INNOCENCE PROJECT OF TEXAS

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December 13, 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 second report pursuant to this statutory requirement.

On May 23rd, 2012, the Innocence Project of Texas was successful in obtaining Habeas Corpus relief for Darryl Washington, Marcus Smith, and Shakara Robertson. Washington has spent approximately 16 years incarcerated for the aggravated robbery of a woman in Dallas. Smith pled guilty for deferred probation and successfully completed it. Robertson also took a plea for probation, which was later revoked for subsequent offenses. An investigation by Tracy Cobb, the Dallas County District Attorney's Conviction Integrity Unit, and the Innocence Project of Texas resulted in affidavits from the original perpetrators that proved that the men did not commit the crime.

Attached to this letter is a report on their 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 Darryl Washington Marcus Smith & Shakara Robertson

Submitted by The Innocence Project of Texas

December 2012

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Introduction

The Innocence Project of Texas (IPOT) is pleased to present this report on the exoneration of Mr. Darryl Washington, Marcus Smith, and Shakara Robertson. IPOT was able to establish their innocence with affidavits from the actual perpetrators and evidence of the faulty nature of outdated eyewitness identification procedures. The Texas Court of Criminal Appeals granted habeas corpus relief on May 23, 2012.

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 a lass 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 transcript, the Habeas findings of fact and conclusions of law, and the affidavit provided by eyewitness identification expert, Jennifer Dysart.

Case Data Overview

Exoneree:	Darryl Washington
	Marcus Smith
	Shakara Robertson
Offence Date:	November 17, 1994
Jurisdiction:	Dallas County

Offence:	Aggravated Robbery
Plea:	Not Guilty (Washington)
	Nolo Contendre (Smith)
	Guilty (Robertson)
Sentence:	99 years (Washington)
	Deferred Community Supervision (Smith)
	10 years deferred probation; 5 years confinement (Robertson)
Years Incarcerated:	Approximately 16.5 years (Washington)
Evidence Used To Convict:	Eyewitness Identifications by Witnesses
Evidence of Innocence:	Affidavits and testimony from actual perpetrators, Expert Affidavit on eyewitness identification evidence
Habeas Relief Granted:	May 23, 2012
Case #s:	F94-61422-TQ; F94-61422-TQ (Washington)
	F94-61419-QF; F94-61422-TQ (Smith)
	F94-61421-QF; F94-61422-TQ (Robertson)
Trial Prosecutor:	Mark Moffit (Washington)
Trial Defense Attorney:	William Hughey (Washington)
Convicting Court:	Dallas County Criminal District Court #204th, Hon. Mark Nancarrow
IPOT Attorneys:	Gary Udashen (IPOT Board President)
	Bruce Anton (IPOT Board Member)
	Robert Udashen

Case Summary

Washington, Robertson, and Smith were charged with Aggravated Robbery that was alleged to have occurred on November 17, 1994. Only Washington had a trial of this case and the factual evidence comes from his trial.

The state's evidence showed that on November 17, 1994, Carolyn Webster was approaching the Eckerd's at Inwood and Lovers Lane, Dallas County, Texas, where she observed five African-American young men hanging around outside the building. Her handbag was snatched and someone pushed her down to the sidewalk. The young men were wearing jackets, running shoes, and jeans and quickly fled the scene on foot. This all happened very fast. Webster received a bloody knee, bruised hands, and

bruising on her left side. Less than thirty minutes later, police officers brought five individuals to the scene for her to examine where she was unable to identify any of the arrestees. She was only able to say that the arrestees were dressed in similar manner to the perpetrators.

Three other witnesses testified for the state that they had seen the group of young black males either commit the offense or run from the scene. One witness identified Washington as being one of the persons involved. The other two witnesses said that the clothing of the people detained by the police appeared to be the same clothing as the people they saw running from the scene. All three of these witnesses made their identifications after the police detained Washington, Robertson, Smith, and two other juveniles at a nearby bus stop and returned them to the scene to be viewed by the three witnesses at the same time.

Analysis of Factors Leading to the Wrongful Conviction

It is clear from the record that the only evidence relied upon to convict Mr. Washington, Smith, and Robertson was the identifications of them by the three witnesses. No physical evidence tied the men 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 effect identification reliability and evidentiary value. In this case, the circumstances of the initial identifications, namely a group show-up to all three witnesses at the same time, compromised the reliability of the initial identifications as well as the subsequent identification that occurred in court.

The most important lessons to be drawn from Mr. Washington, Smith, and Robertson's wrongful convictions 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. Washington, Smith, and Robertson occurred approximately 30 minutes after the crime occurred. The victim indicated that five young black males were involved in the incident. Several witnesses who were in the vicinity saw the incident and one individual, Charles Long, chased after one of the males in his motor vehicle. Two other witnesses who worked at a nearby bank saw two or three young males running in and around the bank. The police apprehended five young black males matching the general description provided to them by the witnesses, including race, age, and clothing. These five young males were detained at a nearby bus stop and brought back to the scene of the incident for purposes of being identified by the witnesses. All three witness were presented with the five individuals apprehended by the police officers at the same time. In essence, this was a 3-on-5 show-up. The National Institute of Justice permits the use of show-ups that contain only one suspect

and a minimum of five fillers. In this case, the officer either conducted a five-person all-suspect lineup or they conducted a large show-up identification procedure. The National Institute of Justice recognizes the use of show-ups but clearly states that a show-up should be conducted 1-on-1, with one witness and one suspect at a time. In this case, both of these recommendations were violated.

In summary, the witnesses in this case were together for their identification of the defendants and may have contributed to the multiple positive identifications of the defendants. This was a highly suggesting procedure.

The Subsequent In-Court Identification

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. There were no subsequent photo lineups conducted and the next positive identification of Mr. Washington occurred at his trial. At trial, one of the witnesses was not asked to make an in-court identification and another did not make a positive identification. One witness did make an in-court identification. This can be explained in part by the inherently suggestive circumstances of the in-court identification. In-court identifications are a variation of a single-person show-up identification procedure, which have been shown to be highly suggestive regardless of whether they occur in court.

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. Washington's case and other similar cases, in which an initial identification occurs in a suggestive show-up 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. Washington's case, the model policy issued by LEMIT does address this issue. The model policy states that photo arrays are preferred over other techniques. It goes on to state that because they involve multiple persons under relatively controlled circumstances, a properly conducted live lineup, like a properly conducted photo array, is preferable to a show-up. Further, it states that because they are highly suggestive, show-ups are vulnerable to challenges to their validity and should only be employed where other indicia of guilt are present. The model policy also defines a show-up as "an identification procedure in which a single suspect is shown to a victim or witness soon after the commission of a crime for the purpose of identifying or eliminating the suspect as the perpetrator." The methods used in this case clearly do not conform to even the less preferred standard show-up procedure.

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. Washington'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 are 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 photo spread but was picked out of a subsequent lineup in which he was the only person who was also in the previous photo spread. 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 Washington case, they were related in that the witness was presented with Tillman prior to a controlled suspect presentation, and its impact on evidentiary value of identifications was at issue.

Because the ways in which circumstances such as those in Washington'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

IPOT 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 Mr. Darryl Washington, Marcus Smith, and Shakara Robertson endured.