

INNOCENCE PROJECT OF TEXAS

1511 TEXAS AVE.
LUBBOCK, TX 79401
TELEPHONE (806) 744-6525
FACSIMILE (806) 744-6480
WWW.IPOFTEXAS.ORG

August 9, 2012

Jim Bethke, Executive Director
Texas Indigent Defense Commission
209 West 14th Street, Room 202
Austin, Texas 78701

Dear Mr. Bethke,

In 2011, the 82nd Texas Legislature passed House Bill 1754. House Bill 1754 created a requirement that all public law school innocence projects prepare a report annually on client exonerations, "identifying each likely cause of the wrongful convictions and recommend to the judiciary and legislature best practices, policies, and statutory changes to address or mitigate those likely causes with respect to future criminal cases." The Innocence Project of Texas is proud to present its first report pursuant to this statutory requirement.

On May 12, 2011, the Innocence Project of Texas was successful in obtaining the release of Johnny Edward Pinchback. Pinchback spent approximately 27 years incarcerated for the sexual assault of two young female victims. DNA evidence and an investigation by the Innocence Project of Texas proved that he did not commit the crime.

Attached to this letter is a report on Pinchback's conviction and exoneration. We have highlighted the likely causes of his wrongful conviction and made recommendations to address these issues. Because the statute refers to recommendations to the legislature and the judiciary, we are also forwarding this report to the following officials:

- Governor Rick Perry
- Lieutenant Governor David Dewhurst
- Speaker of the House Joe Straus
- Senator John Whitmire, Chair of the Senate Criminal Justice Committee
- Representative Pete Gallego, Chair of the House Criminal Jurisprudence Committee
- David Slayton, Executive Director of the Texas Judicial Council

Please feel free to contact us should you have any questions.

Best Regards,



Nick Vilbas
Executive Director





**Report on the Exoneration of
Johnny Edward Pinchback**

**Submitted by
The Innocence Project of Texas**

August 2012

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Introduction

The Innocence Project of Texas (IPOT) is pleased to present this report on the exoneration of our client, Mr. Johnny Edward Pinchback, who served almost 27 years in prison for his wrongful convictions. IPOT was able to establish Mr. Pinchback’s innocence with the help of advanced DNA testing in 2011. The Texas Court of Criminal Appeals granted Mr. Pinchback’s writ of habeas corpus on June 8, 2011.

This report was prepared pursuant to a new statute passed by the 82nd Legislature (79.039, Texas Government Code), which requires all law school-affiliated innocence projects that receive legislatively directed financial support through the Texas Indigent Defense Commission to submit an annual report detailing any cases leading to relief based on actual innocence. The statute indicates that the report should “identify each likely cause of a wrongful conviction” regarding the cases in the report and “recommend to the judiciary and the legislature best practices, policies and statutory changes to address or mitigate those likely causes with respect to future criminal cases.”

IPOT is a non-profit organization that contracts with Texas Tech University to operate the innocence project as class and internship opportunity for law and forensic science students. As one of the four innocence projects based at Texas public law schools, our program receives legislatively directed grant funds through the Texas Indigent Defense Commission pursuant to a budget rider directive.

This report was prepared based on a review of the trial transcripts, the unpublished direct appeal opinion issued in Mr. Pinchback’s case, the state’s response to Mr. Pinchback’s post-conviction motion for DNA testing, police reports, forensic reports and other case documents.

Case Data Overview

Exoneree:	Johnny Edward Pinchback
Offence Date:	March 22, 1984
Jurisdiction:	Dallas County
Offence:	Aggravated Sexual Assault (x2)
Plea:	Not Guilty
Sentence:	99 years

Years Incarcerated:	Approximately 26.5 years
Evidence Used To Convict:	Eyewitness Identifications by Victims
Evidence of Innocence:	Y-STR DNA Testing
Habeas Relief Granted:	June 8, 2011
Case #s:	F84-91719; F84-91720-RI
Trial Prosecutor:	Bob Phillips
Trial Defense Attorney:	W.C. (Corky) Davis
Convicting Court:	Dallas County Criminal District Court #2, Hon. Don Metcalfe
IPOP Attorneys:	Gary Udashen (IPOP Board President) Natalie Roetzel (Chief Staff Attorney) Jason Partney (former Staff Attorney)

Case Summary

Johnny Edward Pinchback was convicted in 1984 of the aggravated sexual assault of two female victims (B.T. and T.W.), ages 14 and 15. On March 22, 1984, the girls were walking down Illinois Avenue in the Oak Cliff area of Dallas when a man with a gun approached them. The man ordered them to run across a vacant lot to a location where they were tied together at the legs and raped. After their brutal attack, the girls rushed to a nearby residence and called the police. They were then transferred to Parkland Hospital for rape examinations.

Three days later, the girls noticed a man in the parking lot at B.T.'s apartment complex whom they believed was their attacker. They documented the license plate number and make of the vehicle the man was driving. They then notified the authorities, who promptly located the owner of the vehicle and determined that the owner had loaned the car to Johnny Pinchback. Meanwhile, Pinchback found out that the police were looking for the car's driver in connection with a criminal investigation. Against the advice of friends and family, Pinchback initiated a meeting with the police in the hopes of clearing his name.

Although the police allowed Pinchback to leave at that time, on April 4, 1984 an officer from the Dallas Police Department presented each of the victims with a six-picture photospread that included Mr. Pinchback's photo. During the presentation of that photospread, the girls identified Johnny Pinchback as the man who raped them. They positively identified him again at trial. These identifications ultimately led to Mr. Pinchback's conviction and were the key pieces of evidence presented by the state in support of the guilty verdict.

Although the rape examinations were conducted shortly after the victims' attack, no semen was detected in any of the samples examined in 1984. While the rape examinations did reveal signs of trauma, there was no physical evidence linking Pinchback to the crime.

Throughout his trial, Mr. Pinchback maintained his innocence. He took the stand in his own defense and attempted to convince the jurors that the wrong man had been charged. When Pinchback could not produce a strong alibi, however, his conviction based on the identification evidence was sealed. He was sentenced to life in prison.

Shortly after the trial, Pinchback learned the name of a man who his friends claimed had made incriminating statements about the rape of two girls in the area. Pinchback's attorney filed a Motion for New Trial on the basis of this newly discovered evidence, but the motion was denied. Mr. Pinchback's conviction and sentence were affirmed on direct appeal.

Mr. Pinchback would later write letters to several innocence organizations across the United States. Although some expressed an interest in helping him, one-by-one they closed his case. In a last-ditch effort to clear his name, he wrote one more letter. IPOT received a request for assistance from Mr. Pinchback in October of 2007. At that time, his case was placed on our organization's waiting list for review. Despite the more than 1000 files in line before Pinchback's case, we were able to launch an investigation into his claim of innocence in May 2009.

As soon as our investigation began, it became apparent that DNA testing would be the simplest way to conclusively determine whether Pinchback was responsible for the crime. Exonerree (and IPOT Board Member) James Woodard assisted with the investigation. He travelled with an IPOT attorney to Mr. Pinchback's prison unit to speak with him and learn more about his case. In addition to that interview and the facts of the case seemed to support Mr. Pinchback's innocence claim, his claim was further bolstered by the support of another Dallas County exoneree, Charles Chatman, who served time with Mr. Pinchback in the Coffield unit. Mr. Chatman strongly believed in Mr. Pinchback's innocence and regularly contacted IPOT to encourage our organization to pursue his case.

IPOT initiated litigation with a motion for DNA testing less than two months after beginning work on Mr. Pinchback's file. In April 2010 the District Attorney's Office responded to the DNA motion. Although the State acknowledged in its response that DNA testing of the victims' rape kits could prove Mr. Pinchback's innocence, the State informed the court and IPOT that most of the biological evidence collected in 1984 was missing, and all that remained were pubic hair cuttings taken from the second victim. Because the cuttings were hairs that belonged to the female victim herself, it was believed that a test of those hairs would only yield the victim's DNA profile.

Despite this discouraging news, IPOT decided to press on. Chief Staff Attorney Natalie Roetzel consulted with a DNA expert, who acknowledged that although not probable, it was possible that modern DNA testing technologies could yield trace amounts of male DNA (semen) on the hairs. The District Attorney's Office agreed. On July 13, 2010, the State put its full support behind Pinchback's motion for DNA testing. Seven days later, on July 20, the Court granted Pinchback's motion and the DNA testing process began. The Orchid Cellmark DNA lab would later report that the hairs tested positive for seminal fluid, and that

the male DNA profile obtained from those hairs did not belong to Johnny Pinchback. The female DNA from the hairs was a match to the female victim, confirming that the evidence tested was the same evidence collected during the victim's 1984 rape examination. This confirmation, in addition to the exclusion of Pinchback as the source of the male DNA, proved that Johnny Pinchback was wrongly convicted of aggravated sexual assault.

Unfortunately, the true perpetrator in the case has not been identified. The male DNA profile that was obtained from the rape examination evidence and which positively excluded Mr. Pinchback came via a Y-STR test, which yields a profile of the DNA only from the Y chromosome and is not the type able to be run through CODIS, the FBI's DNA database. If an alternative suspect were able to be identified at some point, however, it would be possible to compare that person's Y-STR profile with the crime scene evidence.

Analysis of Factors Leading to the Wrongful Conviction

It is clear from the record that the only evidence relied upon to convict Mr. Pinchback were the identifications of him by the two young victims. No physical evidence tied Mr. Pinchback to the crime.

While eyewitness evidence is very important in the criminal justice system, decades of scientific research have established that the circumstances under which eyewitness identifications are made are enormously important and affect identification reliability and evidentiary value. In Mr. Pinchback's case, the circumstances of the initial identifications, which occurred outside of the control of the police, compromised the reliability of the initial identifications as well as the subsequent identifications that occurred in photospreads and in court.

The most important lessons to be drawn from Mr. Pinchback's wrongful conviction is a heightened awareness of the reduced evidentiary value of identifications made outside of properly controlled eyewitness procedures, and how exposure of a suspect to a witness prior to a properly controlled procedure undermines the reliability of the outcome.

The Initial Identification

The initial identification of Mr. Pinchback occurred during a chance encounter in public, when the victims saw him getting into a car at the apartment complex where one of the victims lived. The identification was thus wholly outside the control of the authorities (through no fault of their own) and lacked any of the controls and safeguards, such as appropriate instructions, separation of witnesses, and, perhaps most importantly, properly selected foils or fillers. It is also no fault of the victims that they thought they recognized Pinchback in public. But the fact that their initial identification took place outside of any controlled lineup procedure results in the identification having a diminished degree of reliability compared to a properly controlled identification procedure. The reason identification

procedures are designed as they are, with fillers who fit the description of the assailant, etc., is to give eyewitness evidence a greater degree of reliability, and our courts have come to expect that higher degree of reliability.

The victims were together when they saw Mr. Pinchback in public and believed that they recognized him as their assailant. Of course, this, too, was beyond the control of authorities in the case, but may have contributed to the girls both identifying the wrong person. The mistaken recognition of one victim may have influenced the other victim to make the same mistaken identification. The possibility of such influence is the rationale behind the best practice of separating witnesses during identification procedures.

While an identification under such uncontrolled circumstances is clearly important in a criminal investigation, its limitations must be understood and acknowledged. Without safeguards such as properly selected fillers, appropriate witness instructions, and separation of witnesses, this type of identification evidence must be regarded as having diminished evidentiary value, and the importance of corroborating the identification with some other evidence increases. In this case, the record indicates that there was no corroboration of the identification by physical or even other circumstantial evidence, and the fact that Mr. Pinchback could not produce an alibi was detrimental to his case.

The Subsequent Photospreads and In-Court Identifications

It is essential to understand that the reduced degree of reliability of an identification outside of a properly controlled procedure flows “downstream” –it undermines the evidentiary value of any subsequent identification of the same suspect, even if properly controlled. By the time the victims were presented with photospreads that included Mr. Pinchback’s picture, they had already seen him in the neighborhood and concluded that he was the assailant. The subsequent identification of Mr. Pinchback in controlled photospreads was then a *fait accompli*, as were the in-court identifications.

Witness identification is based on perceived familiarity, and witnesses may confuse the source of their familiarity with a suspect. In the case of the subsequent photospreads, it appears that the witnesses indeed recognized Mr. Pinchback, but the source of this familiarity was their innocuous encounter with him in public, rather than from the crime. (It is also possible that the victims had in fact seen Mr. Pinchback around the neighborhood, as they had claimed.) Eyewitness memory scientists have identified a phenomenon called “transference,” in which recognition of a person may be incorrectly associated with the perpetration of a crime, when in fact the person is familiar because of some innocuous encounter, apart from a criminal act. This same phenomenon would apply to situation in which a previous identification procedure which included the same suspect.

While the police may have run controlled lineups as an additional investigative check on the consistency of their witnesses, (which would seem to be a reasonable investigative action), presentation of these photospread identifications in court, absent any caveat about the influence of the previous encounter, likely gave jurors an exaggerated sense of the identification’s reliability. The photospread identifications

carried with them the air of enhanced reliability from a controlled lineup procedure which they did not deserve.

Under typical circumstances, the composition and presentation of the photospread itself are the main factors evaluated to determine the reliability of an eyewitness identification. In this case, however, the fact that both victims identified Mr. Pinchback from a photospread, even if properly compiled and administered, added very little, if any, evidentiary value to their previous identification of him outside of a controlled procedure.

In order to evaluate the fairness of the photospread itself it would be necessary to review the photographs in order to see if Mr. Pinchback's photo unduly stood out for any reason, and whether the filler photos placed in the lineup were consistent with the victim's description. In this case it is impossible to evaluate the fairness of the photospread, both in terms of its composition or its presentation, because the photospread could not be located, and because the documentation of the procedures was minimal. While police reports indicate that the photo lineup was checked into the DPD property room, recent records searches did not turn up the lineup photos. The trial record does indicate that the two victims were separated when they were presented with the photospread, which is consistent with best practices. Again, even if the photospreads were properly constructed and presented, their evidentiary value was undermined by the circumstances of the initial identification discussed above.

Similar Pattern to Other Texas DNA Exoneration Cases

Unfortunately, the type of mistaken identification in Mr. Pinchback's case is not unprecedented among Texas DNA exoneration cases. It is important to note that several other Texas wrongful convictions involve similar identifications by victims when they initially encountered a person in public whom they believed they recognized as their attacker.

James Waller was initially identified by a 12-year-old sexual assault victim when the boy saw him in line at a convenience store. Keith Turner was wrongfully identified after the victim of a sexual assault saw him at work and believed that she recognized him as her attacker. Billy Smith was wrongfully identified when a victim's boyfriend, an apartment complex manager, heard her description of the assailant, went to Smith's apartment, and asked him to step outside his front door so that the victim could view him. These wrongful convictions share the characteristic of the initial identification occurring outside of a properly controlled identification procedure. Again, while such an identification is not necessarily inaccurate, the lack of controls diminishes the evidentiary value of such identifications and makes the need for corroborating evidence even more important than in a typical eyewitness case.

The recurrence of this fact pattern in several wrongful conviction cases underscores the need to explicitly address the limitations and risks associated with identifications outside of controlled procedures. This can be accomplished through training, implementation of sound policy, expert testimony, and requiring corroboration of eyewitness evidence.

Recommendations

Training

In recent years Texas has responded to the series of wrongful convictions that have been uncovered in part by expanded training opportunities on issues related to wrongful convictions. For example, the Court of Criminal Appeals receives legislative funding for a grant program to train judges, prosecutors, defense attorneys and law enforcement personnel on the causes of wrongful convictions and solutions to reduce the risk. Many of these trainings have focused on eyewitness identification procedures that improve reliability. While the focus of most of this training has quite naturally been on properly controlled procedures themselves, IPOT recommends that the future eyewitness training sessions explicitly address the issues present in Mr. Pinchback's case and other similar cases, in which an initial identification occurs outside of a controlled procedure. Educating all actors in the criminal justice system about the risks associated with such evidence and the elevated need for corroboration under such circumstances will make it more likely that our system will better appreciate the limitations of such evidence.

Implementation of Sound Eyewitness Policies (HB 215)

In 2011 the Texas Legislature passed legislation (HB215), which requires all law enforcement agencies to adopt and implement detailed written policies for the conduct of eyewitness identification procedures that are evidence-based and which incorporate key best practices. The legislation also tasked the Law Enforcement Management Institute (LEMIT) at Sam Houston State University to develop a model policy and associated training materials as resources for local jurisdictions. That model policy was issued in late 2011.

The success of this law depends on Texas police jurisdictions following through, and it will be important for the state to monitor the implementation of the law to determine if effective, evidence-based identification procedures are reliably used across the state. The absence of any clear sanction for failing to implement more reliable evidence-based procedures may result in a lack of compliance. We recommend that the state closely monitor the implementation of HB215 and consider putting in place sanctions for failure to comply if necessary.

With regard to the evidentiary problems in Mr. Pinchback's case, the model policy issued by LEMIT does not address this issue directly. This is understandable, considering that the focus was on the appropriate conduct of controlled identification procedures themselves. The LEMIT policy does, however, appropriately acknowledge the dangers associated with multiple exposures of the suspect to a witness as undermining evidentiary value. The model policy includes the following: "Avoid multiple identification procedures in which the same witness views the same suspect more than once."

IPOT recommends that LEMIT consider expanding policy guidance on this issue in training materials and in future policy revisions to more directly address the weaker evidentiary value of identifications that occur outside of controlled procedures, and address how that diminished evidentiary value carries forward to subsequent procedures.

Require Corroboration

Mistaken eyewitness identification is the leading factor by far among wrongful convictions conclusively established by DNA testing. Many DNA exoneration cases even include multiple mistaken eyewitness identifications. While eyewitness evidence is clearly very important to our criminal justice system, it has proven to be more fallible than previously understood. While properly composed and administered identification procedures have a higher degree of reliability compared to identifications without proper controls, eyewitness evidence is still highly imperfect. Studies of real world lineup administrations indicate that approximately 20% of the time a witness will identify a filler (i.e. a known innocent) in a lineup. (For studies of filler rates in the real world lineups see: Behrman and Davey 2001; Behrman and Richards 2005; Slater 1994; Valentine et al. 2003; Wright and McDaid 1996; Wright and Skagerberg 2007).

With an awareness of this fallibility, the Texas Legislature should consider requiring some corroborating evidence, so that eyewitness evidence alone cannot serve as the basis for a conviction. At a minimum, requiring corroboration in cases in which an initial identification occurs outside of a properly controlled identification procedure would help to prevent future erroneous convictions like Mr. Pinchback's. If such eyewitness evidence is going to be presented, expert testimony on the impact of the circumstances of the identification on evidentiary value should be expressly permitted, because the factors that diminished the value of the identification is not obvious to lay persons.

Permit Eyewitness Expert Testimony in Similar Cases

It is important when police present live and photo lineups that they are constructed and presented properly and in accordance with evidence-based best practices. However sometimes circumstances preclude a properly controlled suspect presentation. In such cases, expert testimony is especially valuable to understand how the context of the identification affects reliability. In *Tillman v. Texas* (CCA PD-0727-10, 2011) the Court of Criminal Appeals unanimously found that denial of relevant and reliable eyewitness expert testimony amounted to an abuse of discretion that prejudiced the defendant, and reversed the judgment of the appellate court. In *Tillman*, the defendant was not identified in an initial photospread, but was picked out of a subsequent lineup in which he was the only person who was also in the previous photospread. Another witness was driven around the neighborhood with police until he saw Mr. Tillman on the street. He later picked Mr. Tillman out of a lineup. While the circumstances were somewhat different from the Pinchback case, they were related, in that witness familiarity with the suspect and its impact on evidentiary value of identifications was at issue.

Because the ways in which circumstances such as those in Pinchback's case affect eyewitness reliability are complex and not easily understood by a layperson, expert testimony is essential in such cases. Judges should be trained about the *Tillman* decision and its implications for other cases in which witness familiarity may have compromised the accuracy of an identification, and the importance of expert assistance regarding when and how this may happen.

Conclusion

I POT is proud to help rescue wrongfully convicted Texans from unjust imprisonment. Each time an error is uncovered, it represents both an end to a particular case, but also a beginning of a new opportunity to learn from our mistakes. This report was prepared to aid in the effort to incorporate the lessons of wrongful convictions so that we can reduce the risk that another innocent person will suffer the type of injustice Johnny Pinchback endured.