Executing Justice

THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION. By James S. Liebman & the Columbia DeLuna Project. New York, New York: Columbia University Press, 2014. 448 pages. $27.95.

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I. Introduction

In recent years there have been many exoneration stories in American criminal justice and one big dispute about a possible exoneration story of a person already executed. The most publicized are people who have served long prison sentences[1] or have sat on death row[2] and who, with or without the acknowledgment of the prosecuting state, have turned out to be "actually innocent."[3] The public and the media tend to associate these exonerations with the magic of DNA[4]—the so-called CSI effect[5]—although in many cases, and indeed in many of the DNA cases, the major or contributing factors have been the more mundane problems of false testimony, illegally withheld evidence, and so on.

I referred above to a "possible" wrongful execution because much recent public debate has focused on a very unusual case—an instance of homicidal arson—where some see overwhelming proof of the actual innocence of

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1. See, for example, the famous rape exoneration of Ronald Cotton, documented in the well-known Frontline episode, *What Jennifer Saw* (PBS television broadcast Feb. 25, 1997).

2. See, for example, the case of Kirk Bloodsworth, *Kirk Bloodsworth*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Kirk_Bloodsworth.php, *archived at* http://perma.cc/V6VH-SSJY.

3. I emphasize the latter phrase because injustice occurs as well in cases of "legal innocence." These are of course cases where, because of errors or malfeasance, a person not wholly innocent of involvement in a criminal event turns out not to have been legally convicted; in these cases the defendant merits reversal, and sometimes because of the procedural posture reversal bars retrial. Where that error involves a capital trial, there has been a risk that a person is "wrongly sentenced" (and eventually is wrongly executed). And indeed on that latter score, the lead author of *The Wrong Carlos*, James Liebman, is also coauthor of the recent vast survey of the great number of wrongly sentenced capital defendants. Andrew Gelman, James S. Liebman, Valerie West & Alexander Kiss, *A Broken System: The Persistent Pattern of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 210–13 (2004).

4. *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (describing cases of wrongfully convicted persons exonerated based on DNA evidence).

5. *See generally The "CSI Effect,"* ECONOMIST, Apr. 22, 2010, http://www.economist.com/node/15949089, *archived at* http://perma.cc/2LN9-VAJV (describing the CSI effect and its impact on jury trials).

someone who was indeed executed but about which controversy continues.[6] More broadly the debate has been about whether, at least since the restoration of capital punishment in the 1970s and the advent of the modern due process heavy rules of the penalty trial, there has actually been a single actually innocent person executed. Notable figures, including Justice Antonin Scalia, deny or doubt this.[7] The claim of *The Wrong Carlos* is that the execution of Carlos DeLuna in Texas in 1989 disproves the reassurance side of the debate. The case of Carlos DeLuna did not exactly involve DNA, although had there been a proper forensic investigation of the case there might have been some DNA material subject to testing by the technology that might have become available in time had Carlos DeLuna lived longer. It does involve other forensic flaws, including the state's bizarre failure to preserve evidence in the more mundane, but statistically far more common, form of fingerprints.

For many, proof of a categorically undeniable wrongful execution should settle the big debate about whether to retain capital punishment. That may seem a powerfully logical deduction, but it is not philosophically flawless. Those who think capital punishment serves legitimate purposes need not establish that errors never occur because it is naive to think that any government policy that involves the likelihood or virtual (statistical) certainty of death must meet this standard of proof. And if Carlos DeLuna was wrongly sentenced and even actually innocent, his case is still likely to be an extremely rare one, and a robust debate about its relevance still leaves the possibility that the risk, however psychologically unbearable in a particular case, is not necessarily morally intolerable in the aggregate. Deontological values will always clash with utilitarian values.[8]

The Wrong Carlos will contribute to that big debate. But even if the outcome of the Carlos DeLuna case is a cosmic injustice, the inputs into that outcome do not represent deliberate government evil on any cosmic scale. Rather, the injustice occurred because of the perfect storm (a cliché hard to avoid here) of the inputs, the almost incredible confluence of the whole possible range of intentional, reckless, careless, and foolish actions and omissions by individual police, judges, prosecutors, and defense lawyers,

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6. This is the Texas case of Cameron Willingham, executed for killing his children, where forensic evidence and post-execution discoveries of potential prosecutorial misconduct have raised great doubt about his guilt. Maurice Possley, *Fresh Doubts over a Texas Execution: New Evidence Revives Concerns that a Man Was Wrongly Put to Death in 2004*, WASH. POST, Aug. 3, 2014, http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/, *archived at* http://perma.cc/PDZ5-EA3U.

7. JAMES S. LIEBMAN ET AL., THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION, at ix (2014).

8. *Compare* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705 (2005) (suggesting, based on a rejection of the act–omission distinction, that capital punishment may be morally required), *with* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 752–56 (2005) (critiquing Sunstein and Vermeule's argument and arguing that capital punishment is not morally required).

which in smaller pieces occur in a wide range of cases, most of which are noncapital. So the takeaway of *The Wrong Carlos* may be that the established standards of conventional trial practice and appellate and postconviction review for error are both woefully insufficient but realistically capable of great improvement.

While lead author James Liebman is one of the most erudite criminal law academics in the nation—and earlier was one of the most elite death penalty lawyers in the nation—this is quite avowedly not a scholarly book or even a very legalistic book. It is a factual narrative, in effect a book-length work of feature journalism, abetted by a prize-winning team of investigative reporters and aimed at a general audience.[9] As a result, I must offer a somewhat telescoped review of the plot because no short review can cover all the key details. And because the target audience of an academic book reviewer is more legally trained than the general audience of the book, I will focus on those facts that enable me to break out the legal issues with some doctrinal and institutional detail to convey what, I suggest, are the real lessons.

The authors draw out some of the admonitory lessons of the story at the end of the book. These include the venerable problems of eyewitness identifications, the only recent advent of DNA testing and its still erratic use, and the local cultures of certain jurisdictions in the United States that combine inflated fear of violent crime by outsiders and minority groups with a mistrust of government that precludes the funding needed for professionally skilled prosecutors and defense lawyers.[10] These are all necessary lessons, but the nature of the book and the intended audience make them incomplete.

The egregious specifics of this story are (fortunately) very unusual and not likely to recur very often, but I suggest that to help prevent the punishment of the wholly innocent in a much wider range of cases one very concrete institutional conclusion follows. This is a conclusion that sounds dully bureaucratic in comparison to the ones the authors emphasize (although it is one they would surely concur in): the need for better funding and regulation of state postconviction review. Of course we must worry about the often pathetic skills of and funding for defense lawyers at trial, as well as malfeasance and incompetence among police officers. Nevertheless, the factual record that uncovers potentially tragic errors by those parties often requires the development of posttrial investigation and presentation of facts outside the official trial record, through the practice variously called collateral, postconviction, or habeas review. And given the barriers to state defendants seeking that review in *federal* court, the real hope lies in the *state* version of that practice. Therefore, to return to *The Wrong Carlos*, while there are many faulty parties in this tale, the one I will ultimately point to—

9. The book cross-references a vast archive of the background research, located at http://thewrongcarlos.net. LIEBMAN ET AL., *supra* note 7, at ix–xi.

10. *Id.* at 327–41.

the one who had at least the last clear chance to save an innocent man—is a figure who appears only briefly and at the very end: a lawyer named Richard Anderson.

II. The Fatal Confluence and a Remarkably Analogous Case

A first cut summary of the story: the title is self-defining. In February 1983 in Corpus Christi, Texas, Wanda Lopez, a clerk in a gas station convenience shop, was stabbed to death.[11] Relying on eyewitness reports, within forty minutes the police arrested Carlos DeLuna, who was hunkered under a pickup truck a short distance away.[12] Within six months Carlos DeLuna was convicted of murder and sentenced to death.[13] Five years later (a speck of time by the norms of modern death-penalty cases), he was executed.[14] But the book tells us that they got the wrong Carlos because Carlos Hernandez, who was also unquestionably nearby, fit the best eyewitness descriptions much better in terms of clothes and facial appearance. Carlos Hernandez was definitely seen running in the direction that the best eyewitness, one Kevan Baker, saw the killer run (opposite the direction in which Carlos DeLuna was found); had committed atrocious crimes, including stabbing other women, that closely resembled the modus operandi of the Lopez killing; and, most important, had undeniably spoken of and indeed bragged about the Lopez killing to a number of acquaintances and even family.[15]

What degree of convergence of what kinds of factors and events made this error possible? Here is a summary: Not only was Carlos DeLuna found in very stealthy circumstances close by to the crime scene, but he was not an improbable suspect anyway, at least in the eyes of the police and prosecutors (and perhaps indirectly the jury). He was a morally compromised lowlife who had committed many crimes (arguably some of them violent) and had been in and out of juvenile hall, jail, and prison most of his 25 years.[16] So convinced were the police that they had the right man that they overlooked tens and tens of potential sources of physical and forensic evidence before prematurely shutting down the crime scene.[17] The plausible and alleged motive for Carlos DeLuna to have killed Lopez was robbery, but the forensic evidence belied this motive, instead suggesting it was a purely sadistic slaughter.[18] And no such robbery motive was needed to accuse Carlos

11. *Id.* at 7, 9.
12. *Id.* at 30–32.
13. *Id.* at 232, 239.
14. *Id.* at 284.
15. *Id.* at 3–4, 22–32, 127–34.
16. *Id.* at 70–77.
17. *See id.* at 57 (describing how detectives were at the crime scene for approximately an hour before leaving and letting employees clean the store).
18. *Id.* at 54–57.

Hernandez because his record showed a proclivity towards sadistic beatings and stabbings of women.[19]

Compounding these factors was some local sociology: in the demi-monde of their dusty poor Texas neighborhood, in the mix of often tortured and overlapping relations of people who knew and were related to both Carlos DeLuna and Carlos Hernandez, no one seems to have had an incentive to report to the prosecutors or detectives that Carlos Hernandez had essentially confessed to the crime,[20] and those officials who heard rumors of these confessions just ignored them.[21] Finally, of course Carlos DeLuna was indigent, and the lawyer appointed for his trial was a novice local shingle hanger with essentially no criminal experience, somewhat aided by a lawyer who knew something about criminal law but who operated as a high-volume, quick-turnover case processor.[22] But as discussed below, while questions of the quality of appellate lawyering make for less interesting drama than the botches of the investigation and trial, the incompetence of the new lawyer who handled appeals and habeas review contains some of the key lessons of *The Wrong Carlos*.

Those are the most elemental key facts, the bulk of which emerged long after Carlos DeLuna's execution through the diligence of documentary journalists and ultimately the team that wrote this book. I will mention other important facts below but, to set the predicate for the legal implications of this story, I first turn to a very famous Supreme Court case, which will prove useful in drawing those implications. This is *Kyles v. Whitley*.[23] The remarkable facts of *Kyles* were roughly these. In 1984 a woman named Dolores Dye left a Schwegmann Brothers' market in New Orleans.[24] "As she put her grocery bags into the trunk of her red Ford LTD," a man assaulted her, shot her to death, and drove away in her car.[25] Six eyewitnesses gave the police varied and contradictory statements in regard to height, weight, build, and hair length.[26] Having assumed that the killer left his own car in the lot, the police "recorded the license numbers of cars remaining in the parking lots," but this information proved a dead end.[27]

Two days after the murder,

> a man identifying himself as James Joseph called the police and reported that on the day of the murder he had bought a red Thunderbird

19. *Id.* at 83–89, 115. Indeed, in a fascinating twist in the case, the informal cash accounting system of this store indicated that little to no money was taken at all. *See id.* at 56–57 (describing that the store clerk estimated that no more than "a couple of $10 bills" were missing).

20. *Id.* at 129–31.

21. *Id.* at 134.

22. *Id.* at 172, 177.

23. 514 U.S. 419 (1995).

24. *Id.* at 423.

25. *Id.*

26. *Id.*

27. *Id.* at 423–24.

> from a friend named Curtis, whom he later identified as . . . Curtis Kyles. He said that he had subsequently read about Dye's murder in the newspapers and feared that the car he purchased was the victim's.[28]

He met with the police, now telling them his real name was Joseph Banks and that he was called Beanie, although it turned out his real name was Joseph Wallace.[29] He told a new story—that he had bought the car a day later, and he then led the police to a car that indeed turned out to be the victim's.[30] In his narrative, he averred "that he lived with Kyles's brother-in-law," and he gave the police a description that partly matched and partly contradicted the eyewitnesses' reports.[31] More bizarrely, Beanie told police that because he was worried that he had been seen driving Dye's car, he had changed its plates, but the police reassured him he had done nothing wrong and indicated to him that he might be rewarded for his information.[32] So Beanie went on to urge the police that Kyles was the killer, telling them about Kyles's past acts of violence against him (Beanie) and others and leading them to Kyles's house.[33] He added that after he bought the car, he drove Kyles to the market parking lot to pick up Kyles's own car, which he described as an orange Ford, and he added that at the scene Kyles went into some bushes to retrieve a purse, which Kyles later hid in his (Kyles's) house, and that purchases from that same market would be found there.[34]

A series of recorded conversations between the police and Beanie revealed a number of startling contradictions, but "[t]he police neither noted the inconsistencies nor questioned Beanie about them."[35] Ultimately Kyles was arrested and inculpatory evidence was found in his house, although some of the things Beanie had said would be here were not, and the fingerprints on the key items were not Kyles's.[36]

All this background led to a controversial Supreme Court decision holding that the prosecution's failure to disclose just this background violated the rule of *Brady v. Maryland*.[37] *Brady* is the classic case holding that due process requires the state to turn over material exculpatory evidence.[38] In *Kyles*, that evidence included some of the contradictory eyewitness reports and all the interactions with Beanie, plus the records of the police scan of the parking lot, which did not come up with Kyles's actual license plate, and evidence of Beanie's own involvement in violent crimes, including some at

28. *Id.* at 424.
29. *Id.*
30. *Id.*
31. *Id.* at 424–25.
32. *Id.* at 425.
33. *Id.*
34. *Id.* at 425–26.
35. *Id.* at 426–27.
36. *Id.* at 427–28.
37. 373 U.S. 83 (1963).
38. *Id.* at 87.

the very same supermarket.[39] Kyles was tried three more times after the Supreme Court ruling,[40] "but each [trial] ended in mistrial."[41] "The State finally dropped the charges against . . . Kyles after the fifth trial in 1998."[42]

Kyles hauntingly resonates with *The Wrong Carlos*—not least in literary ways. In New Orleans, as in Corpus Christi, while a capital murder defendant denies any involvement in the crime, a shadowy secondary figure inserts himself into the story and virtually dares the authorities to turn suspicions on him; during the investigation and trial of the defendant, a shadow narrative unfolds in which various figures, official and unofficial, are exposed to the secondary story; where some officials partly test out and partly avoid the possibility of the alternate suspect; where the defendant's trial jury learns virtually nothing about the alternative possibility; where defense lawyers lack access to what the police know about the secondary story; and where enough of the story is known to the police, prosecutors, and defense lawyers that the defendant's constitutional rights are implicated.

But then there are the differences, and in laying them out, I want to note a nuance about constitutional doctrine that might be helpful. The decisive factor in *Kyles* was that the prosecution withheld evidence that, under *Brady*, was exculpatory because, in retrospect, there was a "reasonable probability" that had the jurors known it, they would have acquitted.[43] But imagine the case from a different angle. Surely the defense lawyers at trial had some reason to focus on Beanie as the true killer, and indeed they put on witnesses who implicated Beanie by testifying, among other things, that shortly after the killing he was seen driving a car just like the victim's.[44] Had Kyles focused on the failure of his lawyers to take the initiative in finding and developing the facts withheld by the prosecutor, a lawyer for Kyles on direct appeal or postconviction review could have argued that the trial lawyers were unconstitutionally ineffective. Under the doctrine of *Strickland v. Washington*,[45] the argument would turn on two necessary points of proof: that a reasonably competent lawyer would have found the information on her own, and that, had she found and used it, there is a reasonable probability that Kyles would have been acquitted.[46] Yes, the latter part, the so-called "prejudice prong" of the *Strickland* test, is the same thing as the very

39. Kyles v. Whitley, 514 U.S. 419, 441–54 (1995).

40. In fact, the conviction under review came in his second trial because the first had ended in a deadlock. *Id.* at 429.

41. *Curtis Kyles*, INNOCENCE PROJECT NEW ORLEANS, http://www.ip-no.org/exonoree-profile/curtis-kyles, *archived at* http://perma.cc/5634-P9ZL.

42. *Id.*

43. *Kyles*, 514 U.S. at 421–22.

44. *Id.* at 430.

45. 466 U.S. 668 (1984).

46. *See id.* at 687, 694 (explaining that "[f]irst, the defendant must show that counsel's performance was deficient" and second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

definition of exculpatory evidence under *Brady*. And depending on the relative access of the defense and the prosecution to information that meets this overlapping standard, a misbegotten adjudication can be blamed on either a prosecution failure or a defense failure.[47]

In any event, Curtis Kyles won on a *Brady*, not a *Strickland*, claim and for some good reasons. While the published history of the *Kyles* case is silent on any possible challenge to the trial lawyer's competence, we at least know that the trial lawyer did something that Carlos DeLuna's lawyer did not. From the very start of the first of the several trials, Kyles's lawyer not only argued to the jury that someone else did the killing but also named that person.[48] Moreover, when the appeals got framed on *Brady*, not on *Strickland*, grounds two advantages followed. One was a simple matter of law: holding constant the nature of the information (the whole Beanie backstory), Kyles only had to show that this information was had by the police and would have affected the verdict, whereas under *Strickland* he would have had to reconstruct why a competent defense lawyer would have gotten the information. But the second difference between the Kyles story and the Carlos DeLuna story is the crucial one. Armed with the predicate that Beanie had been at least known of and that defense witnesses offered some credible evidence implicating him at the trial, Kyles's postconviction lawyers were able to undertake a thorough investigation of the Beanie story that enabled them to get supporting facts and to get them on the record before a state habeas court.[49] While Kyles of course lost in that state habeas court, the lawyers were then well armed to make the *Brady* claim in federal district court on federal habeas, and that is why Curtis Kyles, in the long run, was never successfully convicted of murder. Notably, in the *Kyles* opinion in the Supreme Court the state habeas phase is just mentioned in a cursory way to explain why there was no jurisdictional barrier to federal habeas review.[50] While the statutory complexities and judicial history of federal habeas under 28 U.S.C. § 2254 are the subject of a whole industry of commentary,[51] state postconviction review remains an under-the-radar matter of obscure local practices. But when it involves good lawyers who have mastered the obscure exotica of this obscure practice, it is the lifesaver for innocent defendants.

47. It would be an interesting hypothetical if the degree of failure was virtually the same for both and whether a reviewing court would find both violations or favor one claim over the other; presumably a cancelling-out tie game, while equitable as between the two sets of lawyers, would be unfair to the defendant.

48. *Kyles*, 514 U.S. at 429.

49. *Id.* at 430–31.

50. *See id.* at 431 (mentioning that Kyles exhausted his state remedies).

51. *E.g.*, RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (6th ed. 2014).

III. The Pretrial Story

So now back to the more detailed story of *The Wrong Carlos* to develop these legal lessons. Although they were not as obviously intertwined as Beanie and Kyles, Carlos DeLuna and Carlos Hernandez shared acquaintances.[52] But most important, Carlos DeLuna probably saw Carlos Hernandez at a bar not far from the crime scene in the hours before the killing,[53] and some of the eyewitnesses implicitly showed that Carlos Hernandez just happened to be near the killing scene at the fatal time.[54] Thus, we can believe Carlos DeLuna's suggestion that Carlos Hernandez was afraid of being fingered by him for the crime and then got lucky when the wrong man was arrested. Moreover, the two men may have crossed paths later in a jail, where Carlos Hernandez may have warned Carlos DeLuna to keep silent if he wanted to avoid retaliation.[55]

As noted above, Carlos DeLuna, born in 1962, had quite a string of priors, mostly for things like disorderly conduct, theft, and burglary.[56] There was, however, one 1980 incident that was initially alleged as an attempted rape but charged as an assault,[57] a crime that proved important in the penalty phase of his trial.[58] Carlos DeLuna was also somewhat developmentally disabled.[59] He was eight years younger than Carlos Hernandez and was somewhat different in facial look (he was usually clean shaven, Carlos Hernandez scruffily bearded) and in clothing habits (he was known to favor dress shirts, whereas Carlos Hernandez was usually in worn-out flannels and sweatshirts).[60] But from a distance or, conversely, in certain photos, he could be confused with Carlos Hernandez; indeed, years after the crime Carlos Hernandez's brother-in-law Freddy Schilling saw a photo of Carlos DeLuna and said it was Carlos Hernandez.[61]

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52. LIEBMAN ET AL., *supra* note 7, at 220.

53. *Id.*

54. *Id.* at 209–10. One witness originally described the man as wearing jeans and a white t-shirt or thermal shirt but later testified at trial to dark-blue or black pants and a white button down. *Id.* at 209. Another witness originally described the attacker as wearing a red flannel jacket and having a mustache, which matched the description given on the manhunt tape not provided at trial. *Id.* at 210. Furthermore, two witnesses claimed to see the man they identified as the attacker in two different places at the same time: "[I]t is very likely that the Arsuagas' sighting of DeLuna two blocks from the Sigmor Shamrock station provided him with an alibi—not corroboration of his guilt—given that it occurred at the same moment as Baker saw the killer fleeing the gas station in the opposite direction." *Id.* at 321.

55. *Id.* at 317.

56. *Id.* at 59, 70–74.

57. *Id.* at 75–76.

58. *See infra* notes 126–29 and accompanying text.

59. LIEBMAN ET AL., *supra* note 7, at 66, 69–70.

60. *Id.* at 3, 59, 67–69, 90–92.

61. *Id.* at 3.

Carlos Hernandez was born in 1954 and spent most of his teen-to-adult years in and out of jail and prison.[62] He was arrested at least two dozen times between the ages of 24 and 42.[63] His crimes including the egregiously reckless vehicular homicide of his sister's fiancé (and almost the death of his sister)[64] and a 1972 armed robbery for which he received a twenty-year sentence, of which he served only a brief part.[65] He was well known to engage in gratuitous misogynist violence, once thrusting an axe handle into his wife's chest.[66] Most important, the vast research that underlies *The Wrong Carlos* convincingly establishes that in 1979, Carlos Hernandez murdered a woman named Dahlia Sauceda (indeed did so in front of her two-year old child and stabbed a sign of *X* on her body)[67] because she had had an affair with his sister's husband Freddy.[68] And in one of the more bizarre turns in this bizarre set of intertwined stories, another man, Jesse Garza, was charged with the killing of Sauceda.[69]

Jesse Garza was lucky to have an excellent lawyer, Albert Peña, who had heard rumors about Carlos Hernandez's confessions about Sauceda and hired a first-class investigation team to develop the side case against him.[70] In fact, Carlos Hernandez was initially arrested for the Sauceda killing while the Jesse Garza trial was in process.[71] Peña persuaded the jury to acquit Jesse Garza, and six years later Carlos Hernandez was again arrested for the killing,[72] in part because witnesses reported that he had confessed to it[73] and also thanks to investigation by a local investigator named Eddie Cruz who had infiltrated Carlos Hernandez's gang.[74] But Carlos Hernandez won dismissal because the case had become too stale.[75] Finally, in 1989, in a fit of sexual frustration, Carlos Hernandez beat and stabbed a woman named Dina Ybanez.[76] For that assault he received a ten-year sentence, for which he served only nineteen months.[77] But when he then encountered a tough parole officer after an arrest for a 1996 assault, he was sent to prison for what turned out to be the last three years of his life—he died of cirrhosis in prison.[78]

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62. *Id.* at 3–4.
63. *Id.* at 96.
64. *Id.* at 92.
65. *Id.* at 94–95.
66. *Id.* at 83–89.
67. *Id.* at 116–17.
68. *Id.* at 117.
69. *Id.* at 102.
70. *Id.* at 103–04.
71. *Id.* at 104.
72. *Id.* at 115.
73. *Id.* at 115–18.
74. *Id.* at 103.
75. *Id.* at 120.
76. *Id.* at 308.
77. *Id.* at 313–14.
78. *Id.* at 4, 314.

Among the things that went wrong in the Carlos DeLuna case, perhaps the most conventional was the problem of the eyewitnesses. We have become so used to the problem of eyewitnesses that the "notorious unreliability" of this evidence has become a tired cliché. But the case of Carlos DeLuna exhibits the whole panoply of eyewitness problems. Kevan Baker was the only witness who arguably saw the killer in the store and saw and heard the fatal incident itself.[79] Baker was a sympathetically tortured man who, seeing the assailant approach Lopez, at first turned away but then felt compelled to try to help.[80] Baker reported to the police on the man he saw in the store and then running away.[81] The man wore an old flannel shirt and gray sweatshirt and departed in an eastward or northward direction—in any event, opposite to the direction of the place where Carlos DeLuna was found.[82] When the police arranged a hasty show-up identification of Carlos DeLuna at the crime scene, Baker uttered ambivalent and even contradictory statements,[83] and he reprised this ambivalent and contradictory performance at trial.[84]

Meanwhile, three other witnesses saw a man in a white dress shirt running (by one report, casually jogging) in the opposite direction from where Baker saw his man going—again, clearly in the opposite direction to where Carlos DeLuna was found.[85] A series of officers immediately began scurrying around the neighborhood in reaction to these initial reports. In retrospect, the chaotic interactions of the police in response to the confused reports of the witnesses set in motion the flawed investigation that led to the arrest of Carlos DeLuna, far from where the best witness saw the killer going.[86] The chaos was captured by the 911 operator who also heard an anguished cry for help from Wanda Lopez[87] but, and here it takes heroic effort to resist the phrase "in another bizarre twist," the retrospect was two decades long. It was a fortuity that the 911 operator recorded 42 minutes of the calls among the police; a fortuity that the operator retained a copy of the tape; either a fortuity or a scandal that the police lost or destroyed the original tape;[88] and an ultimate fortuity that the authors of *The Wrong Carlos* received the copy from the 911 operator in researching this book. If Carlos DeLuna's lawyers had received this tape, they might have been able to destroy the

79. *Id.* at 12–13.

80. *Id.* at 12.

81. *Id.* at 13–14.

82. *Id.* at 13, 20.

83. *See id.* at 38–39, 42 (describing Baker's statements at the crime scene and the potentially leading statements made by police officers).

84. *Id.* at 210.

85. *Id.* at 15–17.

86. The tape included one distinct report from an officer named Bruno Mejia that the witness and police descriptions and movement observations were not squaring and that the police might be chasing the wrong man. *Id.* at 20–21, 188.

87. *Id.* at 18.

88. *Id.*

eyewitness trial testimony that was virtually all of the prosecutor's case. And they surely would have been able to rely on the then-established constitutional law on how hastily arranged show-up procedures might render some trial testimony inadmissible.[89]

A key to the truth was available from a man named Robert Stange, the owner of the gas station franchise, but that truth only emerged years after Carlos DeLuna's execution. For one thing, when Stange saw that a few tens of dollars had been left at the store,[90] and knowing that the strict rules of the business limited the amount of cash the clerk could keep on hand, he found it inconceivable that robbery was the motive.[91] In addition, Stange himself meticulously examined the crime scene and the pattern of blood, and he surmised that the killer had gone over the counter and towards the victim in a way absolutely inconsistent with any desire to steal.[92] From the day of the murder, Stange had always worried over these things, but he was unable to influence the police.[93] In effect, Stange had conducted a parallel investigation and analysis, filling the gaps left by the police. And that parallel investigation had its own and much more comprehensive parallel in the work of Eddie Garza, an accomplished local detective who had been shunted away from the case in favor of Olivia Escobedo, an officer of much less experience.[94] Both during the Jesse Garza (no relation) trial and after, Eddie Garza investigated Carlos Hernandez, suspecting that he was benefiting from his status as a paid police informant.[95] Ultimately, Eddie Garza discovered damning information about Carlos Hernandez[96] and performed a withering critique of the police investigation of Carlos DeLuna and the crime scene. Eddie Garza was concerned that the police had barely made any effort to check for prints on a huge number of surfaces at the crime scene.[97] He criticized the indifference of the police to the absence of any blood on Carlos DeLuna when he was arrested, given the extensive smearing of blood all over

89. *Id.* at 37–40; *see also, e.g.*, Neil v. Biggers, 409 U.S. 188, 198–200 (1972) (acknowledging that a manipulative show-up procedure that leads to an unreliable identification may make references to the show-up identification or later in-court identification inadmissible).

90. LIEBMAN ET AL., *supra* note 7, at 56.

91. *Id.* at 46–47, 56–57.

92. *Id.* at 49.

93. *Id.* at 56–57.

94. *Id.* at 149. Years later Escobedo spoke with investigators who had reviewed her files on the case. *Id.* at 142–43. Although she denied knowledge of it, in the Wanda Lopez case file there were actually the rap sheets of seven other men named Carlos—only one of whom, Carlos Hernandez—came even close to fitting the witness descriptions, yet no further look at Carlos Hernandez occurred, although Carlos Hernandez's rap sheet included an arrest on suspicion for killing a woman with a knife. *Id.* Also, shortly after the killing of Lopez, Carlos Hernandez had been arrested on a traffic warrant and routinely fingerprinted, but the prints were useless in regard to Lopez because the ones taken from the scene were so inadequate. *Id.* at 140–41.

95. *Id.* at 138–39.

96. *See, e.g.*, *id.* at 139 (stating that Garza relayed to Escobedo boasts by Carlos Hernandez relating to the Lopez murder).

97. *Id.* at 165–66.

the murder scene.[98] And he was professionally offended at the incompetence of the police officers at the eyewitness show-up, where they managed to both miss and cause inconsistencies with and among the reports and made no effort at any objective cross-checking of the initial reports.[99]

Eddie Garza's research and analysis would have been invaluable to the trial defense lawyers if they had connected with him. It would have been invaluable to Carlos DeLuna's postconviction lawyers pursuing either *Brady* or *Strickland* claims. And none of that would have mattered anyway had the police and prosecutors themselves realized that Eddie Garza's analysis was an invaluable framework for analyzing the evidence, because it might have led them to the right person. But despite his effort to get his research to the investigating officers and the prosecutors, he was rebuffed,[100] and his research remained, like so much else in this case, just a parallel shadow.

IV. The Trial

As for the trial of Carlos DeLuna itself, it was a short and desultory affair. The trial judge, borrowed from another county, made nice extra money for this assignment and saw no reason to jeopardize future income by doing anything interventionist or dramatic in this case.[101] The prosecution relied almost exclusively on the compromised (but unchallenged) eyewitnesses.[102] In fact, beyond that evidence itself, the prosecution *defensively* put on witnesses to explain why the forensic and identification evidence was not more ample.[103] The two prosecutors who handled the case were strong figures who, when challenged later, either minimized the alternate-killer theory or seemed to blame each other for any hint that there were angles about Carlos Hernandez left unexplored.[104] One of them received permission after the trial to remove the physical evidence, and it was never found again.[105] The other insisted that he could discount any claim that Carlos Hernandez had threatened and then framed Carlos DeLuna when they encountered each other at the jail because he had ensured that Hernandez and DeLuna had never been in the same jail at once—despite clear documentation that they had.[106]

And then there were the defense lawyers. The lead lawyer, the wholly inexperienced Hector De Peña, did little work and seemed inclined to

98. *Id.* at 153–54.

99. *Id.* at 168–69.

100. *Id.* at 139.

101. *See id.* at 181 (relating one defense attorney's concerns regarding visiting judges).

102. *See id.* at 209–10 (describing the prosecution's examinations of eyewitnesses).

103. *Id.* at 207–08.

104. *Id.* at 200–01.

105. *Id.* at 194, 243.

106. *See id.* at 200 (stating that "records show that Carlos DeLuna and Carlos Hernandez evidently *were* in police custody at the same time on at least three occasions").

ingratiate himself with the prosecutors.[107] The co-counsel, James Lawrence, was widely viewed as largely indifferent to his client.[108] With only $500 allocated to them for investigation (it is unclear if they could have gotten more),[109] they did nothing to attack the eyewitnesses. As for defense witnesses, one was an acquaintance of Carlos DeLuna who testified that the defendant had recently earned enough cash to explain the amount found on him when he was arrested.[110] The other was Carlos DeLuna himself, whose testimony mainly amounted to a simple denial of guilt; he did finally utter Carlos Hernandez's name in public, but he could offer no evidence.[111] Worse yet, the lawyers allowed him to make a catastrophic mistake in claiming that he had an alibi witness for the time of the killing. Carlos DeLuna may have been honest and sincere in saying he remembered the supposed witness at a skating rink at the relevant time, but when the alibi was easily disproved at trial, the prosecutor was able to denounce him as a liar to the jury.[112]

So for much of the guilt phase of the trial, the instances of ineffectiveness were clear. Most of the ineffectiveness, of course, lay in the absence of the investigation before the trial ever happened. A sympathetic evaluator would note that the defense lawyers labored under one great disadvantage: while Carlos DeLuna steadfastly denied his guilt, he took a very long time before finally agreeing to give his lawyers Carlos Hernandez's name;[113] presumably he delayed out of fear. But still the defense lawyers might well have found some way to identify Carlos Hernandez, most obviously by making demands of the prosecutor who had plenty of information that linked to Carlos Hernandez.[114] Moreover, the defense lawyers' indifference to uncovering more details and the chance to attack the police investigation were in no way affected by the delay in hearing Carlos Hernandez's name from Carlos DeLuna. After all, Eddie Garza, in his parallel research, had not needed that advantage to critique the forensic

107. *See id.* at 172–73 (describing De Peña as a general practitioner who had never represented a defendant on a serious criminal charge and how De Peña would get coffee with one of the prosecutors during trial breaks).

108. *See id.* at 179 (enumerating how others recounted Lawrence's minimal contacts with his clients and his inability to remember the specifics of DeLuna's case).

109. *Id.* at 181.

110. *Id.* at 217. The judge assigned a psychologist who might have offered some mitigating evidence at the penalty phase, but the witness turned out to be a pedophile and therefore useless. *Id.* at 176.

111. *Id.* at 219–20.

112. *Id.* at 185–86. Carlos DeLuna's error was in recalling that he had seen Linda and Mary Perales at the time of the killing. *Id.* at 185–86, 219. DeLuna compounded the error at trial by succumbing to a manipulative move by the prosecutor and therefore confusing the date on a photo he was shown of Mary Perales, making this error seem even more obvious and dishonest. *Id.* at 224–26.

113. *Id.* at 195.

114. *Id.* at 187–89, 194–95.

blunders by the police and the confusion of the eyewitnesses.[115] The lawyers made only the most feckless effort to get the tapes of the police calls[116] and got none of the photos of the scene, which ironically were obtained by a very good lawyer in yet another parallel case—a civil negligence suit brought by Wanda Lopez's family against the ownership of the gas station.[117]

These were all mundane but devastating failures by the defense, and the key thing about them is that had the lawyers not so failed, they might have won an acquittal. Whether documentation of these failures could have helped Carlos DeLuna later to make an ineffectiveness claim is a problematic matter I will discuss below. But even these trial lawyers probably had enough information to prompt a forceful discovery request of the prosecutor; that effort would have either gotten them information that could prove exculpatory or would have laid the basis for a later *Brady* claim.

The penalty phase requires a different evaluation—and here we must note the coincidental timing of this trial and the emergence of the constitutional ineffectiveness doctrine. It was only in 1984, a year after Carlos DeLuna's trial, that the Supreme Court, in *Strickland v. Washington*, enunciated the two-prong ineffectiveness principle.[118] That case, like most of the later Supreme Court decisions on the subject, involved a capital trial and specifically claims of lawyer ineffectiveness at the penalty phase.[119] And *Strickland*, again like later ones, focused on ineffectiveness in the form of failure to develop and present mitigating evidence that could have led to a life verdict.[120] The defendant in *Strickland* ultimately lost because the Court thought that the lawyer's deficiencies in pursuing mitigating leads were understandable in terms of a reasonable balance of strategic and resource priorities and, in any event, the Court deemed these leads of little weight in comparison to the power of the aggravation in the case.[121]

It may not be a coincidence that the penalty phase was the context for the earliest round of *Strickland*-era claims: the modern two-part death-

115. *See supra* notes 94–99 and accompanying text. Since two of the witnesses, a couple named Arsuaga, gave reports opposite to Kevan Baker's, in terms of both the appearance of the man they saw running and the direction he was running in, the defense lawyers not only had a chance to weaken the prosecution case, they even had a chance to use this couple's testimony as positively exculpatory evidence. They did neither. LIEBMAN ET AL., *supra* note 7, at 189.

116. *See id.* at 187 (detailing the attempts by the defense to acquire the tapes).

117. *Id.* at 189–90.

118. Strickland v. Washington, 466 U.S. 668, 668 (1984).

119. *Id.* at 675.

120. *Id.* at 698–700 (applying the doctrine to determine whether counsel was ineffective at presenting mitigating evidence); *see also, e.g.*, Rompilla v. Beard, 545 U.S. 374, 377 (2005) (examining a lawyer's duty to review evidence that may be used to aggravate a defendant's sentence even in the claimed absence of mitigating evidence); Wiggins v. Smith, 539 U.S. 510, 514 (2003) (discussing appellant's claim that his lawyers' failure to present mitigating evidence of his life history violated his Sixth Amendment right to counsel).

121. *Strickland*, 466 U.S. at 699–700.

penalty trial was very new at the time,[122] and many defense lawyers were probably not used to the unusual form of investigation and proof that penalty mitigation required. That historical point may explain both why there were so many ineffectiveness claims in that form and why, given the highly deferential standard of the performance prong of the new doctrine, so many of those claims failed. In any event, whether one uses *Strickland* as a benchmark for evaluating the performance of Carlos DeLuna's lawyers at the penalty phase or for reconstructing whether his habeas lawyer could have had a better shot at winning a *Strickland* claim, it is not even clear what standard actually applied in this case given the uncertainty of retroactive application.[123] Teasing out whether pre-*Strickland* rules (either more or less generous than *Strickland* depending on the jurisdiction) applied depends on what stage of Carlos DeLuna's case we are looking at and on just what legal authorities the state and defense lawyers were invoking and the appellate and habeas lawyers might have invoked.

How can we assess the Carlos DeLuna trial then? On the one hand, given that the trial lawyers put on virtually no mitigation at all, they might have been ineffective under any standard. On the other hand, given that the habeas lawyer offered almost no facts derived from any fresh investigation into mitigating factors missed by the trial lawyers, his ineffectiveness claim on habeas would probably have lost under any standard.[124] But the habeas lawyer might have *succeeded* under any standard had he done the work to generate the facts to persuade the habeas court of how egregiously faulty the trial lawyers had been and how likely it was that minimally competent lawyers would have won an acquittal.

Beyond one colossal gaffe in closing argument,[125] one other important moment of defense counsel incompetence stands out. At the penalty phase the prosecutors introduced prior crimes as aggravators.[126] The most dramatic was a sexual assault, and the victim of that assault testified and described the crime in disturbing detail.[127] The defense lawyers had access to the file of that old case, which would have shown them that the charge got reduced to

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122. This new statutory form was approved in *Gregg v. Georgia*, 428 U.S. 153, 195 (1976), to remedy the constitutional problems that led to the invalidation of all the earlier laws in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

123. Before the law was clarified in *Teague v. Lane*, 489 U.S. 288, 308–10 (1989), there were inconsistent rules of retroactivity for Supreme Court decisions about criminal procedure. But the principle that was emerging and was ultimately adopted in *Teague* came from Justice Harlan. *Id.* at 309–10 (citing Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part)). By that standard, a new Supreme Court decision applied to any criminal case still in trial and up to the point that direct appeal was finished. *Id.* at 310. It would not apply to cases that had advanced to the postconviction stage. *Id.*

124. *See* LIEBMAN ET AL, *supra* note 7, at 258 (noting that DeLuna's habeas lawyer had "reported only a couple of tidbits of new information" in the initial petition).

125. De Peña's co-counsel essentially insulted the jury by saying in handing down a death sentence they would be putting themselves "above God" as "destroyers of life." *Id.* at 238.

126. *Id.* at 233–34.

127. *Id.* at 234.

assault[128] and which probably had some investigatory information that explained why the prosecutor declined to charge it as an attempted rape. But the lawyers never examined the file.[129] Years later, in *Rompilla v. Beard*,[130] the Supreme Court actually granted *Strickland* relief in a case where at the penalty phase a juvenile prior was introduced as an aggravator, and the defense lawyer never even looked at the file to see if any mitigators might at least indirectly emerge from it.[131] A heated dissent in *Rompilla* complained that the majority had virtually ignored the prejudice prong in this case—that there was nothing to suggest that this potentially foregone evidence would have made a material difference in the penalty decision.[132] The dissent's correct inference was that under the majority holding, some performance violations may be so categorically egregious professional affronts to any judge or lawyer that they automatically warrant reversal. Thus, while the Court has repeatedly said that there is no per se prejudice for a *Strickland* performance violation,[133] failure to look at a potentially relevant case file may be an implied exception. For Carlos DeLuna, the lawyers' failure on the assault charge here obviously resonates with *Rompilla*, and in notable contrast to the Carlos DeLuna case, the lawyers for Rompilla had performed the crucial predicate step for winning on federal habeas: they had thoroughly litigated and made a solid record of the claim in a Pennsylvania state postconviction court.[134]

V. The Legal Aftermath

If the trial of Carlos DeLuna was desultory, the proceedings after the trial were anticlimactic but, I will argue, they are the locus source of the real lessons here. On direct appeal to the Texas Court of Criminal Appeals, Lawrence fashioned a claim—groundless in Texas law—that when the jurors briefly deadlocked on the penalty the trial judge should have just decided that life was the morally right verdict.[135] Lawrence also argued that one juror should have been excused for bias because of experience as a victim, but the appellate court easily concluded that the voir dire had dissipated any serious risk of bias.[136] Ironically, a day after the appeal was denied, the shadow story of Carlos Hernandez manifested itself again in a newspaper story that revealed that a man named Carlos Hernandez had been arrested for the murder of Dahlia Sauceda in Corpus Christi.[137]

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128. *Id.* at 235.
129. *Id.*
130. 545 U.S. 374 (2005).
131. *Id.* at 390, 393.
132. *Id.* at 406–08 (Kennedy, J., dissenting).
133. *E.g.*, Bell v. Cone, 535 U.S. 685, 695–97 (2002).
134. Commonwealth v. Rompilla, 721 A.2d 786, 789–90 (Pa. 1998).
135. LIEBMAN ET AL., *supra* note 7, at 250.
136. *Id.* at 249–50.
137. *Id.* at 250.

After the direct appeal, Carlos DeLuna's family found a Dallas lawyer, Richard Anderson, who had some experience in capital appeals, although there was a warning sign when he acknowledged feeling fairly hopeless about the case from the start.[138] But neither Anderson nor anyone else thought the news of Hernandez's arrest might provide a reason for reexamining Carlos DeLuna's case.

Then Anderson went through the exercise of a state habeas corpus petition. Finally recognizing the trial lawyers' failure to pursue the alternative killer, he chided them for this failure.[139] But Anderson provided no facts—because he had done no investigation that could have uncovered any facts—that the trial lawyers might have discovered Carlos Hernandez and the evidence of his guilt.[140] Otherwise, Anderson was left to argue a hopeless point about their failure to pursue a psychiatric examination that would have turned up information about Carlos DeLuna's problems with drug abuse as potential mitigation.[141] Stretching for a claim of some greater constitutional valence, he argued that the case was rife with racial prejudice against a Latino defendant charged with killing a white woman.[142] Alas, no statistical analysis about sample size or correlation and causation was necessary to reject this claim once the court realized that the *victim*, named Lopez, was *herself* Mexican-American.[143]

Anderson's appeal of the denial of state habeas corpus was more of the same, and so was mostly a clumsy series of federal habeas corpus petitions. Although Anderson made some effort to show that the lawyers could have found Carlos Hernandez, the effort was still all assertion and no evidence.[144] Indeed, he was confused on some key facts and was caught helpless between saying the trial lawyers had the information and thus were ineffective and saying that the key information came in later and could constitute newly discovered evidence.[145] The federal court decided the ambiguities against Anderson on both scores.[146] He made one more try in federal court, but all this was far too late to overcome the deficiencies of his original federal habeas petition, which in turn derived from his failures at the state habeas stage.[147] Appealing the district court's denial of the habeas petition,

138. *See id.* at 250 (stating that Anderson did not believe that Carlos was innocent and saw no reason to take the case).

139. *Id.* at 253.

140. *Id.* at 253–54.

141. *See id.* at 253 (stating that Anderson argued that DeLunas's trial lawyers "improperly advised him not to cooperate with the court-appointed psychiatric experts").

142. *Id.* at 252–53.

143. *Id.* at 256, 262.

144. *Id.* at 258–59.

145. *Id.* at 259.

146. *Id.* at 262.

147. *Id.* at 265–66.

Anderson then filed a twenty-five-page brief in the Fifth Circuit, which readily affirmed the district court.[148]

In one more ironic anticlimax, a very skilled lawyer named Kristen Weaver appeared at the last moment to try a sequence of successive state and federal habeas petitions.[149] But Weaver could not be the deus ex machina Carlos DeLuna needed. Weaver had a very interesting argument under the principle of a new case called *Penry v. Lynaugh*,[150] handed down a few months before Carlos DeLuna's execution. The idea was that the required instruction under the unusual Texas death-penalty law did not explicitly tell the jury to identify and balance aggravating and mitigating factors.[151] Instead, it asked whether the defendant was likely to commit dangerous acts of violence in the future if not executed.[152] Unless otherwise instructed, the jury might thereby refuse to consider legitimate mitigating evidence of mental deficiency[153]—a plausible factor for Carlos DeLuna. But of course no predicate for that claim had ever been laid by any of Weaver's predecessors in the DeLuna case, and this last effort was hopeless.[154]

The Carlos DeLuna story has a few noble figures (e.g., Eddie Garza) who would have been heroes had the truth about two men named Carlos come out while Carlos DeLuna was still alive. It has many arguable villains, or at least people on a continuum of culpability encompassing deception, manipulation, reckless indifference, and neglect with respect to the truth—and of course one person who was a villain because he killed Wanda Lopez. Richard Anderson is not very villainous, and he was dealt a very difficult hand when he inherited a case with virtually no records to support the claims he could make—and presumably at a time when, at least in Texas, he had little available financial or personnel help from the state or any nonprofit organization. Let us then hypothetically apply the modern standards of effective counsel to Anderson. If we do so we must conclude that he did not attempt, much less accomplish, the minimal amount of investigation that would have enabled him to produce the minimally competent pleadings that might have persuaded a state court to at least make a record of, if not decide favorably on the merits, the legal claim that might have unraveled the entire improbable (and mostly dishonest) case that the prosecution made. Or perhaps the villain is the state of Texas or the legal system that placed Anderson in that position with insufficient incentive to do what could have been done.

148. *Id.* at 266–67.
149. *Id.* at 270.
150. 492 U.S. 302 (1989).
151. *Id.* at 310–11.
152. *Id.* at 310.
153. LIEBMAN ET AL., *supra* note 7, at 270–71.
154. *Id.* at 273.

VI. Conclusion: The Last Clear Chance of State Habeas

It would be far better if defense lawyers had the skills and resources to fulfill the vision of *Gideon v. Wainright*,[155] or at least to avoid the disastrous blunders that Carlos DeLuna's lawyers committed. How far we have failed in fulfilling that vision, and what steps it would take to ensure minimally competent trial representation—these are vast questions.[156] But there will always be bad defense lawyers, and state habeas review can provide a firewall, especially in capital cases. Moreover, there are far fewer potentially meritorious habeas cases than there are trials, and allocating resources to ensure decent state habeas review is financially a more realistic challenge to take on.

Some states now have specialist offices doing this work with consummate skill.[157] But the level of state habeas lawyering is dismal in many places, and there is virtually no relief for a defendant who must rely on inadequate state habeas representation. A defendant only has a right to effective assistance of counsel where she has a constitutional right of counsel in the first place,[158] and that right ends on the first appeal as of right.[159] Under the troubling case of *Coleman v. Thompson*,[160] a slight delay in a filing by a state habeas lawyer can preclude any hope of review on federal habeas.[161] Just recently the Supreme Court has implicitly recognized the consequences of its own *Coleman* decision by offering a few small exceptions: where an ineffectiveness at trial claim—the dominant category of claim raised on postconviction review—is officially[162] or virtually[163] required to be raised on state habeas review and not direct appeal, then while there remains no constitutional right to a lawyer at this stage, the lawyer's ineffectiveness might be excused as a statutory matter and might not bar federal review.

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155. 372 U.S. 335 (1963).

156. *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006) (discussing problems impacting the right to counsel and proposing remedies to address those problems).

157. California has an official state entity called the Habeas Corpus Resource Center. HABEAS CORPUS RESOURCE CENTER, http://www.hcrc.ca.gov/, *archived at* http://perma.cc/TLB8-LENH.

158. Murray v. Giarratano, 492 U.S. 1, 7 (1989) (explaining that a defendant only has a right to counsel at the trial court level).

159. Ross v. Moffitt, 417 U.S. 600, 610–12 (1974) (declining to hold a right to counsel for the discretionary review process).

160. 501 U.S. 722 (1991).

161. *Id.* at 729–32.

162. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1318–20 (2012) (holding that an initial review collateral proceeding on a claim of ineffective assistance at trial can provide cause for a procedural default in a federal habeas proceeding).

163. *See* Trevino v. Thaler, 133 S. Ct. 1911, 1915, 1921 (2013) (holding that the *Martinez* exception applies when the state permits, rather than requires, an ineffective assistance claim to be raised on direct appeal but the state's system makes it "virtually impossible" to present the claim on direct review (quoting Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)) (internal quotation marks omitted)).

These cases recognize that state habeas is a minimally necessary mechanism for giving the defendant a shot at federal review. But even where there are no jurisdictional barriers to getting into federal court, the chances of winning the constitutional claim on the merits are so restricted under the new federal habeas statute that we have to look at state habeas a different way. Yes, it is a predicate for federal review, but far more important, it is a place where a defendant might actually win, at least because the state courts obviously cannot invoke any federalism concerns as barriers.[164]

Perhaps this reviewer should apologize for emphasizing a general lesson learned from *The Wrong Carlos* that seems too dry and technical to be adequate to the grave moral and social questions raised by the book. For some readers, the key question about the book may be specific to this story but still of enormous significance: have the authors indeed confirmed that a man was executed for a killing he had nothing to do with? And for some, the answer to that last question may clearly be yes, and then the larger questions emerge: does proof of such a case (which of course increases the likelihood of other such cases) require a categorical moral denunciation of the death penalty, or should we view the case in the broader context of utilitarian decisions by government, examining costs and benefits in more nuanced ways? I hardly denigrate the relevance and importance of those questions.

But, I suggest, the special value of this book for a legal audience lies in what we learn about the ground level of bureaucratic operations of legal institutions where the daily work of often invisible lawyers and those who help them, if done right, can obviate the need to address these larger questions.

164. A declaration of the importance of state habeas review, and a clarion call for better funding for it, comes from Professors Joseph L. Hoffmann and Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 835–37, 843–44 (2009). Notably, they express these views in the course of an essay calling for a redirection of resources away from federal habeas review, which they criticize as wasteful investment of federal and state resources in a mechanism that rarely leads to any relief for defendants anyway. *Id.* at 796–97.