cases. Identified in this report are 41 cases\(^3\) in which official misconduct contributed to the death penalty. As we explain in the conclusion to this chapter, we believe that we have captured only a portion of such cases, because official misconduct is most often concealed and difficult to expose.

No system of justice is immune from the danger of official wrongdoing. The test of whether a legal system merits public confidence is not its infallibility, but rather its capacity to limit abuses of power, to expose those abuses when they occur, and to provide meaningful remedies. As the record compiled in this chapter demonstrates, the Texas death penalty system fails the test. Far too often, the objective of the people's representatives in Texas death penalty cases is not to find the truth, but to get a conviction against a convenient or vulnerable suspect. Far too often, appellate judges in Texas have rationalized or simply overlooked injustice.

II. **The Tip of the Iceberg: A Reappraisal of Some Classic Misconduct Cases**

For justice to be served, prosecutors and police first must learn the truth: they may not intentionally avoid evidence that points away from their favored suspect,\(^4\) nor, of course, may they manufacture false evidence.\(^5\) Second, prosecutors must disclose the truth and provide all exculpatory evidence to the defense.\(^6\) Third, police and prosecutors must speak the truth: they may not present testimony they know to be false, and they must correct any perjury of which they become aware during trial.\(^7\)

These duties — to learn, disclose and speak the truth — are vital safeguards against wrongful convictions, unfair sentences and the execution of the innocent. These safeguards have been absent in too many Texas cases.\(^8\)

It might be tempting to view the cases we discuss in this chapter as aberrations in an otherwise dependable process. A careful re-examination of these cases reveals a troubling pattern, however — especially when viewed in the larger context of this report. These cases, in which official misconduct has been exposed, are not the successes of a functioning system of justice. Texas officials can take no credit for the release of innocent people from death row;

\(^3\) *Infra, Appendix Two*

\(^4\) ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.11 (3d ed. 1993).


\(^7\) *E.g.* Alcorta v. Texas, 355 U.S. 28, 31 (1957).

\(^8\) For the purposes of our study, state misconduct is narrowly defined. It includes only *deliberate conduct by state actors that intentionally distorts the truth seeking process*. It excludes forms of procedural misconduct that, although clear violations, do not directly implicate the pursuit of truth. We focus only on those practices that result in the presentation, or serious risk of presentation, of evidence that is false or misleading.
each has been saved despite the resistance of state officials. And, as the case of Cesar Fierro reveals, even in cases where official misconduct has been exposed, the courts have sometimes refused to provide a remedy.

Clarence Brandley

The court unequivocally concludes that the color of Clarence Brandley’s skin was a substantial factor which pervaded all aspects of the State’s capital prosecution of him.\(^9\)

The prosecution of Clarence Brandley was born of public panic and overt racism. Brandley was the black supervisor of four white janitors at Conroe High School, where in August 1980, a white girl was found raped and murdered in the school auditorium.\(^10\) The school was flooded with telephone calls by frightened parents who refused to send their children to school until the murderer was caught.\(^11\) The authorities announced to the public that a suspect would be arrested before classes started the following week.\(^12\)

A number of people in the high school on the day of the murder were potential suspects, including Clarence Brandley and the other janitors. But as a local police officer later said, “[t]he nigger was elected.”\(^13\) Clarence Brandley became the immediate and sole focus of the investigation.\(^14\)

Police and prosecutors covered up or simply ignored a mass of evidence that might have led to the true killer. One janitor was threatened with arrest when he tried to tell the investigator that another white janitor had accosted the victim shortly before she disappeared. The defense was never told that a man matching the description of that same janitor was seen leaving the area shortly after the victim was last seen alive.\(^15\)

Police found a Caucasian pubic hair that did not belong to the victim near the victim’s vagina. The State, however, resisted efforts to obtain hair samples for comparison from the other janitors, who had seen the victim moments before the assault.\(^16\) The State also refused to obtain blood samples from the other janitors despite finding blood inconsistent with Brandley’s blood type on the victim’s shirt. Not until years later was it learned that the blood on the shirt

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\(^12\) Ex parte Brandley, 781 S.W.2d at 888.
\(^13\) Id. at 890.
\(^14\) Brandley v. State, 691 S.W.2d at 701.
\(^15\) Ex parte Brandley, 781 S.W.2d. at 888 & 891.
\(^16\) Id. at 890.
was the same type as the blood of the white janitor who had been seen accosting the victim.\textsuperscript{17} The blood and hair evidence was later lost. Moreover, after the autopsy discovered the presence of semen in the victim’s vagina, the State failed to run an analysis of the sample to determine the blood type of the donor.\textsuperscript{18}

Police and prosecutors also coached, manipulated and threatened witnesses to ensure that they would present a consistent story inculpating Brandley.\textsuperscript{19} An all-white jury lost little time in sentencing him to death. Eleven months after the conviction, Brandley’s attorneys discovered that 166 of the 309 trial exhibits had vanished.\textsuperscript{20}

Because of the misconduct of the officials who prosecuted him, Clarence Brandley spent nearly a decade on death row for a crime he did not commit. His release came only after an intense public campaign on his behalf by civil rights organizers, volunteer investigators, and the media. Since his release in 1990, Clarence has been a church minister near Houston.\textsuperscript{21} One can only wonder what his fate would have been had there been no public outcry about his case.

\textbf{Ricardo Aldape Guerra}

\textit{The concept of deceit was planted by the police and nurtured by the prosecutors.}\textsuperscript{22}

When official misconduct occurs, it often begins in the initial stages of a prosecution, during the police investigation. Murders that are designated as capital cases frequently arouse considerable public outrage and extensive publicity, placing the authorities under extraordinary pressure to obtain a death sentence.

In 1982, Houston police officer J.D. Harris was shot and killed after approaching the car in which Carrasco Flores and Ricardo Aldape Guerra had been riding. Within an hour of the shooting, Flores was killed in a shootout with the police. Officer Harris’s gun was found in Flores’s waistband, and a gun that had been used to kill a bystander was under Flores’s body.\textsuperscript{23} As one of the prosecutors would later admit, “the physical evidence . . . totally pointed towards

\begin{flushright}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} The police investigator took the other janitors on a “walk through” of the crime scene, after which at least one witness changed his statement. The same investigator assaulted one of the janitors and threatened to “blow” his brains out. When the janitor complained to the district attorney’s office, he was told that it would be taken care of. Nothing was done to rein in the investigator’s rampant misconduct. \textit{Id.} at 889-90.
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Carrasco Flores as being the shooter.\textsuperscript{24}

But since Flores was dead, the police turned their attention to Ricardo Guerra. At trial, five witnesses testified that they had seen Guerra shoot Officer Harris.\textsuperscript{25} Based on this apparently overwhelming evidence, the jury convicted Guerra and sentenced him to die.

In reality, however, the police had threatened and manipulated witnesses into giving testimony implicating Guerra. For instance, when one juvenile witness told police officers at the crime scene that she had not seen the shooting, an officer threatened to take away her daughter unless she cooperated.\textsuperscript{26} Both police and prosecutors engaged in an elaborate scheme to ensure that witnesses would tell a consistent – albeit false – story implicating Guerra.\textsuperscript{27} Statements and forensic evidence clearly indicating that Flores alone had shot Officer Harris were concealed,\textsuperscript{28} as the trial prosecutors presented witness after witness, knowing their testimony was false.\textsuperscript{29}

As with Clarence Brandley, the State secured a death sentence by resorting to elaborate deceptions and by defending those deceptions for years, until their case finally collapsed under the weight of the evidence that Ricardo Aldape Guerra was innocent. In overturning Guerra’s conviction and death sentence, a federal court later determined that “[t]he mood and motivation arising out of this case was to convict Guerra for the death of officer Harris even if the facts did not warrant that result . . . [because] Carrasco had been killed and [there was a] strong, overwhelming desire to charge both men with the same crime, even if it was impossible to do so.”\textsuperscript{30} The court then ordered a new trial, finding that “the extent of the prosecutorial misconduct was legion.”\textsuperscript{31} A panel of the U.S. Fifth Circuit Court of Appeals later upheld that order.\textsuperscript{32} Significantly, Guerra’s conviction and death sentence had been twice affirmed by the Texas Court of Criminal Appeals,\textsuperscript{33} and he was not released until his case had been reviewed a total of

\begin{footnotes}
\textsuperscript{24} Guerra v. Collins, 916 F. Supp. at 630 n.7.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 624-25.
\textsuperscript{27} As the federal court explained, the police prepared multiple written statements that falsified the oral statements given by at least 5 witnesses, id. at 631-34, and “the prosecutors joined the hunt by conducting a reenactment of the shooting shortly after the incident with various chosen witnesses participating. This procedure permitted the witnesses to overhear each other and conform their views to develop a consensus view.” Id. at 629.
\textsuperscript{28} Id. at 631-35.
\textsuperscript{29} Id. at 635-36. The questioning and argument by the prosecutors was also designed to mislead the jury and thereby corrupt the fact finding process. “On no less than five . . . occasions, the prosecutor included with the question, an incorrect statement of the witness’ prior testimony.” In its closing argument, the prosecution relied on facts that it knew to be false. Id. at 636.
\textsuperscript{30} Id. at 626.
\textsuperscript{31} Id. at 637.
\textsuperscript{32} Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).
\end{footnotes}
six times.\textsuperscript{34} Ricardo Aldape Guerra spent 15 years on death row for a crime he did not commit.\textsuperscript{35}

Strikingly, the truth about Mr. Guerra’s case might never have emerged except for the intervention of the Mexican Consulate, which persuaded a prominent Texas law firm to pursue Guerra’s federal post-conviction appeals without charge. The investigation of Guerra’s case took four years and consumed more than two million dollars of billable hours.\textsuperscript{36} The vast majority of death row prisoners in Texas can never expect to receive legal representation even faintly approaching the representation Guerra received.\textsuperscript{37}

\textit{Kerry Max Cook}

\textit{Prosecutorial and police misconduct has tainted this entire matter from the outset. 
... [Its] taint, it seems clear, persisted until the revelation of the State’s misconduct in 1992.}\textsuperscript{38}

In 1978, Kerry Max Cook was convicted and sentenced to death for the brutal sexual assault and murder of his neighbor, Linda Joe Edwards.\textsuperscript{39} Despite significant evidence pointing to other suspects, police and prosecutors in Tyler, Texas focused their efforts on securing a death sentence against Cook, whose fingerprints were found on the outside of the victim’s patio door.\textsuperscript{40}

As recounted by the Texas Court of Criminal Appeals 18 years later, the local authorities spared no effort to convict and execute Mr. Cook. For example, these law enforcement agents concealed evidence that pointed to other suspects.\textsuperscript{41} They persuaded a fingerprint expert to lie, pressuring him to swear that Cook’s fingerprints had been left at the approximate time of the murder -- testimony the expert would later admit was completely unfounded.\textsuperscript{42} And there was more.

\textsuperscript{34} Id.; Guerra v. State, 492 U.S. 925 (1989); 492 U.S. 938 (1989); Guerra v. Collins, 916 F. Supp. 620 (S.D. Tex. 1995); Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).


\textsuperscript{37} Concerning the crisis in representation for death penalty defendants, see infra, Chapters Six and Seven.


\textsuperscript{39} Id. at 625; \textit{Former Death Row Convict Seeks Pardon}, \textit{FT. WORTH STAR-TELEGRAM}, Sept. 13, 1999, at 6.

\textsuperscript{40} Cook v. State, 940 S.W.2d at 624-25.

\textsuperscript{41} For instance, the prosecution did not inform the defense that Lucella Mayfield, whose father had been having an extra-material affair with the victim, had threatened to kill Ms. Edwards on many occasions. \textit{Id.} at 625-26.

\textsuperscript{42} \textit{Id.} at 624; \textit{id.} at 631 (J. Baird, concurring and dissenting).
At trial, a jailhouse snitch stated that Cook had confessed to him, testimony that the informant later conceded was a total fabrication.\(^{43}\) Evidence of the informant’s true motive was withheld: although the prosecution implied it had made no deals to procure the informant’s testimony, his own pending murder charge was plea bargained to a two-year prison term as a reward for his testimony.\(^{44}\) Moreover, prosecutors hid evidence corroborating Cook’s statement that he knew the victim and had been invited to her apartment some days earlier, which explained his fingerprints on the patio door.\(^{45}\) And finally, the prosecutors lied to the court, telling the judge that there was no evidence exonerating Mr. Cook.\(^{46}\)

After his original conviction was reversed on appeal in 1991 because of the erroneous admission of psychiatric testimony,\(^{47}\) prosecutors once again sought a death sentence. The second trial resulted in a hung jury.\(^{48}\) Undaunted, the prosecution once again secured a death sentence against Mr. Cook in 1994. That conviction was overturned in 1997.\(^{49}\)

Despite the crumbling foundation of their tainted case, prosecutors were prepared to retry Mr. Cook a fourth time. In April 1999, however, DNA testing on semen stains found on the victim’s clothing completely eliminated Kerry Max Cook as the assailant.\(^{50}\) Still unwilling to admit their grievous error, prosecutors insisted that they would try Cook yet again unless he pled “no contest” to the killing, which he ultimately did.\(^{51}\)

Insisting on his innocence from the outset, Kerry Max Cook endured three trials and 20 years on death row, once coming within 11 days of execution. He currently is seeking a full pardon from the state of Texas.\(^{52}\)

\(^{43}\) Id. at 626.

\(^{44}\) Id.

\(^{45}\) Id. In fact, the jury in Mr. Cook’s second trial said that they would have acquitted Mr. Cook if he had explained why his fingerprints were on a door to Ms. Edwards’s apartment. Todd J. Gillman, *Divided Jury Causes Mistrial in Cook Case: Prosecutors Say They’ll Try Him a Third Time*, DALLAS MORNING NEWS, Dec. 19, 1992, at 1A.

\(^{46}\) Cook v. State, 940 S.W.2d at 631 (J. Baird, concurring and dissenting).


\(^{48}\) Todd J. Gillman, *Divided Jury Causes Mistrial in Cook Case: Prosecutors Say They’ll Try Him a Third Time*, DALLAS MORNING NEWS, Dec. 19, 1992, at 1A.


\(^{50}\) *Former Death Row Convict Seeks Pardon*, FT. WORTH STAR-TELEGRAM, Sept. 13, 1999, at 6


Cesar Roberto Fierro

[A]t the time of eliciting the Defendant's confession, Det. Medrano ... did have information that the Defendant's mother and step-father had been taken into custody by the Juarez police with the intent of holding them in order to coerce a confession from the Defendant, contrary to the said Det. Medrano's testimony at the pre-trial Suppression hearing.53

No evidence of guilt is more compelling to a jury than a confession.54 Based almost entirely on his confession, Cesar Fierro was convicted in El Paso of the 1979 murder of Nicolas Castanon and sentenced to die.55 What the jury never learned was that his pivotal confession was coerced by the threats and violence of police officers on both sides of the border.56

The case against Cesar Fierro began with an accusation by Geraldo Olague, a 16-year-old who came forward five months after the killing, claiming to have been with Fierro at the time of the shooting. Olague was far from an ideal witness. He admitted to participating in over forty car burglaries57 and to having "psychological problems,"58 and he behaved bizarrely on the witness stand, at one point accusing a juror of having bought stolen property from him.59 Even the prosecutor discounted Olague's testimony, arguing "[e]ven if you don't believe the boy, believe the confession."60 The case against Cesar Fierro rested only on the testimony of Geraldo Olague, and Fierro's confession.61

No physical evidence linked Fierro to the crime, nor was he a suspect until Olague accused him of the murder. Both before and during his trial, Fierro insisted that he confessed only because the Mexican police had arrested and threatened to torture his family unless he confessed. Mr. Fierro testified that his interrogators told him his parents were being held

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54 The United States Supreme Court has recognized that "[c]onfessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." For this reason, and just as importantly, because of the risk that coerced confessions are "unreliable," the Supreme Court has ordered the lower courts to "exercise extreme caution before determining that the admission of the confession at trial was harmless." Arizona v. Fulminante, 499 U.S. 279, 296 (1991).
57 S.F. Vol. II at 1234, State v. Fierro (CCA No. 68,383).
58 S.F. Vol. II at 1269-71.
59 S.F. Vol. II at 1245-46.
60 Id. at Vol. II at 1240, 1234, 1246 1269-1271; Profile: Texas Criminal Appeals Court Denying a New Trial of a Convicted Murderer, Even Though His Confession was Admittedly Coerced, ALL THINGS CONSIDERED, July 6, 2000, 2000 WL 21471112. Thus, it is difficult to believe that the jury relied on any evidence other than Mr. Fierro's confession.
hostage in Mexico by Juarez police. 62 Faced with the imminent danger confronting his parents, Fierro signed a confession — and his parents were released from the Juarez jail. His stepfather testified that Juarez police "said Cesar had confessed, and we were free." 63 Detective Medrano, the El Paso police officer who took Fierro's confession, testified before and during trial that he had not been aware that Fierro's parents had been detained in Mexico, and thus could not have used that information to coerce Fierro's confession. 64 The jury rejected Fierro's uncorroborated account of extraordinary misconduct, convicted him of capital murder, and sentenced him to die.

More than a decade after his conviction, new attorneys for Mr. Fierro uncovered previously hidden evidence that confirmed Fierro's account of his interrogation. 65 Following a lengthy hearing on this evidence, the trial court concluded that Detective Medrano went to Mexico for a series of meetings with Juarez Police Commandante Jorge Palacios after Fierro had been implicated in the crime. 66 Early the next morning, Palacios took Fierro's parents captive and threatened to torture Fierro's stepfather with an electrical current to his genitals unless his step-son confessed to the El Paso police. The post conviction judge determined that Detective Medrano was aware that Fierro's parents were being held hostage and that his pretrial and trial testimony to the contrary was a deliberate lie. 67

Confronted with overwhelming evidence of Medrano's efforts to coerce a confession and his false testimony denying knowledge of such efforts, the post-conviction judge ruled that there should be a new trial. The State of Texas appealed that recommendation to the Court of Criminal Appeals. While unanimously adopting the findings of fact of the trial court, a bare majority of the appellate judges refused to grant a new trial. The majority concluded that the admittedly coerced confession was "harmless error" and that the jury would likely still have convicted Fierro on the remaining evidence. 68 What their decision neglected to note was that there probably would have been no trial at all, if the police had not conspired to extract a suspect confession under psychological torture. As the prosecutor himself explained in a sworn statement, "Had I known at the time of Fierro's suppression hearing what I have since learned about the family's arrest, I would have joined in a motion to suppress the confession. Had the confession been suppressed, I would have moved to dismiss the case unless I could have corroborated Olaque's testimony." 69

The U.S. Supreme Court refused to review this ruling. All subsequent appeals to the federal courts have failed to secure a new trial, despite the misgivings of the prosecutor who tried Cesar Fierro and the findings of the trial court. Because of limits placed on an inmate's

62 At that time, Juarez police were notorious for their widespread use of torture against detainees.
63 S.F. Vol I, 137.
64 Ex parte Fierro, at 371.
65 Ex parte Fierro, at 371.
69 Id. at 385 (sworn statement of trial prosecutor Gary Weiser).
ability to obtain a second round of appeals, federal courts may not have the power to remedy the fatal flaws in Fierro’s prosecution and trial.

Although the courts have found that Cesar Fierro’s confession was the product of official misconduct, he has spent 20 years on death row and remains there still, awaiting his execution.\textsuperscript{70}

III. Double Vision: Conflicting Prosecutions for the Same Crime

The State is obliged to pursue just convictions – to seek out and report not the story that is most likely to result in conviction, but the version of events that is the whole truth. In certain Texas death penalty cases, however, prosecutors supposedly ferret out the “truth” about the facts in one case, and then rearrange those facts in a companion case in a way that squarely contradicts the first version. Prosecutors therefore re-write the truth in related cases to suit their prosecutorial goals. The following examples illustrate the injustice of such tactics.

A. The Truth Was No Barrier: Inconsistent Prosecutions in Texas

\textit{James Lee Beathard and Gene Hathorn}

On the night of October 9, 1984, Gene Hathorn Sr., Linda Hathorn, and Marcus Hathorn were shot and killed in their trailer home.\textsuperscript{71} James Beathard and Gene Hathorn, Jr. later were charged with their murders. Mr. Beathard was prosecuted first. At his trial, the prosecution presented a straightforward theory: Gene Hathorn, Jr. fired once through the back window of the trailer, while Beathard burst through the back door and shot everyone inside.\textsuperscript{72} Hathorn’s testimony was the only evidence presented that supported the State’s assertion that Beathard, and

\textsuperscript{70} In another Texas death penalty case, the defendant himself was tortured to obtain a confession. Zimmermann v. State, 750 S.W.2d 194 (Tex. Crim. App. 1988). In an investigation for a 1977 murder, John Charles Zimmerman was beaten, threatened, and shocked with a cattleprod on his chin, chest, nipples and genitals. \textit{Id.} at 206-09 When police promised that they would put his wife through “hell and misery” and would continue to torture him unless he confessed, Charles Zimmerman gave in, asking “There ain’t going to be no more beating is there?” \textit{Id.} at 206. \textit{See also} Gary Taylor, \textit{Zimmerman to Get Retrial}, \textit{HOU StON POST}, February 16, 1979, at A1. At least five state officials witnessed violence or threats against Zimmerman but each remained silent about the abuse. Zimmermann, at 206-09. When one witness attempted to complain about the incident, she was harassed by the police until she sold her home and moved away. Gary Taylor, \textit{Zimmerman to Get Retrial}, \textit{HOU StON POST}, February 16, 1979, at A1. Through their inhuman tactics, the police succeeded in sending Mr. Zimmerman to death row for more than a decade. Texas Department of Criminal Justice, \textit{Offenders Permanently Out of Custody}, at http://www.tdcj.state.tx.us/stat/permantout.htm. In 1989, he plead guilty to a lesser offense and, after 12 years of incarceration, became eligible for parole. \textit{Death Row Inmate Accepts Plea Bargain}, \textit{DALLAS MORNING NEWS}, October 18, 1989, at 16A.


\textsuperscript{72} Beathard v. Johnson, 177 F.3d 340, 342-43 (5th Cir. 1999).
not Hathorn, had gone inside the trailer and shot its occupants.\textsuperscript{73} James Beathard was convicted and sentenced to die.\textsuperscript{74}

Gene Hathorn was then prosecuted for the same crime. The prosecution’s theory at his trial was equally straightforward, but directly contradicted the one presented at Mr. Beathard’s trial. The same prosecutors now argued that it was James Beathard who fired once through the back window of the trailer, while Gene Hathorn burst through the back door and shot and killed everyone inside.\textsuperscript{75} Based on this completely opposite version of the events, Gene Hathorn was convicted and sentenced to death.\textsuperscript{76}

At Beathard’s trial, Hathorn’s testimony was the centerpiece of the State’s case. “[H]e is telling the truth,” the prosecutor assured the jury. “He told the truth before and he is telling it again, and he told it again in here.”\textsuperscript{77} Yet at Hathorn’s trial, when it no longer suited the State to present Hathorn as less culpable, the prosecutor attacked this same testimony as a lie. “And if he told the truth,” the prosecutor argued, “I’m a one-eyed hunting dog. . . . It ain’t in him.”\textsuperscript{78}

The prosecutor has since determined that the testimony used to convict and condemn James Beathard was false, and has concluded that Beathard did not enter the Hathorn trailer and did not kill the victims.\textsuperscript{79} In sworn testimony, Gene Hathorn has since admitted that he shot and killed his family on the evening of October 9, 1984. He now concedes that Beathard’s trial testimony was correct in all respects. Hathorn also admits that he testified as he did only because prosecutors promised that, in exchange for his testimony against Beathard, he would not be prosecuted for capital murder. After the State reneged on its promise, he explained, he recanted his trial testimony.\textsuperscript{80}

The courts were unswayed by the knowledge that at least one of the two men was convicted based on a false theory. Although it acknowledged that the prosecutor “knew that both of the stories [presented at Hathorn’s and Beathard’s trial] could not be true,” the Fifth Circuit found that a defendant’s due process rights do not prohibit the State’s use of a theory that it does not believe to be true.\textsuperscript{81} Although apparently no one (not even the prosecutor) believed

\textsuperscript{73} Beathard v. State, 767 S.W. 2d at 427-30 (analyzing the evidence that corroborated Mr. Hathorn’s testimony and determining only that they created “suspicious circumstances” that tended to connect Mr. Beathard to the crime).

\textsuperscript{74} Id.

\textsuperscript{75} Beathard v. Johnson, 177 F.3d at 344.


\textsuperscript{77} Tr., Vol. VIII at 1554-55, State v. Beathard (CCA No. 69,474).

\textsuperscript{78} Id., Tr., Vol. X at 1395

\textsuperscript{79} David Hanners, \textit{Deadly Deceits}, DALLAS MORNING NEWS, Sept. 10, 1989, at 1A (“The prosecutor said that contrary to what Mr. Hathorn swore under oath, he believes Mr. Beathard fired the shotgun blast while Mr. Hathorn went inside.”).

\textsuperscript{80} Petition for Writ of Habeas Corpus at 2, Beathard v. Johnson, 177 F.3d 340 (5th Cir. No. 96-40760 ).

\textsuperscript{81} Beathard v. Johnson, 177 F.3d at 348 (“a prosecutor can make inconsistent arguments at the separate trials without violating the due process clause.”)
that James Beathard shot the victims, Mr. Beathard was executed by the State of Texas on December 9, 1999.\textsuperscript{82}

\textit{Joseph Nichols and Willie Williams}

Willie Williams and Joseph Nichols, attempted to rob a delicatessen in Houston, Texas. During the course of the robbery, Claude Shaffer was shot and killed.\textsuperscript{83} The evidence established that Shaffer died from a single gunshot wound, but the police were unable to determine whether Nichols or Williams fired the fatal shot.\textsuperscript{84} At the punishment phase of Williams' trial, the prosecutor asserted that "Willie Williams is the individual who shot and killed Claude Shaffer. ... [T]here is only one bullet that could possibly have done it and that was Willie Williams' [bullet]."\textsuperscript{85} A jury sentenced Mr. Williams to death.\textsuperscript{86}

Mr. Nichols was subsequently tried for the same murder, a trial ending in a hung jury.\textsuperscript{87} After learning from the jurors that the uncertain identity of the triggerman had caused concerns,\textsuperscript{88} the prosecutor, in Nichols' second trial, contradicted the facts his own office had established at Williams' trial, arguing, "Willie could not have shot [Shaffer]... [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that."\textsuperscript{89} The second jury convicted Nichols of capital murder and sentenced him to die.\textsuperscript{90}

A federal district court judge found that, because Williams' trial had previously established that Williams fired the fatal shot, the evidence presented in Nichols' trial that Nichols had fired the fatal shot was "necessarily false."\textsuperscript{91} The district court also explained that, because only one bullet killed the victim, due process permitted only one person to be charged with firing the fatal shot.\textsuperscript{92} Otherwise the State could convict an unlimited number of individuals for the very same act.\textsuperscript{93} The Fifth Circuit, however, reversed the district court, finding that the prosecution's inconsistencies "did not affect the reliability or fairness of the fact finding process

\begin{itemize}
  \item \textsuperscript{82} See Texas Department of Criminal Justice, \textit{Statistics and Death Row}, at http://www.tdcj.state.tx.us/statistics/stats-home.htm.
  \item \textsuperscript{84} Nichols v. Scott, 69 F.3d 1255, 1260 (5th Cir. 1995).
  \item \textsuperscript{85} Nichols v. Collins, 802 F. Supp. at 802 F. Supp. at 73 (alteration in original) (internal quotations omitted).
  \item \textsuperscript{86} Id. at 72.
  \item \textsuperscript{87} Id. at 75.
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} Id. at 73 (alteration in original) (internal quotations omitted).
  \item \textsuperscript{90} Id. at 68.
  \item \textsuperscript{91} See id. at 72-75.
  \item \textsuperscript{92} Id. at 74 (finding that the prosecution was collaterally estopped from taking a different position in Nichols' subsequent trial).
  \item \textsuperscript{93} Id.
\end{itemize}
in Nichols’ trial.\footnote{Nichols v. Scott, 69 F.3d 1255, 1269-74 (5th Cir. 1995).}

One bullet killed Claude Shaffer. But the State, knowing that it was wrong in at least one case, argued that two different men committed the same shooting. Only one of these men committed the murder for which he was sentenced to die; the other was condemned to death on the basis of false evidence. Mr. Nichols sits on death row, awaiting execution. Willie Williams was executed in January 1995, one of the first two men put to death after George W. Bush became governor.\footnote{See Texas Department of Criminal Justice, Executed Offenders, http://www.tdcj.state.tx.us/stat/executedoffenders.htm; Jim Yardley, Texas's Busy Death Chamber Helps Define Bush's Tenure, NEW YORK TIMES, Jan. 7, 2000, at A1, 2000 WL 12392119.}

\textit{Jesse Jacobs}

Both Jesse Jacobs and his sister, Bobbie Hogan, were charged with the murder of Etta Urdiales.\footnote{Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994); see also Jacobs v. Scott, 513 U.S. 1067 (1995) (denying Mr. Jacob's application for a stay of sentence of death).} At Mr. Jacobs's trial, the prosecutor argued that "[t]he simple fact of the matter is that Jesse Jacobs and Jesse Jacobs alone killed Etta Ann Urdiales."\footnote{Jacobs v. Scott, 31 F.3d at 1322 n.6 (alteration in original) (internal quotations omitted).} The jury found Jacobs guilty of capital murder and sentenced him to death.\footnote{Id. at 1322.}

During Bobbie Hogan’s trial, however, the same prosecutor advanced a dramatically different story. He admitted that he had been wrong in Mr. Jacobs’s trial and was certain that Hogan, not Jacob, shot Ms. Urdiales.\footnote{Id. at 1322 n. 6.} The prosecutor called Mr. Jacobs to testify that Hogan had killed Urdiales and then argued that “I changed my mind about what actually happened. And I'm convinced that Bobbie Hogan is the one who pulled the trigger. And I'm convinced that Jesse Jacobs is telling the truth when he says that Bobbie Hogan is the one that pulled the trigger.”\footnote{Id.}

Even the prosecutor acknowledged that Jacobs was sentenced to die based on the jury’s acceptance of an abject falsehood. But the Fifth Circuit deemed this admission irrelevant, explaining that, even if the admission constituted evidence of Jacobs’s innocence, “the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.”\footnote{Jacobs v. Scott, 31 F.3d at 1324 (internal quotations omitted).} As United States Supreme Court Justice John Paul Stevens highlighted in his dissent to the denial of a stay of Jacob’s execution, however, “[i]f the prosecutor’s statements at the Hogan trial were correct, then Jacobs is innocent of capital
In this case, innocence was no barrier to execution. Jesse Jacobs was executed on January 4, 1995. Hogan, whom the prosecutor believed pulled the trigger, received a sentence of ten years imprisonment.

**James Lee Clark**

Shari Catherine Crews and Jesus Garza were murdered in 1993, each killed by a single shotgun wound. James Lee Clark and James Brown were arrested for the murders. Clark was tried, convicted, and sentenced to die. Brown then became the target. Not only did the prosecutor’s arguments change, but essential evidence was modified from one trial to the next. In Clark’s trial, the autopsy physician testified that one of the victims was shot from “a couple of feet.” At Brown’s trial, the same physician swore that the same victim was shot from “just a few inches.” This remarkable transformation of scientific evidence allowed the prosecutor to first insist at Clark’s trial that it was impossible that Brown had fired the shot, and then to turn around at Brown’s trial and argue that Brown alone did fire the shot. Even though the prosecutor argued that James Lee Clark was not the shooter, the United States Fifth Circuit Court, relying on Mr. Beathard’s case, has just turned down what will probably be Mr. Clark’s last appeal.

**B. The Accident of Geography: Other Jurisdictions That Prohibit Inconsistent Prosecutions**

The unfairness of the inconsistent arguments advanced by the prosecutors in the Beathard, Williams, Nichols, Jacobs, and Clark cases is obvious. Compounding this injustice is the fact that these tactics would not be tolerated in several jurisdictions outside of Texas. If Joseph Nichols had been tried in New York, rather than Texas, the prosecutor would not have been allowed to change his theory that Nichols, rather than Williams, was the actual shooter. If Willie Williams had been convicted in California, in all probability he would not have been executed. And if Jessie Jacobs had been tried in Mississippi, his conviction may well have been

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104 Clark v. Johnson, ___ F.3d ___, No. 00-40061 (5th Cir. Sept. 12, 2000).

105 Id.

106 Id. (describing the prosecutor’s argument that Brown shot Mr. Garza).

107 Id.
reversed, and he likely would be alive today.  

Several courts have found that due process is violated when a prosecutor “pursue[s] wholly inconsistent theories of a case at separate trials.” In the plurality decision in Thompson v. Calderon, for example, the Ninth Circuit explained that “it is well established that when no significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime.” In reaching its conclusion, the court relied both on the prosecutor’s duty to administer justice and the prohibition against knowingly presenting false evidence at trial.

Other courts have prevented a prosecutor’s use of inconsistent factual theories in successive trials by using evidentiary standards. In United States v. GAF Corp., the Second Circuit ruled that the defense should be permitted to introduce evidence of the prosecution’s actions in previous trials that were inconsistent with its actions in the current trial. The court reasoned that “if the government chooses to change its strategy at successive trials, and contradict its previous theories of the case and version of the historical facts, the jury is entitled to be aware of what the government has previously claimed, and accord whatever weight it deems appropriate to such information.”

Texas’ state and federal courts have not been swayed by this logic. They continue to condone executions obtained through prosecutorial sleight of hand.

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108 See infra, notes 107-112 and accompanying text.
110 Id. at 1058.
111 See id. Even Judges Kozinski and Nelson, in their dissent to the plurality opinion, agreed that, when it is clear that a crime was committed by either defendant A or defendant B, we “[m]ust be troubled . . . where A and B get convicted. . . . In the case of mutually inconsistent verdicts . . . I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts.” Id. at 1072 (Kozinski, J., dissenting). See also Drake v. Kemp, 762 F.2d 1449, 1470 (11th Cir. 1985) (en banc) (Clark, J. concurring) (“the prosecution’s theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice. . . . The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth.”); Smith v. Groose, 205 F.3d 1045 (8th Cir., 2000) (holding that the prosecutor’s use of one of co-defendant’s two factually contradictory versions of events surrounding murders to convict defendant and subsequent use of other version to convict someone else of the same murders was a violation of the defendant’s right to due process).
112 928 F.2d 1253 (2d Cir. 1991).
113 See id. at 1257-62.
114 Id. at 1262. Likewise, in Hoover v. State, 552 So. 2d 834 (Miss. 1989), the Supreme Court of Mississippi found that the arguments of a prosecutor in the previous trial of a co-indictee were admissible in the trial of another co-indictee, where the prosecutor has argued inconsistent factual theories in the two trials.
115 For a more detailed analysis of the legal issues involved in inconsistent prosecutions and the related case law, see Michael Q. English, A Prosecutor’s Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation? 68 FORDHAM L. REV. 525 (Nov. 1999).
IV. Violating the Duty to Disclose the Truth

The U.S. Supreme Court has stressed that “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police,” and to provide that evidence to the defendant.\footnote{Kyles v. Whitley, 514 U.S. 419, 432-38 (1995).} This duty to disclose evidence is one of the foundations of the adversarial process. Without it, there can be no guarantee that evidence of innocence is fully explored and blameless persons are not convicted and sentenced to die. But, as the following cases demonstrate, this critical safeguard is all too often ignored by Texas prosecutors.\footnote{In order to determine whether the failure of a prosecutor to disclose exculpatory evidence has violated the due process rights of a defendant, the courts employ a three part test: (1) Has there been a failure to disclose evidence? (2) Is the evidence favorable to the accused? and, (3) Does the evidence create a probability sufficient to undermine the confidence in the outcome of the proceeding? Ex parte Mitchell, 853 S.W.2d 1, 4 (Tex. Crim. App. 1993) (citing Thomas v. State, 841 S.W.2d 399, 403-04 (Tex. Crim. App.1992)). Courts determine whether or not to grant relief based not only on whether the State has withheld evidence, but also on the court’s evaluation of the damage to the defendant’s case that was caused by the State’s failure to disclose evidence. We are concerned with whether the State has acted contrary to the full revelation of the truth. Thus, we include in the category of state misconduct those cases in which the courts have found that the prosecutor withheld evidence from the defendant, even when the court found that the second or third prong of the test was not satisfied.}

\textit{Andrew Lee Mitchell}

In 1981, Andrew Mitchell was convicted and sentenced to death for the 1979 murder of Keith Wills. The only direct evidence linking Mitchell to the murder was the testimony of two alleged accomplices.\footnote{One accomplice received immunity in exchange for his testimony and the other received a promise of ten years of probation. \textit{Id.} at 2 n.1.} They testified that they had gone with Mitchell to Mr. Wills’s workplace at around 8:30 p.m. on the night of December 26, and that Mitchell shot Wills at around 9:00 p.m..

After trial, Mitchell’s attorneys learned that the police had covered up the testimony of two law enforcement officers – evidence that proved that the case presented by the prosecution, and the entire sequence of events described by their witnesses, was false. Kelly Stroud, a deputy sheriff, and Ralph East, a game warden, had both seen the victim alive after 10 p.m.. By that time, as the prosecution had proven, Mitchell could not have been at the place where Wills was murdered.\footnote{\textit{Id.} at 2-4.}

On the day Wills’ body was found, both law enforcement officers told the sheriff’s department what they had seen.\footnote{\textit{Id.} at 2-3.} Perhaps because they knew that it had the potential to destroy their entire case against Mitchell, the sheriff’s department hid this exculpatory testimony from
the defense. Many years later, the discovery of this crucial evidence did destroy the case against Mitchell. However, because of the duplicity of the sheriff's department, Andrew Mitchell spent more than a decade under sentence of death and once came within five days of execution. He was released from death row in 1993.

Ernest Willis

When Ernest Willis was convicted and sentenced to death for setting a house fire that killed two young women, even the prosecutor was shocked. "We were very surprised even winning the trial," he said. "Our chances were about 10 percent even going into it. . . . We didn't have any eyewitnesses. We didn't know what type of flammable material was used. It was all circumstantial. . . ."

In Texas, the death penalty may not be imposed in any case unless the jury unanimously finds that there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." In Mr. Willis's case, the prosecution concealed from the jury (and the defense) the findings of the psychologist they hired to examine Willis. This psychologist, Jarvis Wright, determined that he could not justify saying that Willis would be dangerous in the future, explaining that he "didn't think this was a good death penalty case." The State nevertheless proceeded with a death penalty case against Willis and did not disclose these findings.

The State's cover-up of its own expert's diagnosis sent Ernest Willis to death row in 1987. He is still awaiting the outcome of his appeals thirteen years later.

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121 Id. at 4.
123 Howard Swindle and Dan Malone, Judge Says Inmate Wrongly Convicted, DALLAS MORNING NEWS, Sept. 11, 2000, at 1A.
124 TEX. CODE CRIM. PROC. art. 37.071(2)(b)(1). See supra, Chapter One.
126 See Texas Department of Criminal Justice, Offenders on Death Row, at http://www.tdcj.state.tx.us/statistics/stats-home.htm
127 Howard Swindle and Dan Malone, Judge Says Inmate Wrongly Convicted, DALLAS MORNING NEWS, Sept. 11, 2000, at 1A. In the interim, direct evidence of Willis's actual innocence has come to light. David Martin Long has confessed to setting the fire for which Willis was convicted, giving details about the murder scene, the way he set the fire, and his motive for doing so. Id.
V. Bearing False Witness: The Testimony of Jailhouse Informants

Prosecutors in Texas frequently introduce the testimony of jailhouse informants to support their cases. These witnesses claim that capital defendants, whom they had often never before met, confessed to them important details of the crime. Such jailhouse snitches usually testify because they expect rewards, which may include a reduced charge, early release, better conditions of confinement, or even cash.\(^{128}\) Despite the obvious risk that inmates will fabricate testimony to curry favor with authorities, Texas imposes no restrictions on its use.\(^{129}\)

A high profile debacle in Los Angeles demonstrated just how easily informants can fabricate confessions in serious cases. In 1988, jailhouse informant Leslie Vernon White demonstrated to a sheriff’s deputy how, in 20 minutes, an informant could fabricate a convincing confession from a defendant he had never met. White was provided only the last name of a murder suspect and access to the pay telephone used by inmates. During three telephone conversations, White posed as a deputy district attorney and a police sergeant and called the homicide squad and the deputy district attorney handling the case. He was able to learn details of the case that would corroborate the "confession" that White could then manufacture. White was also able to arrange a meeting with the defendant, so he could show he had been in contact with the inmate who purportedly confessed.\(^{130}\)

A Los Angeles Times investigation later revealed a variety of other techniques that informants use to manufacture confessions. Informants maintain files on sensational criminal cases and steal legal documents from other inmates. If one "confession" did not result in sufficient benefits, informants fabricate additional confessions until they receive bigger rewards.\(^{131}\)

**Johnny Dean Pyles**

On June 20, 1982, Officer Ray Kovar encountered Johnny Dean Pyles in an empty parking lot and, apparently believing that he had interrupted a crime, fired six shots at him.

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Pyles returned the fire, killing Kovar.\textsuperscript{132} Shortly thereafter, Pyles was arrested. He quickly acknowledged that he had shot the officer, but explained that he shot only because he saw a flashlight and a gun pointed at him. He said he did not see the person he shot.\textsuperscript{133} This created a problem for the State — if they could not prove that Pyles knew or should have known that Kovar was a police officer, then Pyles could not be found guilty of capital murder. But there was no evidence that Pyles had such knowledge.

On August 10, 1982, for no apparent reason, officials with the Dallas County Jail transferred Johnny Pyles from solitary confinement to a five man tank.\textsuperscript{134} Pyles was housed with two known jailhouse snitches.\textsuperscript{135} Both snitches later admitted they were instructed by police to elicit from Pyles the fact that he knew he was shooting at a police officer.\textsuperscript{136} "They told us what they wanted to hear from Johnny, . . . saying they wanted him to say he knew the man was a police officer, and that Johnny had bragged about the killing."\textsuperscript{137} Pyles, however, made no such confession. Not to be denied, the informants simply manufactured a confession. Both snitches have since admitted that their testimony was untrue and that the State presented it knowing that it was false. At a hearing in federal court, a magistrate found that both snitches had testified falsely.\textsuperscript{138}

In fact, the five man tank into which Pyles was placed could aptly be described as "the snitch tank." Five months after Pyles was tried and convicted based on the testimony of jailhouse informants, the Dallas County District Attorney prosecuted Harold Joe Lane for an unrelated capital murder.\textsuperscript{139} Lane, like Pyles, was transferred from his cell to the snitch tank where he, like Pyles, was housed with a known snitch.\textsuperscript{140} Like the snitches in Pyles’s case, the snitch in Lane’s case promptly told police that Lane had confessed to him the critical issue in his case.\textsuperscript{141} Both Harold Joe Lane and Johnny Dean Pyles have been executed.\textsuperscript{142}

\textsuperscript{132}Tr., Vol. II at 92-94, 170; Vol. III at 449, 515-19, 634-37, 660, State v. Pyles (CCA No. 69,091).
\textsuperscript{133}Id., Pretrial Vol. II at 151-52.
\textsuperscript{134}Id., Pretrial Vol. II at 305-06.
\textsuperscript{135}Id., Vol. III at 761, 782, 805-13; Petition for Writ of Habeas Corpus, Exhibits J, L, Y, Pyles v. Johnson, 136 F.3d 986 (5th Cir. No. 97-10809).
\textsuperscript{136}Pyles, Petition for Writ of Habeas Corpus, Exhibit J, Affidavit of Gary LaCour; Exhibit L, Affidavit of Robert Bansenbach.
\textsuperscript{137}Id. at Exhibit J; Exhibit L.
\textsuperscript{138}Pyles v. Johnson, 136 F.3d 986, 996-1000 (5th Cir. 1998).
\textsuperscript{139}Pyles, Petition for Writ of Habeas Corpus, Affidavit of Robert Bansenbach at Exhibit V.
\textsuperscript{140}Pyles and Lane were both put in tank 12-S-13 at the Dallas County Jail. Id. Pretrial Vol. II at 305-06; Tr. Vol. III at 761, 782, Pyles v. State.
\textsuperscript{141}Id.
\textsuperscript{142}Our research has uncovered 43 capital cases involving jailhouse snitches. See infra, Appendix Two. Because the judicial decisions which were our primary source of information may not discuss snitch testimony in every case, our review likely has missed a number of cases. In the final chapter of this report, we profile the cases of two men — David Wayne Spence and David Wayne Stoker — convicted and sentenced to die by the State of Texas largely on snitch testimony that has since been discredited. Both men were executed despite substantial doubt about their guilt. See also Steve Mills, Ken Armstrong & Douglas Holt, Flawed Trials Lead to Death Chamber Bush Confident in System Rife with Problems, CHICAGO TRIB., June 11, 2000, at 1 (identifying 23 defendant’s executed...
VI. Conclusion: The Erosion of Confidence in the Integrity of Capital Prosecutions

Since 1976, in at least 41 cases, some form of official misconduct has been exposed in subsequent legal proceedings and found to have occurred. By its nature, official misconduct is hidden from the defense and the court. Because it is hidden, official misconduct is not always discovered after trial. Without exhaustive investigation – through the defense gaining access in the post-conviction process to new police and prosecutorial files, through witnesses recanting their trial testimony and acknowledging they testified falsely, or through police or prosecutors acknowledging misconduct at trial – official misconduct will remain hidden. In some cases, therefore, official misconduct will have occurred but will not be exposed. In Texas, the risk of misconduct remaining hidden, even through post-conviction proceedings, is high because, as we document in Chapter Five, many lawyers who represent condemned inmates in post-conviction proceedings conduct no investigation. Thus, the 41 cases in which official misconduct has been exposed after trial and found to have occurred surely represents only a portion of the cases in which official misconduct in fact occurred. No one can know what portion these cases represent.

What can be said with confidence about the number of cases in which this hidden unfairness has been exposed is that it is too many to conclude that such instances of misconduct are an aberration in a system that otherwise functions with integrity. Official misconduct has been exposed in enough cases that we should be worried whether such behavior is endemic in capital prosecutions in Texas.

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under Governor Bush's tenure which involve jailhouse informants).