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THE TRAGEDY OF FALSE CONFESSIONS (AND A COMMON SENSE PROPOSAL)

MARGARET EDDS, AN EXPENDABLE MAN

REVIEWED BY ALAN HIRSCH*

DNA testing has unveiled the unthinkable about American criminal justice: innocent persons are convicted with some frequency.¹ More disturbing still, this sometimes happens because of faulty evidence assumed to be nearly infallible: a defendant's confession.²

Perhaps we shouldn't be surprised. For some time now, experts have warned that false confessions occur surprisingly often.³ However, because it seems so counterintuitive that an innocent person would confess to a crime absent physical or extreme psychological coercion, some commentators remain skeptical and resist reforms designed to reduce false confessions.⁴

To overcome such resistance, a good story may be worth a thousand essays and social science experiments. Enter Margaret Edds' AN EXPENDABLE MAN,⁵ the riveting story of Earl Washington, who came within days of execution for a rape and murder he did not commit. Washington spent

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1. See Barry Scheck & Peter Neufeld, *DNA and Innocence Scholarship*, in *WRONGLY CONVICTED* 241 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (noting 82 cases of post-conviction DNA exonerations as of October 2000). See <http://www.innocenceproject.com>, (last visited Nov. 10, 2005) (providing the current number of convicts exonerated by DNA evidence).

2. See BARRY SCHECK ET AL., *ACTUAL INNOCENCE* 92 (2000) ("Among DNA exonerations studied by the Innocence Project, 23 percent of the convictions were based on false confessions or admissions."). See also Richard Leo & Richard Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (discussing false confessions generally and specifically, 60 cases of confessions either proven false or deemed likely to be false by the authors); Albert Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 973 n. 78 (1997) (stating that cases of known false confessions are "no more than the tip of an iceberg.").

3. See, e.g., SAUL KASSIN & LAWRENCE WRIGHTSMAN, *CONFESSIONS IN THE COURTROOM* 2-3 (1993).

4. See, e.g., Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?* 99 MICH. L. REV. 1168 (2001); Paul Cassell, *Balanced Approaches To The False Confession Problem: A Brief Comment On Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123 (1997).

5. MARGARET EDDS, *AN EXPENDABLE MAN* (New York University Press) (2003).

more than 17 years in Virginia prisons, much of it on death row, before receiving a gubernatorial pardon.⁶

Edds' account of Washington's odyssey is a rarity: a true-crime and courtroom drama that handles legal issues with clarity and sophistication. The saga suffers from no shortage of heroes and villains. The heroes include Washington himself, a mildly retarded man who remained upbeat in the face of the ultimate injustice, and his committed legal team which maintained faith and persistence in the face of countless courtroom defeats. The villains include an array of lawyers and judges, starting with Williams' own trial lawyer.

The case against Washington was based almost exclusively on his recanted, error-riddled confession. As the United States Court of Appeals for the Fourth Circuit would later note, the confession "contained numerous original factual errors—including the race of the victim, the injury inflicted, the non-presence of any others at the crime scene (two children were present), and the location of the victim's apartment."⁷ In addition, "expert medical opinion . . . [was offered] that he was highly suggestible, 'easily led,' that 'out of his need to please . . . he relies on cues given by others and reflexive affability.'"⁸

Washington's trial attorney failed to drive home the weakness of the case. Most egregiously, he never introduced key exculpatory evidence: seminal fluid found inside the victim that did not match the defendant's blood type (and *did* match the blood type of one of the original suspects in the case).⁹ This, of course, is a familiar story: the indigent defendant receiving poor representation from inexperienced counsel. A somewhat less familiar but equally important story is the lazy or stubborn judge who allows the defendant to be railroaded. A few such judges played a role in the Earl Washington tragedy, none more disturbing than that of Dickson Phillips Jr., ironically one of the most liberal members of the Fourth Circuit (which, admittedly, is like being one of the more conservative members of the ACLU).¹⁰

The case reached the Fourth Circuit on review of denial of habeas corpus.¹¹ Washington's arguments included a powerful claim of ineffective

6. Edds, *supra* note 5, at 5-6.

7. Washington v. Murray, 952 F.2d 1472, 1478 n.5 (4th Cir. 1991).

8. *Id.*

9. See Edds, *supra* note 5, at 60, 64 (discussing some of the egregious errors made by Washington's trial attorney); *id.* at 102-03 (discussing the discovery of the seminal fluid not matching Washington's).

10. See *id.* at 114.

11. See *id.* at 111.

assistance of counsel based primarily on the aforementioned failure to introduce crucial scientific evidence.¹² The Fourth Circuit recognized that this appeared to be a clear case of ineffective assistance,¹³ and further recognized that the case against Washington was weak.¹⁴ The court remanded the case to the trial court for a hearing to determine whether the apparent ineffective assistance was indeed ineffective and whether it prejudiced the defendant.¹⁵ But the court opinion made this seem like a formality. How could it possibly not be ineffective assistance to ignore key exculpatory evidence? How could such error not warrant reversal in a case that was weak to begin with?¹⁶

Yet, when the case returned to the Fourth Circuit two years later, the court viewed the matter very differently—with Judge Phillips flipping and joining a majority opinion wildly at odds with the court's initial opinion.¹⁷ On remand, the trial court (allegedly caught dozing during a key moment of testimony)¹⁸ had found that, because the allegedly exculpatory evidence was not conclusive or rebutted, it would not have swayed the jury.¹⁹ The Fourth Circuit affirmed, thus rejecting the ineffective assistance claim and keeping Earl Washington on death row.²⁰

A comparison between the Fourth Circuit's two opinions is unsettling. When the court initially heard the case, it recognized that, even without the

12. *See id.* at 117; *see also Murray*, 952 F.2d at 1476.

13. *See Murray*, 952 F.2d at 1477 (“On this state of the record, the district court could not properly conclude as a matter of law, without an evidentiary hearing, that counsel’s conduct as alleged in Washington’s petition fell within the range of reasonable professional conduct.”).

14. *See id.* (stating that the probative evidence that was not presented by Washington’s trial attorney could have created a reasonable doubt sufficient to acquit Washington).

15. *Id.* at 1485.

16. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (demonstrating that to establish ineffective assistance, the defendant must show that counsel’s performance fell below an objective standard of reasonableness and there was a “reasonable probability” that it affected the outcome).

17. Edds, *supra* note 5, at 127.

18. *Id.* at 122, 126.

19. *Washington v. Murray*, 4 F.3d 1285, 1286-88 (4th Cir. 1993). In addition, the trial court had found that the failure to introduce the exculpatory evidence was a reasonable “strategic decision” by his attorney. This odd suggestion was dismissed by the Fourth Circuit. *Id.* at 1289.

20. *Id.* at 1292. At the evidentiary hearing, two forensics experts testified that semen stains could not have been left by Washington. Edds, *supra* note 5, at 122-24. However, under cross-examination they acknowledged the theoretical possibility that the stains could have been left by the victim’s husband during an earlier sexual encounter and this, mixed with the victim’s secretions, could have “masked” the defendant’s semen. *Murray*, 4 F.3d at 1290. The stain did not match the husband’s blood type either, but could have mixed with vaginal fluid and masked his blood type. *Id.* No evidence supported this conjecture, but it was a theoretical possibility. Because the evidence did not necessarily exonerate the defendant, the Fourth Circuit affirmed the district court’s finding that there was no “reasonable probability” that such evidence would have led the jury to a different conclusion. *Id.* at 1289.

exculpatory scientific evidence, the prosecution's case was flimsy.²¹ Now, viewing the identical record, the court found "a strong case against petitioner."²² Whereas its initial opinion cited major errors in the confession,²³ the second time around the court offered possible (albeit strained) explanations for the errors.²⁴ In its initial opinion, the court noted that the evidence consisted "essentially" of the confession, and described the extreme weakness in the only other putative evidence—a shirt found at the crime scene.²⁵ In the second opinion, the court simply stated that Washington's confessions were "corroborated [by] his admitted ownership of a shirt linked to the crime scene"²⁶ and made no mention of the serious problems with this evidence.²⁷

How could Judge Phillips join each of these divergent opinions? It is theoretically possible, of course, that faced with new briefs, an opportunity to revisit the record, and the benefits of the evidentiary hearing, he simply took a different view of the evidence. But Phillips himself offers a different explanation for his flip-flop. Years later, after a more sophisticated DNA test conclusively established that the seminal fluid was not Washington's, Phillips claimed that "my intuition was that there was something very, very wrong about the case in the first place."²⁸ However, after the trial court found the exculpatory evidence inconclusive, Phillips "felt compelled to

21. See *Murray*, 952 F.2d at 1479 (stating that though evidence was technically sufficient to support conviction, "it is not without real, as opposed to merely fanciful, problems for any fair minded jury asked . . . to find guilt beyond a reasonable doubt").

22. *Murray*, 4 F.3d at 1290.

23. *Murray*, 952 F.2d at 1481.

24. See *Murray*, 4 F.3d at 1290-91 (purporting to explain the initial errors in the case). For example, Washington had testified that he stabbed the victim two or three times, whereas the victim was actually stabbed 38 times. *Id.* at 1291 n.4. Washington had testified that no one was present, whereas two children were present. *Id.* The court posited that Washington may have been too embarrassed to state these facts accurately. *Id.* The court had no such explanation for Washington stating the wrong race of the victim, but pointed out that he subsequently changed his mind. *Id.*

25. *Murray*, 952 F.2d at 1477-78.

26. *Murray*, 4 F.3d at 1290.

27. See *Murray*, 4 F.3d at 1293 (Butzner, J., dissenting). Judge Butzner's dissent points out that

in a thorough, investigative search of the crime scene the shirt was not discovered. The victim's mother-in-law found it in a dresser draw that contained clothes belonging to the victim and her husband The laboratory report shows that hairs in the shirt were consistent with the hair of [the original suspect]. When defense counsel requested comparison with Washington's facial hair, the request was denied. Washington's sister, who laundered his clothes, testified that the shirt was not his.

Id. Note, too, that the defendant (who had an I.Q. of 69, roughly that of a 10 year old boy) did not volunteer information about the shirt. Edds, *supra* note 5, at 118. He was shown the shirt and assented when asked—perhaps very suggestively—if it was his. *Id.*

28. Edds, *supra* note 5, at 129 (quoting Brooke A. Masters, *Misssteps On Road To Justice; In Va., Innocent Man Was Nearly Executed*, WASHINGTON POST, Dec. 1, 2000, at A-1).

uphold [those] findings.”²⁹ Had he followed his intuition, and his colleague Judge John Butzner, whose dissent cogently outlined flaws in the trial court’s findings, Earl Washington would have been a free man years earlier.

Sadly, Judge Phillips’ behavior is not the most disturbing in this tragedy. That dubious distinction belongs to the prosecutors, who arguably never should have gone forward with such a shaky case. Apart from the many inconsistencies noted above, Washington’s confession never made much sense. He said he was driven to the crime scene by two unidentified people, whose motivation for transporting him was never made clear, whose actions during and after the alleged crime were never probed, and who were never located or heard from again.³⁰ Moreover, the prosecutors knew that Washington was a mentally retarded man whose confession was wrong on critical details, such as the race of the victim (though, under prodding, he corrected himself), and who also confessed to a string of crimes that he couldn’t possibly have committed.³¹

Moreover, they knew about the seminal fluid, and never mentioned it at trial. True, they complied with their legal obligations by turning over the relevant reports to the defense,³² then silently accepted their good fortune when the defense failed to appreciate that these reports contained crucial evidence. When forced to confront this evidence at the evidentiary hearing ordered by the Fourth Circuit, the prosecution came up with the theory noted above: the seminal fluid belonged to the victim’s husband.³³ This failed to explain why none of Washington’s seminal fluid or DNA was found at the crime scene.

When further DNA testing conclusively ruled out Washington as the source of the seminal fluid, the prosecution did not flinch. They merely changed their theory of the case, arguing that Washington was not the rapist but an accomplice.³⁴ This new theory suggested that the victim was mistaken in her dying declaration that only one man was present. Moreover, it

29. *Id.*

30. *Id.* at 40.

31. *See id.* at 40-44. Indeed, they dropped the charges with respect to his many other confessions. *Id.* at 44. In fairness to the prosecutors, Washington clearly had committed one crime—breaking into a home and wounding an elderly woman—shortly before the rape/murder and other crimes to which he falsely confessed. The crime, triggered by a combustible mix of poverty, depravity, alcohol, and a family argument, seems the single blemish on the record of a man everyone regarded as kind and benign. But, as Margaret Edds fully understands, circumstances explain without excusing. She does not downplay Washington’s actual crime, or the possibility that it might mitigate the injustice of his punishment for a crime he did not commit.

32. *See Brady v. Maryland*, 373 U.S. 83, 90-91 (1963) (holding that prosecution must disclose to the defense all potentially exculpatory evidence).

33. *See supra* note 20.

34. *Id.* at 140-41.

meant that Washington's confession—the only real evidence against him—was also fundamentally erroneous. In other words, the prosecutors were convinced of one thing and one thing only: somehow or other, Earl Washington was guilty. That was their story and they stuck to it, even after Washington's pardon.³⁵

In the concluding chapter of *AN EXPENDABLE MAN*, Margaret Edds mentions several policy reforms that would reduce the likelihood of future tragedies: videotaping confessions; selection of better defense counsel in capital cases and greater expert resources available to them; post-conviction DNA testing; relaxing rules barring newly-discovered evidence in post-conviction challenges; and assistance for mentally retarded persons during interrogations.³⁶ Such proposals will not surprise those acquainted with the literature on criminal justice reform. But there's another reform whose need is powerfully suggested by the Earl Washington saga, a proposal not made by Edds or anyone else to date, that can and should be immediately adopted.

A MODEST PROPOSAL

The behavior of the prosecutors in the Earl Washington case is disturbingly common. In many cases where DNA testing exonerates persons wrongly convicted of crimes because they confessed, prosecutors refuse to acknowledge the innocence of the defendant and resist his release.³⁷ In some of these cases (like the Washington case), the resistance is absurd,³⁸ with prosecutors shifting to a new theory unsupported by the

35. *Id.* at 199.

36. *Id.* at 196-212.

37. See generally Steve Mills & Maurice Possley, *After Exonerations, Hunt For Killer Rare; Police, Prosecutors Cling to Original Theories, Seldom Pursue New Leads*, CHI. TRIB., Oct. 27, 2003. For examples of particular cases of prosecutors refusing to accept DNA exonerations subsequent to confessions, see also Bob Herbert, *Getting Away With . . .*, N.Y. TIMES, Jan. 4, 2004, at A-17 (case of Darryl Hunt); Robbin Topping & Chau Lam, *Despite DNA, Case Continues; New Trial For Man Freed In Rape-Murder*, NEWSDAY, Sept. 12, 2003, at A-8 (John Kogut); Carlos Sadovi, *Two Men Freed After Judge Orders New Trial in '76 Murder*, CHI. SUN-TIMES, May 24, 2003, at 6 (Paul Terry and Michael Evans); Sara Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, N.Y. TIMES, Feb. 15, 2002, at A-12 (Bruce Godshalk); Eric Herman, *Conspiracy Theory*, AM. LAWYER, March 1998, 74 (Reynaldo Cruz and Alejandro Hernandez); PAUL MONES, *STALKING JUSTICE* (1995) (David Vasquez); Sheck et al., *supra* note 2, at 78-87, 92-106 (Robert Miller); Steven Drizin & Beth Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is The Solution to Illinois Problem of False Confessions*, 32 LOY. U. CHI. L. J. 337, 361-62 (2001) (Ronald Jones); TERRY GANEY, *INNOCENT BLOOD: A TRUE STORY OF TERROR AND JUSTICE* 227 (1989) (Melvin Reynolds).

38. See, e.g., Drizin & Colgan, *supra* note 37, at 347 (stating that Illinois law enforcement authorities have "failed to acknowledge the innocence of defendants even where scientific evidence has proven their innocence, where evidence shows it was physically impossible for the confessor to have committed the crime, or where another person was later convicted of the crime").

evidence.³⁹ Without the prosecution's cooperation, the defendant remains incarcerated for long periods while the case winds its way through the bureaucracy until a court order, re-trial, or governor's pardon finally results in vindication and freedom.

This phenomenon reflects several factors. First, like everyone else inside and outside the criminal justice system, prosecutors find it counter-intuitive that an innocent person would confess.⁴⁰ Thus, prosecutors "almost never consider the possibility that they may be prosecuting an innocent defendant based on a police-induced false confession,"⁴¹ and when a defendant recants the confession, "prosecutors dismiss the recantation with sneering derision."⁴²

But there are particular factors at work as well. Many district attorneys are ambitious, and may fear that admitting they put away someone innocent will prove damaging to their political prospects. More importantly, prosecutors, like all people, have a powerful need to rationalize: those who put people behind bars cannot easily admit—to themselves or others—such egregious error.⁴³

A relatively simple solution suggests itself. When a credible case of DNA exoneration is made, responsibility for the defendant should automatically be transferred to a different office from that which prosecuted him.⁴⁴

The proposal does not entail automatically freeing anyone who appears exonerated by DNA. The new prosecutor will want confirmation of the DNA results, and should probe the confession for internal or other external evidence that will refute or corroborate it. A true confession often includes information known only to the culprit or, better still, leads the police to new information. By contrast, a false confession is often internally inconsistent or uninformative—it spits back information supplied by the interrogators or

39. See Edds, *supra* note 5, at 199 (noting tendency of prosecutors to make "wildly improbable adjustments" to their theory of the case following apparent DNA exoneration).

40. See, e.g., Rimer, *supra* note 37, at A-12 (explaining that even after multiple DNA tests cleared the defendant, the District Attorney maintained serious doubts about the defendant's innocence because he has "no reason to doubt the validity of the confession."); Scheck et al., *supra* note 2, at 93 (stating that the prosecutor remained unconvinced because "the DNA tests do not erase the statements given by Mr. Miller himself concerning these crimes.").

41. Leo & Ofsche, *supra* note 2, at 45.

42. *Id.*

43. See Ganey, *supra* note 37, at 227 ("'You can imagine the difficulty I had convincing myself that Melvin Reynolds didn't commit the crime.' Insko said later. 'I was the one that prosecuted Reynolds . . . I was reluctant to believe it.'"); Edds, *supra* note 5, at 199 ("In the Washington case, as in others, many of those invested in the original conviction maintain their belief in its accuracy").

44. Consideration might also be given to creating a special prosecutor to handle these cases.

known to the public. In addition, various factors (such as young or mentally impaired suspects, a lengthy interrogation, and threats or promises by the police) increase the likelihood of a false confession.⁴⁵

In assessing the evidence, the new prosecutor will have to deal with his own intuition that innocent people don't confess. But the fact that DNA evidence appears to have exonerated the defendant, coupled with knowledge that false confessions have turned out to be more frequent than anyone imagined, should create a healthy skepticism about the confession.⁴⁶ Critically, the new prosecutor can evaluate the matter with a clear head and conscience, unburdened by past association with the case and any need to rationalize his involvement in it.⁴⁷

Legislators should give the matter serious attention, and prosecutors can begin to utilize the proposed measure without waiting for adoption of a formal rule. The proposal is neither costly nor difficult to implement, and would immediately help reduce one of the worst imaginable tragedies: punishment of the innocent.

In the meantime, legislators, members of the legal profession, and all others interested in criminal justice should treat themselves to AN EXPENDABLE MAN. Earl Washington's tragic story, as it unfolds in this richly textured book, inspires both outrage at human folly and awe of the human spirit. Maybe it can inspire desperately needed reform as well.

45. See, e.g., Welsh White, *False Confessions And The Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 142-53 (1997).

46. It may be argued that no such skepticism is in order, for the prosecutor is an advocate whose job is to represent the People. But, in fact, it has long been accepted that prosecutors are not simply advocates, but serve a "quasi-judicial" function. See Roberta Flowers, *What You see Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 728-733 (1998). This, at times, entails that "the prosecutor must protect not only her own case, but her opponent's as well." *Id.* at 731. As the Supreme Court has made clear, prosecutors must be as concerned that the innocent not be punished as that the guilty not escape punishment. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935).

47. See *Winthrow v. Larkin*, 421 U.S. 35, 47 (1975) (assessing the propriety of a particular prosecutor or judge's involvement in a case requires "a realistic appraisal of psychological tendencies and human weakness").