

**PEEKING BEHIND THE CURTAIN OF GOVERNMENT DISMISSALS IN CRIMINAL CASES
AND LESSONS UNLEARNED**

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I. INTRODUCTION

If, as the saying goes, “*history repeats itself*” and derivatively “*those who cannot learn from history are doomed to repeat it,*” then prosecutors, as a broad sector of the legal profession, are poor historians. Amidst the wave of exonerations in the last decade, massive prison overcrowding, and a historically low public opinion of our criminal justice system, we should be studying intensely the mistakes of the past to design a better criminal justice system in the future. Most lessons for prosecutors, however, continue to go unlearned. Countless convictions dismissed by motion of the government, as discussed in this Article, mask a larger story behind the dismissal. The dismissed conviction not only reverses a community pronouncement but also represents a missed teaching moment for future prosecutors. The government’s dismissal of the conviction and sentencing of Damon Thibodeaux is illustrative.

Prosecutors abjectly fail to learn from reoccurring mistakes and prosecutorial misconduct in any systematic, organized way. Prosecuting criminal cases can be incredibly challenging, and demanding. Many factors can affect the heavy prosecutorial decisions to charge individuals, determine the extent of the offense conduct, and even to dismiss criminal *allegations*. The circumstances surrounding these seminal prosecutorial decisions can evolve and degrade throughout the life of a case. However, like elsewhere in government, mistakes inevitably occur within our criminal justice system. Irresponsibility can result in impactful mistakes. We must develop processes to better analyze reoccurring mistakes and misconduct by prosecutors for the

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benefit of future prosecutors. This Article isolates a brand of reoccurring mistakes and misconduct often paved over by post-conviction dismissals by the government.

Post-conviction dismissals have increased dramatically in the last 20 years. The advent of post-conviction DNA testing (and re-testing) of evidence and the important work of dedicated attorneys and advocacy groups like the Innocence Project deserve much of the credit. While DNA exonerations have unfortunately become commonplace in the national news, post-conviction dismissals may serve as the keystone to increased transparency, policy changes, and an improved criminal justice system. The wave of post-conviction DNA exonerations and derivative wrongful convictions have caused us *to begin* to re-examine enormously important processes and practices in criminal cases related to witness identifications, confessions, overzealous investigators, prosecutorial discovery, coercive plea discussions, and improper influence over government witnesses. Although structured to protect the constitutional rights of the accused, our criminal justice system has only identified, but not yet mended, some of its deep wounds revealed by far too many wrongful convictions.

II. THE MYTHICAL PROTECTIONS OF PROSECUTORIAL DISCRETION

Prosecutorial discretion is not, and has never been, a right to secrecy of the government process in criminal cases. As a rule of thumb for the government in a criminal case, the prosecution should not bring a case to the grand jury and seek a “true-bill” on an indictment unless it is ready to prove the case beyond a reasonable doubt at trial. If the government has investigated a case, presented it to the grand jury, and secured an indictment, then the charges represent a community ratification of probable cause that a crime was committed and the

defendant committed it. Prosecutors do not enjoy any discretion to undo and cover up their mistakes and misconduct.

Prosecutors do enjoy wide discretion when deciding to bring criminal charges against an individual. After an indictment or other formal accusation, the wide prosecutorial discretion continues as the government may dismiss mere allegations with very little process or oversight. A dismissed indictment may legitimately arise due to the changed circumstances in a criminal case: evidence went missing, a witness' testimony changed, or exculpatory evidence surfaced as the case progressed. Prosecutorial discretion means the government decides who and what to charge; it does not provide a cover for decisions to back out of a criminal prosecution without justification. Even when the government later dismisses mere *allegations*, the prosecution often has a larger story to tell than is made public and lessons go unlearned.

Other dismissals, however, result from mistakes by law enforcement or the prosecution. Other dismissals derive from clear misconduct by the government. Yet, tomorrow's prosecutors seldom know of, or forget to learn from, the history of mistakes or misconduct that lead to dismissed allegations. Very few incidents of mistake or misconduct land in a published opinion by the appellate courts. Because too many new prosecutors reinvent the wheel, we set them up for failure.

As a new federal prosecutor, I once indicted a defendant in federal court on drug and firearm charges derived from a "routine traffic stop." The charges carried significant (and mandatory) imprisonment pursuant to the statute. While I had interviewed the arresting officer prior to charging, his story changed when, on the eve of a suppression hearing, I met with the officer to prepare him for his testimony and cross-examination from the defense. My mock cross examination quickly evolved into a genuine inquiry about the legitimacy of the traffic stop. The

officer's testimony suffered from many gaps and inconsistencies, and worse yet, he demonstrated significant credibility issues. The officer finally admitted to me that the events of the traffic stop "differed slightly" from the "simplified version" he included in his report. In other words, *he flat out lied*. I strongly counseled the officer in my office, conferred immediately with supervisors, and ultimately dismissed the case before the suppression hearing.

That day's injustice was avoided, but so too were the systemic problems and lessons for others. The larger story behind my government-dismissed allegations would be contained within my supervisory chain. The process before the court and with the defense was minimal. After this experience *I* took a drastically different approach to my initial conversations with law enforcement prior to indictment. But the lessons I learned from this experience and others like it were decidedly narrow and likely repeated countless times since by my prosecution colleagues.

It is imperative for us to appreciate today that, with *every* government-dismissed indictment, prosecutors have a larger story to tell about what went wrong and likely teaching moments to pass along. In too many jurisdictions, the additional information that led to the government-dismissed allegations stays hidden behind the curtain of an unopposed filing by the government. The criminal justice machine blindly marches to the next case. While the government dismisses far too many cases to aggregate in a meaningful way, we must start with some oversight and process to look into these blind spots of our American criminal justice system.

III. DISMISSED CONVICTIONS

These concerns worsen exponentially when the government dismisses a conviction, especially one preceded by a trial and jury verdict. A conviction represents the community's

pronouncement and condemnation, as opposed to a mere accusation. Most jurisdictions require more for a post-conviction dismissal, such as statutory authority accompanied by a filing, hearing and some showing by the prosecution. The prosecutor has no discretion or independent authority to unwind a community pronouncement of guilt. The government owes the community and explanation of “why?”

If DNA has proven conclusively that the conviction was in error, then the process of government post-conviction dismissal should be swift and the study of how the system failed the individual defendant should be expansive. Much more attention and work is needed in the study of what contributes to convictions that are later dismissed because of DNA testing. It is simply impossible to overanalyze these cases. However, when the post-conviction dismissal is *not* based upon DNA or other conclusive scientific proof, we must analyze all available information for prosecutorial mistakes and misconduct. The reason for the dismissal of the conviction, a community pronouncement, at that moment, becomes a community concern.

Here, the larger untold story relates directly to the government’s role in an improper verdict realized through our criminal justice system. The post-conviction dismissal can be hidden behind closed meetings, sealed filings and pretext language. That a dismissal is “in the interests of justice” is near meaningless and only further degrades the public perception of our criminal justice system. We have a duty to better explore the reasons for a post-conviction dismissal in these circumstances.

This Article focuses on one such blind spot: post-conviction dismissals *not based upon DNA results*. Our criminal justice system simply fails to learn from, or even inquire into, other improper prosecutorial processes, practices, and misconduct reoccurring in criminal cases. With the inherent interplay between government power, politics and prosecutorial discretion, we are

not able to look where the government doesn't want us to see. In the context of post-conviction government dismissals, this Article profiles the current developments in an infamous Louisiana murder case, State of Louisiana versus Damon Thibodeaux. Today, Thibodeaux's case is celebrated as another "DNA exoneration" of a death-row defendant, but there is simply more to the story—and more for prosecutors to learn from this case. Beneath *every* government-dismissed conviction (and even dismissed *allegations*) there is an opportunity to educate future prosecutors and prevent future suffering at the hands of our criminal justice system.

IV. THE INVESTIGATION & PROSECUTION OF DAMON THIBODEAUX

On July 19, 1996, a 14-year-old girl from Louisiana went missing. That same day, Damon Thibodeaux joined the search party looking for the missing girl, his step-cousin named Crystal Champagne. Champagne's body was found partially disrobed and with a piece of wire tied around her neck. Investigators with the Jefferson Parrish Sheriff's Office suspected Thibodeaux and brought him in for questioning shortly after the body was recovered.

During a nine-hour interrogation, Thibodeaux eventually confessed to the both rape and murder of his young step-cousin. Thibodeaux told investigators, "I guess I did it then." Thibodeaux later recanted this confession to his attorney and claimed that he simply told investigators what they wanted to hear. The Jefferson Parrish Sheriff's Office, however, narrowed down on Thibodeaux as their lead suspect. Investigators tested the wire and Champagne's clothing for DNA with negative results—that is, no DNA matching Thibodeaux or any other suspect. The sheriff's office did, however, track down two witnesses who placed Thibodeaux in the area where the body was found around the same time Champagne went missing.

In early 1997, the Jefferson Parrish District Attorney's office indicted Thibodeaux for the capital offense of murder in the first degree. Thibodeaux plead not guilty, maintained his innocence, and the case proceed to trial in August 1997. Because Thibodeaux recanted his confession, his defense team moved pretrial to suppress it as involuntary, coerced, and a "false confession." The trial court heard argument from counsel and denied Thibodeaux's motion to suppress his confession.

At trial, the government did not present forensic evidence identifying Thibodeaux. Again, the DNA testing of the pertinent items did not produce *any positive* results. The prosecution presented witness testimony placing Thibodeaux in the area where Champagne's body was recovered. The witnesses provided in-court identifications of Thibodeaux. The government presented evidence of Thibodeaux's confession. Counsel for Thibodeaux conducted a significant cross-examination of the sheriff's detectives about his confession, law enforcement's interrogation, and the defense theory of false confession.

Additionally, witnesses who assisted the Jefferson Parrish Sheriff's Office provided an out-of-court identification of Thibodeaux picked from a photo array closer to the time of Champagne's death. The defense did not engage an expert witness for trial nor present any independent evidence to the jury about the science of false confessions.

Counsel for Thibodeaux argued in closing that the jury must acquit Thibodeaux because, among other things, the government failed to produce forensic evidence such as DNA evidence linking Thibodeaux to Champagne's body. Defense counsel further argued that Thibodeaux recanted his confession, it was a false confession, and the investigators coerced his confession admitting to murder and rape only after nine hours of interrogation. In sum, the petit jury considered the defense arguments for acquittal based upon the lack of DNA and other forensic

evidence in the government's case and Thibodeaux's false confession. In late 1997, the jury rejected those arguments and Damon Thibodeaux was convicted for the brutal murder of his 14-year old step-cousin.

The trial proceeded to a death penalty phase based upon the aggravating factor of rape of a minor related to the murder. The government presented overlapping evidence during the guilt and death penalty phases including Champagne's partially disrobed body as evidence of a rape. Again, the defense argued that his confession was coerced, involuntary, and a false confession. The jury, as required by statute, again rejected these arguments and unanimously voted to impose the death penalty on Thibodeaux.

Thibodeaux thereafter began the long process of legal challenges to his conviction and capital punishment on appeal, including to the Supreme Court of the United States. He presented many questions and issues in several tiers of appeals and collateral challenges to his conviction and sentence. Central themes to his appeals and collateral challenges again related to the lack of physical evidence linking him to the murder including DNA and his false confession. Thibodeaux raised issues related to the sufficiency of the evidence and other claims based upon lack of identification evidence such as DNA, as well as other claims related to his alleged false confession. After years of post-trial filings while on death row in Louisiana, Thibodeaux was granted no relief from his conviction or the jury's finding of death as the appropriate punishment. Stated differently, Louisiana successfully defended the conviction and imposition of capital punishment at every stage.

As portrayed in a specially dedicated episode of the television show *48 Hours*², many criminal defense lawyers believed that, as he sat on death row with no prior criminal history, Damon Thibodeaux was innocent and wrongfully convicted at trial. During the course of his countless appeals, his appellate attorneys convinced the district attorney's office, (they did so for five years between 2007 and 2011), to reinvestigate the matter.

Counsel for Thibodeaux and dedicated lawyers assisting in the post-conviction phase, in a nearly unprecedented move, further requested a meeting to deliver a post-conviction presentation to the District Attorney about the case. The district attorney office's own investigation was based upon, at least in part, the defense counsel's post-trial presentation. Most notably, the government's reinvestigation involved the re-testing for DNA of all physical evidence in the case. The re-testing *still* yielded negative results. That is, a capital conviction not based upon DNA evidence *still* had no usable DNA results nor other forensic identification evidence. In their presentation to the government, joining Thibodeaux's now familiar claims of false confession and the lack of physical evidence, defense counsel offered that there were problems with the government witness accounts including their timeline of the murder presented to the jury.

The *48 Hours* feature on Thibodeaux's case dramatized the witness issues raised post-conviction, as well as cleverly implicating one of these witnesses in the murder. To watch the *48 Hours* special, most viewers would: (1) marvel at the hard work and dedication of the Thibodeaux's lawyers; (2) be persuaded that the government's interrogation tactics were problematic (if not coercive and overbearing); (3) be persuaded that Thibodeaux is not guilty (and maybe even innocent) and someone else likely committed the murder and rape; and, most

² Erin Moriarty, *48 Hours: Last Chance*, CBS (aired March 29, 2014) available at, <http://www.cbsnews.com/news/the-confession-of-damon-thibodeaux/>.

interestingly, (4) believe that the district attorney should be commended for his willingness to reconsider, and even reinvestigate, the case despite the conviction, ultimate sentence and success defending the case at every turn post-conviction.

The above deductions from the *48 Hours* special are fascinating, particularly the last one about the district attorney, in light of what happens after the exoneration. In a story about an exoneration and wrongful conviction, the district attorney is also heralded for his temperament and compassion? If you keep in mind my central thesis here, that *every* dismissal masks a larger untold story, then the dismissal and the District Attorney's role in the story become suspicious.

V. THIBODEAUX'S EXONERATION & THE GOVERNMENT'S POST-CONVICTION DISMISSAL

The government's post-conviction dismissal of Thibodeaux's conviction more than a decade later is remarkable. Considering the consistency of his unsuccessful trial arguments, appeals and post-conviction pleas for relief. This case consistently featured defense arguments based upon no forensic evidence and false confession. The story of Thibodeaux's exoneration should astound anyone who reviews it. But what is most astounding is perhaps the one part we will never know, why it really happened?

Damon Thibodeaux was a young man in 1997 with no criminal history when he was first accused of Champagne's murder. Yet, he was convicted and sentenced to death row by a unanimous verdict returned by a jury of his peers. He, through his lawyers, kept fighting, took chances and ultimately caused a prosecutor to do something extraordinary. It is story of perseverance. It is a story of second chances. It is a story of exoneration. Nothing in this article should suggest otherwise. My focus, however, is prosecutorial ethics, misconduct and better exploration of the history of past mistakes and misconduct committed by prosecutors.

Some people might see Thibodeaux's story as one of compassion from a prosecutor. I don't. I can only scroll in my mind to the larger story behind the dismissal. I can only see it as a compilation of unrevealed mistakes, potentially covered-up misconduct and more lessons unlearned for prosecutors in Louisiana, and everywhere else. The public also sees the problems that led to the exoneration before the happy ending of a second chance for the individual defendant. The district attorney leaves us in the dark about what really happened leading up to their decision to reverse course and undo years of work from their colleagues—hard work investigating, charging, securing conviction, and defending that conviction and punishment on appeal for years.

Louisiana, like other states, requires statutory authority for a post-conviction dismissal of felony convictions in a case like Thibodeaux's. The statutory authority of the prosecutor to undo the community pronouncement of guilt and death as a punishment explicitly requires DNA evidence and, with it, a certainty of the error. But we cannot, despite the recitation of the statutory authority in the court documents, classify Thibodeaux's exoneration as *based upon DNA*, can we? After all, as his counsel argued throughout trial, sentencing, and post-conviction, the government provided no DNA evidence to connect Thibodeaux to the scene or the victim. Nor did the prosecutors present any DNA evidence to the jury at trial, nor during the death penalty phase. The re-testing of many items of physical evidence during the post-conviction phase *again* revealed negative results.

The district attorney's post-conviction dismissal of Thibodeaux's conviction did not meet the statutory grounds provided by the Louisiana legislature. Statutory authority, court documents, and the *48 Hours* special gloss over the square hole of post-conviction DNA evidence and the round peg of Thibodeaux's case. A district attorney overrode a community

pronouncement of guilt and expended significant taxpayer money to do so. The district attorney must enjoy the discretion to bring a case. He should be permitted to dismiss allegations with changed circumstances. But who protects the community from potential prosecutorial abuse or improper motives here?

When DNA forges the government's post-conviction dismissal and exoneration, the underlying reason for the dismissal is obvious and we then must move to the deeper analysis about what led to the wrongful conviction instead. And it often does. When *not* based upon DNA, a more pressing issue presents: *why did the district attorney's office make the decision?* Why did they undo a community pronouncement of conviction and, the pronouncement of capital punishment as well? Why is the prosecutor allowed to undo the results derived from our criminal justice system? Since when are prosecutors afforded any discretion to do *that*.

Prosecutors must not be permitted to dismiss post-conviction without explanation and transparency. Nor should the courts allow prosecutors to hide behind sealed filing and boilerplate, pretextual language, and merely reference inapplicable authority. A dismissal *based upon* the "interests of justice," "factual innocence," "new evidence" or, even a term as seemingly clear as "DNA" often demands further explanation and transparency. The community deserves to understand what those terms mean and what happened. The community, who was compelled to participate in the criminal justice system as part of their civic duties, deserves transparency and clarity when *their* work as jurors is set aside unilaterally. The Thibodeaux exoneration, if not based upon DNA as required in the Louisiana statute, becomes quickly susceptible to important questions that may be swept under the rug. It also produces another hit to the public's perception of our criminal justice system.

As difficult as it is to do, if we put aside the issue of the individual defendant's guilt or innocence, should we not distrust the government's decision to set aside a conviction and the community's statement on punishment? *Any* freedom taken from *any* exoneree is abhorrent. Any wrongful conviction represents a failure of the criminal justice system. But I can't help but think of the other individuals doomed to fall victim to *this* history as it inevitably repeats itself. More individuals will wrongfully become defendants, and then convicts, because of the same mistakes and misconduct that remain behind the curtain in Louisiana. I suspect that there is a larger story behind the post-conviction dismissal and vacated punishment of Damon Thibodeaux that is untold. I suspect that power, politics and misguided notions of prosecutorial discretion contributed to this outcome. Tragically, I predict that we will never know what really happened. The aftermath of the Thibodeaux's exoneration confirms my suspicion that there is something more to the story.

VI. THE AFTERMATH

Three events following the exoneration provoke more questions and suspicion related to Thibodeaux's exoneration. First, the State's denial of Thibodeaux's claim for reparations, and the award of state-appropriate funds, based upon a wrongful conviction. Second, a Thibodeaux lawsuit filed against the sheriff's office that investigated the case, but not the district attorney's office that prosecuted it and later dismissed his conviction and death sentence. Lastly, the rotation of the players in the capital murder trial: from defense attorney to prosecutor and prosecutor to the bench.

The State of Louisiana, like some other states, has set aside a government fund for exonerees. Rightfully, exonerees not only receive their freedom and their life back but they

often have monetary causes of actions against the government. The civil lawsuit for money damages inevitably follows the often long overdue release from improper and unlawful incarceration. Some state governments, like Louisiana, appropriate funds to pay out individuals who have fallen victim to wrongful conviction and unjustified incarceration. The decision to create and administer such a fund in Louisiana was born out of efficiency—to spare inevitable lawsuits against the government in each tragic incident of wrongful conviction and to expedite reparations to the exoneree.

The State of Louisiana readily and efficiently grants reparations under this established fund. Yet, the State denied Thibodeaux's claim? One arm of the government declared its conviction and sentence in error. The district attorney, who charged, convicted, reinvestigated for 5 years and then dismissed the conviction. Then, another arm of the government, the civil component charged with exoneree claims, declines to pay out on the claim for reparations based upon wrongful conviction? That, in and of itself, is cause for suspicion.

Second, Thibodeaux filed a lawsuit after his exoneration. The claims of the lawsuit are less intriguing than who the lawsuit is against—or, better yet, *not* against. Thibodeaux sued the sheriff's office but not the District Attorney. The sheriff's office conducted the interrogation that led to the well-litigated confession that Thibodeaux argued was false through his trial and appeals. But the district attorney presented this confession at trial and defended it for years on appeal. The sheriff's office did not produce any physical evidence of identification including DNA to link Thibodeaux to the crime. But it was the district attorney who convicted Thibodeaux without presenting any DNA or other forensic evidence at trial. The district attorney presented the government witnesses and timeline of the crime that Thibodeaux contested post-

conviction and in their post-conviction meeting that led to the dismissal. Yet, he sued the sheriff's office and not the district attorney? This fact too raises suspicion about the dismissal.

Lastly, politics and power always play a role in jurisdictions, like Louisiana, where the public elects its district attorneys and judges. Shortly after the trial and during his appeals, Thibodeaux's attorney left the public defender's office to join the district attorney's office in the very same Parrish that prosecuted Thibodeaux. One of the prosecutors on the case central to the decision-making moved on to become a judge—in the same Parrish. That prosecutor's close friend, who joined the office from private practice not long after the Thibodeaux case, fled up to become the district attorney after the trial—and was the District Attorney who was eventually commended for his role in the re-investigation and dismissal of Thibodeaux in the *48 Hours* special.

Sometimes we fail to learn the untold story behind a dismissed conviction because of *what* really happened. Sometimes the larger story remains behind the curtain because of *who* was responsible. Only by peeking behind this curtain can we begin to systemize the lessons learned that will prevent future prosecutorial mistakes and ensure that our criminal justice system improves in the future and in the public's eye.