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Defending Wrongful Conviction Civil Cases in North Carolina **Notes and Issues**

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By Chris Geis*



What is a wrongful conviction?

- A person who is factually innocent of a crime is nevertheless convicted of that crime.
- Conviction may be obtained by police or prosecutorial misconduct (e.g., withholding or manufacturing evidence or witness statements), or by false witness testimony.
- Or conviction may be properly and fairly obtained, but later evidence shows conviction was in error.
 - e.g., because DNA could not be tested at time of trial.
- Some cases may have mix of above elements.

National statistics for exonerations

- DNA not used in criminal cases until late 1980s, and not commonly used until 1993.
- Convictions prior to then easily could be revisited.
- According to National Registry of Exonerations:
 - 1,535 exonerations in U.S. from 1989 through 2014.
 - 125 exonerations in 2014 alone.
 - **Source: The Atlantic, Feb. 9, 2015.**
- One of these cases may be coming to a county near you.

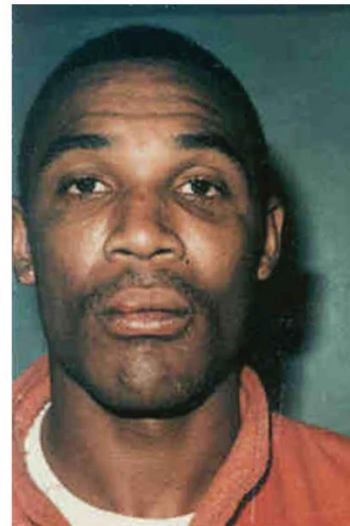
High-profile exonerations in North Carolina

- Ronald Cotton, Alamance County, 1995 (rape)
- Darryl Hunt, Forsyth County, 2004 (rape and murder)
- Dwayne Dail, Wayne County, 2007 (rape)
- Greg Taylor, Wake County, 2010 (murder of prostitute, \$4.6M settlement w/state)
- Joseph Sledge, Bladen County, 2015 (double murder)
- Willie Grimes, Catawba County, 2016 (rape)
- Henry McCollum and Leon Brown, Robeson County, 2014 (rape and murder of child)
- ***** Common element: New DNA tests**



Ronald Cotton

- Elon College student raped in Alamance County in 1984.
- Cotton convicted in 1985 and 1987.
- Primary evidence is victim's cross-racial I.D.
- 1995: DNA tested by SBI Lab leads to another man.
- Cotton set free in June 1995 and pardoned by Governor.
- Joint motion by D.A. and defense.
- First DNA exoneration in N.C.
- Subject of best-selling book, Picking Cotton.



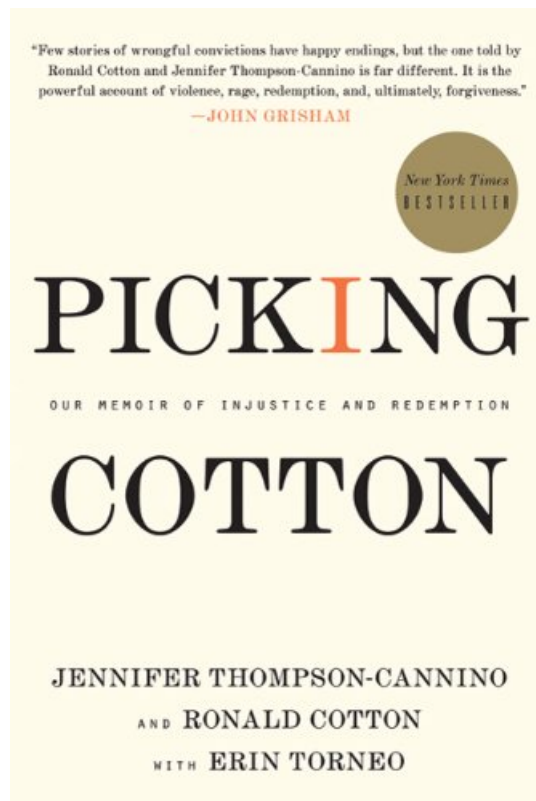
Poole



Cotton



Ronald Cotton (cont.)



Darryl Hunt

- Newspaper editor killed in Winston-Salem in 1984.
- Hunt convicted in 1990 for 2nd time.
- 1994: DNA does not match, but N.C. Supreme Ct. denies relief 4-3.
- 2003: DNA matched to another man, who confesses.
- Hunt is freed on Christmas Eve.
- Hunt settles with city for \$1.6M.
- Pardoned and receives \$358,545 from state.
- Subject of documentary film, *The Trials of Darryl Hunt*.



Dwayne Dail

- 12-year-old girl raped at home in Goldsboro, 1987.
- Identifies Dwayne Dail.
- Cross-racial I.D.
- Dail convicted in 1989.
- Dail released in 2007 after DNA was found and tested.
- Actual rapist sentenced to three life terms in 2010.
- Dail settles with City of Goldsboro for \$7.5M.



Joseph Sledge

- Escaped from prison in Bladen County, Labor Day weekend 1976.
- Two women killed that night near escape route.
- Charged 18 months later; after mistrial, convicted and sentenced to two life terms in 1978.
- 2009-13: DNA tests – no match.
- 2013: Jailhouse snitch recants.
- 2015: Released by 3-judge panel after NCIIC inquiry; D.A. consents.
- \$4M settlement with Bladen County and pending cases against state.



Willie Grimes

- Convicted in 1988 of rape of 69-year-old woman.
- Hair, semen, and prints collected at scene.
- Cross-racial I.D.
- Prints found in 2007; later tested, matched to assailant.
- Exonerated by 3-judge panel in 2012 after NCIIC inquiry and D.A.'s consent.
- Settled with City of Hickory for \$3.25M.

(with Chris Mumma and Greg Taylor, below)



How convictions get set aside

- Motion for Appropriate Relief by Defendant:
 - N.C. Gen. Stat. Sec. 14A-1411 et. seq.
 - State v. Britt, 320 N.C. 705 (1987).
 - Test: Would new evidence have changed outcome of trial?
 - D.A. or A.G. can consent or contest.
 - Court has multiple remedies: new trial, set aside conviction, release defendant, etc.
- Some private agencies and nonprofits handle these cases:
 - N.C. Center on Actual Innocence in Durham
 - Innocence Projects at law schools (Duke & Wake Forest).



Investigation of cases

- Cases may start by pro se filings of convicted defendant.
- Defendant may seek DNA testing of physical evidence.
- Defense attorneys, private groups, and innocence projects at law schools may represent defendants and investigate cases.
 - e.g., N.C. Center on Actual Innocence.
- Cases also may be investigated by North Carolina's unique state investigative agency, the N.C. Innocence Inquiry Commission.
 - NCIIC does not represent defendants but is designed to determine the truth.

N.C. Center on Actual Innocence

- Private, nonprofit agency in Durham with lawyers who represent post-conviction defendants pro bono.
- **Not** a state agency.
- Acts as criminal defense firm and advocates for its clients.
- Handles cases of factual innocence.
- Executive director: Christine Mumma, former clerk to N.C. Supreme Court Chief Justice Beverly Lake.
- Also oversees innocence projects at N.C. law schools.
- Represented Willie Grimes, Joseph Sledge, Greg Taylor, Dwayne Dail, and others exonerated.
- <http://www.nccai.org/>



N.C. Innocence Inquiry Commission

- Neutral, fact-finding **state** agency – only such agency in nation.
- Authorized by N.C. Gen. Stat. Sec. 15A-1460 et. seq.
- Does **not** represent any individual; stated goal is to seek the truth.
- Created in 2006, opened in 2007.
- Offices at N.C. Judicial Center in Raleigh.
- Staffed with lawyers and investigators.
- Evaluates claims of factual innocence.
- Has power to subpoena witnesses, take custody of evidence, order evidence tested for DNA, and search law enforcement spaces for missing or lost evidence.
- <http://innocencecommission-nc.gov/>



NCIIC cases: Commission hearings

- Following staff's investigation, case may be forwarded to Innocence Commission for hearing if warranted.
 - Commission has 8 members appointed by Chief Justice of Supreme Court and Chief Judge of Court of Appeals: sheriffs, prosecutors, judges, victim advocates, defense lawyers, etc.
 - Commission chair: Superior Court Judge Anna Mills Wagoner; alternate chair: Superior Court Judge Thomas Lock.
- Commission takes testimony and reviews evidence.
- By majority vote, commission can send case to panel of three Superior Court judges for hearing and determination of innocence.
- Standard is "sufficient evidence of factual innocence to merit judicial review." N.C.G.S. Sec. 15A-1468(c).

NCIIC cases: Three-judge panels

- Three-judge panel holds hearing in Superior Court in county of conviction to determine if conviction should be set aside.
- Panel must be unanimous to set aside conviction.
- Standard is “clear and convincing evidence of innocence.” N.C.G.S. Sec.15A-1469(h).
- May be adversarial hearing – D.A. or A.G. can contest or consent.
- Hearings may result in exonerations, but some may not.
- If conviction is set aside, accused is automatically pardoned and entitled to compensation from state for wrongful incarceration.
- Contrast process with defendant filing motion for appropriate relief.
 - No automatic pardon and compensation if MAR is granted.

NCIIC's record

- Since 2007, the NCIIC has:
 - received 2,314 claims of innocence (311 in 2017 alone).
 - closed 2,229 cases.
 - Sent 11 cases to Commission hearings.
 - Assisted in exoneration of 10 persons (8 of which were exonerated by three-judge panels, and 3 of which had convictions set aside based on NCIIC's work).

Source: NCIIC website, data compiled as of Dec. 31, 2017.



Roles of NCIIC staff and criminal defense attorneys

- Some cases involve only work by private lawyers or innocence projects, who bring motions for appropriate relief.
- Some involve only work by N.C. Innocence Inquiry Commission.
- Some cases involve both.
 - e.g., NCCAI represented Joseph Sledge for 10 years before turning files over to NCIIC, which investigated and took case to commission and 3-judge panel.
 - but in McCollum/Brown case, NCIIC did initial work and defendants' attorneys then filed MAR without commission hearing or 3-judge panel.



What comes after exoneration?

CIVIL LAWSUITS

- Filed in federal court (likely) or state court (possibly).
- Claims against state and its agencies (e.g., SBI or Clerk of Court's Office) are filed in N.C. Industrial Commission (negligence standard applies).
- Possible defendants:
 - current and former local law enforcement officers
 - SBI agents.
 - officials with custodial authority over evidence.
 - the estates of any of the above who are deceased.
 - but not judges or prosecutors (absolute immunity).

Civil lawsuits: Claims and defenses

- Typical claims:
 - Violation of due process rights under Fourth, Fifth, and Fourteenth Amendments (42 U.S.C. 1983).
 - False arrest/imprisonment.
 - Malicious prosecution.
 - Intentional and negligent infliction of emotional distress.
 - Violation of state statutory duties to preserve evidence or state constitutional rights.
 - Sheriff's bond claims (negligence and intentional conduct).
- Possible defenses: qualified, governmental, and public official immunities.

Civil lawsuit issues: Storage of evidence

- N.C.G.S. Sec. 15A-268 (duty to maintain biological evidence).
 - Enacted as of Jan. 1, 2001.
 - Prisoners have right of access to biological (DNA) evidence.
 - For life imprisonment or death cases, must store evidence until prisoner dies; other murder, sexual assault, and major felonies, must store while prisoner incarcerated or on supervised release.
- Fingerprints may be considered DNA evidence.
- Who has physical evidence – SBI or local agencies?
- Does custodial agency have written policy and follow that policy for proper storage of biological evidence?
- Is old evidence properly inventoried?

Insurance policies and coverage

- Need to find policies from each year of arrest, conviction, and incarceration (e.g., Sledge, 1976-2015).
- Which insurer pays for defense, or do they share? Or does local government pay until insurers sort it out?
- What events trigger coverage from policy and duty to defend?
- Does policy have exclusions? Eroding limits?
- Does local government need to file D.J. action for coverage?
- Will it need to chip in for settlement beyond policy limits?
- For counties: Are they liable for excess verdict against sheriff or deputies?
 - This is an open question in North Carolina.



Discovery and investigation

- Factual investigation by defense lawyers needed.
- Are all defendants and key witnesses still available?
- If so, do they remember anything? (Interrogatories, depositions.)
- Are there transcripts of court proceedings, recordings of interviews, SBI reports, and other paper files?
- Does suit allege wrongful procuring of conviction or just mishandling of evidence years later?
- Was physical evidence contaminated by improper storage?
- Working with NCIIC and getting its files by protective order – very helpful.
- NCIIC files may contains thousands of pages of documents.
- NCIIC may have done much factual legwork, but defense counsel still must sort through and determine what is appropriate in civil case.
- Parallel Industrial Commission cases and discovery.

Expert witnesses

- Expert witnesses:
 - DNA experts on reliability of evidence and testing.
 - Experts on evidence handling and storage.
 - Experts on quantum of evidence necessary for MAR (e.g., former Superior Court judges can testify).
 - Damages experts (e.g., was plaintiff subjected to special damage in prison?)



Settlement considerations

- Insurance policy limits of each policy.
- What if policy limits are not enough for plaintiff?
- Are multiple policies implicated, and if so how to allocate?
- What triggers, exclusions, and limits apply in each policy?
- Can government or official be liable above and beyond limits?
 - federal claims – yes, no limits.
 - state claims – not against entity, but maybe against official.
- Costs to try case through verdict.
- Risk of excessive verdicts and bad publicity.
- What are defendants alleged to have done?

Settlement considerations (cont.)

- What is each year of wrongful incarceration worth?
 - \$1M a year of incarceration? (See *Spring 2016 DRI article*.)
 - Does case involve wrongful procuring of conviction, or just misplaced evidence handling years later?
 - Latter will have shorter window of liability exposure.
- Do set-offs from state apply? Unclear.
 - Exonerated prisoner is entitled to state compensation for each year of incarceration (e.g., Sledge got \$750,000 for 36+ years).

Settlements are public records

\$6.42M settlement for freed murder defendant

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David Rudolf

The city of Greensboro has agreed to pay \$6.42 million to settle a federal lawsuit alleging that its law enforcement officials deprived a defendant of the right to a fair trial, leading to his conviction and 17-year imprisonment for a murder he did not commit.

The City Council voted 7-1 to approve the settlement for LaVonte LaVonte, 66, who was freed in 2012. Her evidence showed that he did not kill North Carolina A&T State University professor Ernestine Compton.

Armstrong alleged in his civil rights suit that city police encouraged or attempted to elicit "improper" statements from him and then withheld exculpatory evidence during his trial, said an attorney for Armstrong, David Rudolf Rudolf Widenhouse in Charlotte.

Rudolf said the primary legal challenges in the case centered on equal-discrimination insurance liability and damages.

The city did not have insurance coverage for conduct that occurred before April 20, 1993 — and Armstrong was arrested on April 7 of that year, according to Rudolf. He said the city's insurer argued that it did not have to provide coverage based on Arm-

strong's arrest date.

The city could have been the case if Armstrong had alleged malicious prosecution, Rudolf said. Instead, he argued that he was deprived of his right to a fair trial, which meant that the trigger date for insurance liability occurred when his trial began.

"That was really critical for us because we were able to collect anything from the insurance company," Rudolf said. "How you plead those issues may ultimately decide whether there's insurance coverage."

The city's insurer is on the hook for \$5.27 million of the settlement. City taxpayers have to pay the remaining \$1.15 million.

In calculating damages, Rudolf said he consulted racial statistics on wrongful conviction settlements that he has been compiling for the past decade. So far, Rudolf has helped five wrongfully convicted defendants secure settlements in North Carolina.

"The interesting thing you find when you do that look at the numbers is that generally speaking, both in the conservative places and the less conservative places, a sort of minimum average is about \$1 million a year," he said.

He added, "When you can present these kinds of statistics to defendants and insurance carriers it has some impact."

The state caps compensation for wrongfully convicted defendants at \$50,000 a year or a maximum of \$750,000, which is what Armstrong received from the North Carolina In-

SETTLEMENT REPORT CIVIL RIGHTS – FAIR TRIAL RIGHT VIOLATION

Amount: \$6.42 million

Injuries alleged: 17 years of imprisonment

Case name: Armstrong v. City of Greensboro, et al.

Court: U.S. District Court for the Middle District

Case No.: 1:15-cv-00282

Judge: Chief Judge William Osteen Jr.

Date of settlement: Oct. 21

Attorneys for plaintiff: David Rudolf of Rudolf Widenhouse in Charlotte and David Pishko of Winston-Salem

Attorney for defendants: Alan Duncan and Stephen Russell of Mullins Duncan Harrel & Russell in Greensboro; and Seth Cohen of Smith James Rowlett & Cohen in Greensboro

Justice Commission in addition to his settlement with Greensboro.

The city's attorney, Seth Cohen, did not respond to an interview request. An attempt to speak with City Councilman Tony Wilkins, who voted against the settlement, also was unsuccessful.

Wilkins told the Greensboro News & Record that the state should have paid more than his city because a State Bureau of Investigation employee botched the analysis of a fingerprint that belonged to the real killer.

"While I certainly believe Mr. Arm-

strong should be compensated for the injustice, I could not justify the city being asked to provide 85% percent more than the state," Wilkins said.

Rudolf disagreed with Wilkins, saying that "at most what you have with the SDI is negligence."

"I don't even know if it was negligence. It might have been a very hard fingerprint to match — as opposed to intentional fabrication and intentional withholding of exculpatory evidence," he added.

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- Wake Forest University School of Law Justice and Innocence Project: <http://innocence-clinic.law.wfu.edu/>
 - Attorney Mark Rabil, director (represented Darryl Hunt)





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