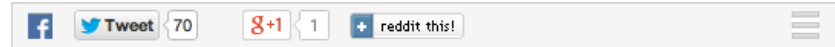


Opinion / Commentary

## Wrongful convictions expose troubling holes in justice system

Last month, three cases of wrongful murder convictions were uncovered in one week, raising disturbing questions about our legal system.



JESSE JOHNSTON / THE CANADIAN PRESS

Leighton Hay walks out of a court house in Toronto, on Friday, Nov. 28, 2014. Hay was wrongfully convicted of first-degree murder more than a decade ago and last months took his first steps as a free man after the Crown withdrew the charge against him.

**By:** Jonathan Rosenthal Published on Thu Dec 18 2014

A series of milestone developments in three wrongful murder conviction cases in one week last month is likely to have provoked as much astonishment as horror.

Three in a single week? Weren't wrongful convictions supposed to be a historical aberration, akin to aboriginal residential schools, that have been methodically cleared up? Have not advances in forensic science, the stuff of countless television crime series, eliminated the problem? Did the justice system not learn lasting lessons about the perils of tunnel vision, faulty eyewitness testimony, junk science and police deception?

If so, try telling that to [Leighton Hay](#), [Glen Assoun](#), [Frank Ostrowski](#) and the dozens of other prisoners whose cases are under investigation by a growing phalanx of underfunded defence counsel.

In the wake of Hay's murder exoneration and the likelihood that Ostrowski and Assoun are well on the way to seeing their innocence restored, it is time to challenge a disturbing complacency that has crept into the social conversation about miscarriages of justice. If anything, the need for skepticism and oversight has become all the more urgent.

Since Nova Scotia's Donald Marshall was exonerated of murder in 1990, 18 others have entered the wrongful conviction Hall of Shame — names such as Guy Paul Morin, David Milgaard, Clayton Johnson, Steven Truscott and Ronald Dalton. Public inquiries have been held. Flagrant problems exposed.

How was it, then, to take the case of Hay, that the Ontario Crown Attorney's Office stubbornly fought to prevent the Association in Defence of the Wrongly Convicted from retesting hairs which had played a pivotal role in securing his conviction? It took nothing short of an order from the Supreme Court of Canada to allow them to be retested. Lo and behold, the exhibit turned out to be beard hairs, not scalp hairs, as the Crown had always claimed.

In the face of this revelation, the Crown's assertion that Hay had shaved his head to mislead eyewitnesses collapsed. After 12 years behind bars, Hay gained his freedom and a judicial apology.

The Ostrowski case was anchored in damning testimony from a jail bird who, unbeknownst to the defence, had been given a deal to dispose of unrelated charges in return for his testimony. During the many years it took AIDWYC lawyers to obtain disclosure of this key piece of information, Ostrowski remained in prison. His freedom may finally be close at hand.

In an age where science is increasingly looked to as the gold standard of evidence, troubling realities have come to light that should give us all pause. Chief amongst them is a sense that science is an impregnable forensic force that leaves little room for doubt.

In fact, faulty lab analysis, contaminated samples and technician error figure prominently in one recent wrongful conviction after another.

Eyewitness testimony has also been increasingly exposed as a singularly unreliable form of evidence which should always be corroborated by other evidence. Likewise, research on the effects of police tactics and compulsion has given new-found credence to the notion that people do genuinely confess to crimes they did not commit.

Meanwhile, there have been consistent news reports in recent months of police giving false testimony or fabricating evidence. Some of these incidents feature garden variety investigative laziness or even malevolence. However, a third cause of police or prosecutorial tunnel vision is an insidious phenomenon known as “noble cause corruption.” The phrase rather elegantly describes a state official who bends or breaks the rules as a result of his or her personal certainty that they have the right culprit. With the spirit of an avenging angel, the official feels justified in taking virtually any action to ensure that the presumed offender is punished.

In the Hay case, a prevailing certainty that the defendant was indeed the killer was probably exacerbated by official concern that giving in to his request to retest the hair exhibits would open the floodgates to other convicted offenders wanting to retest exhibits.

The implicit error in that line of thought ought to be obvious. Closing the gates to potentially legitimate or meritorious requests is no way to root out injustice and sustain the integrity of a justice system.

Typically, it takes at least five years for a defendant to exhaust his appeals and for new lawyers to re-investigate and then engage horrendously time-consuming legal mechanisms that can lead to an exoneration. Cash strapped legal aid budgets tend to be of little help. AIDWYC, an organization supported wholly by grants and individual donations, has a core group of about 50 defence lawyers who supply the equivalent of \$3.5-million annually in legal work. Payments for private investigators and forensic testing challenge its slender budget. Law schools and the Criminal Lawyers Association supply aid and the support of their membership.

Still, it is not enough. The battle to expose wrongful convictions keeps expanding. The rate of pleas for help — some admittedly lacking in merit, others very troubling — continues to increase. Every day of every year, in cases both big and small, the stage is set for a wrongful conviction. To believe otherwise is to perpetuate a cycle of devastating legal error.

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