MISSISSIPPI INNOCENCE:
THE CONVICTIONS AND EXONERATIONS
OF LEVON BROOKS AND KENNEDY BREWER
AND THE FAILURE OF THE AMERICAN PROMISE

BY
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PROLOGUE

The early spring day of March 25, 1995 dawned beautiful and fair in central east Mississippi. By noon the temperature outside edged toward seventy degrees. The unseasonably warm weather was the last thing on Kennedy Brewer's mind, though. Locked up in a cramped jail cell on the second floor of the county courthouse, he passed the time trying to ignore the things he could just barely get his mind around: the four years he'd already spent behind bars waiting for a trial; his conviction for murder the day before; even the ill-fitting suit his lawyers had given him to wear. And prayed on the one thing he couldn't: the fact that just down the hallway twelve jurors were deciding whether he should spend the rest of his life in prison for his crimes, or die for them.

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Likely as not, Brewer was on a fast track to execution. The day before the same jury had convicted him of the abduction, sexual assault and murder of three-year-old Christine Jackson, his girlfriend’s daughter. For the most part, Brewer’s trial had been relatively uncomplicated and presented few thorny legal issues. From beginning to end, it lasted just shy of two weeks. The prosecution’s evidence was overwhelming. Brewer admitted to having been alone at home – a low-slung, mustard-colored clapboard house set a few feet off a rural gravel road – with the little girl in the hours immediately preceding her disappearance. Though he had always maintained that he had no idea what had happened to Christine – he claimed to have been sound asleep when she disappeared – he could offer no explanation about how someone could have gained entry into the house, much less access to the lone living space.

Then there were the bite marks – some nineteen in total, spread across her body. They matched precisely molds that law enforcement investigators had made of Brewer’s teeth. According to the medical personnel who performed the autopsy and analysis, there were many more, but at a certain point it seemed fruitless to continue counting.

The second part of the trial – the penalty phase – had likewise been brief and not seriously contested. The facts of the case – a brutal sexual assault, manual strangling and the disposal of Jackson’s corpse in a creek, combined with whatever kind of savagery it took to cover her tiny body with bite marks – were by their very nature, heinous, atrocious and cruel – the factors that the State was
obligated to prove in order to distinguish Brewer's crime from less egregious murders and earn a death sentence.\(^2\)

To make matters worse, there had been talk that this might not have been Brewer's first victim. Eighteen months earlier, another three-year-old girl had been raped and murdered only a few miles from Brewer's house. Like Christine Jackson, the first victim, Courtney Smith, had been sexually assaulted, manually strangled and dumped into a small body of water. Law enforcement had arrested another local man for that crime – Levon Brooks – and he had been convicted and sentenced to a term of life imprisonment. But the almost identical *modus operandi* in both cases led some to believe that Brewer was responsible for both homicides.

Brewer's defense attorneys also had little to present the jury in the way of mitigation evidence – evidence that Brewer was deserving of something less than death. He showed no remorse, nor signs of mental retardation or other history of physical or mental illness. As for a childhood of abuse and neglect – frequently present in the lives of capital murder defendants and sometimes illustrative of vitiated culpability – there was none. In short, everything pointed to the seemingly inescapable conclusion that Brewer was a dissociative child killer who was eligible for the ultimate criminal sanction.\(^3\)

\(^2\) The aggravating circumstances that jurors are to consider when deliberating whether a defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment include whether the capital offense committed was “especially heinous, atrocious, or cruel.” MISS. CODE ANN. § 99-19-101(5)(h) (West 2011).

\(^3\) In fact, as a unanimous Mississippi Supreme Court would later write when it affirmed Brewer’s conviction, “[t]he evidence in this case, albeit circumstantial . . .
Brewer passed the early afternoon in his cell. Shortly before two p.m. those lingering in the courtroom heard a knock from the door leading to the jury deliberation room. The clerk walked to the door, cracked it slightly, and received a folded piece of paper. She read it quickly and then looked up. The jury had reached a unanimous decision. After sheriff’s deputies ushered Brewer from his cell and back to his seat beside his lawyers, Judge Lee J. Howard returned to the bench, and the clerk opened the rear door. The jurors filed in. They were solemn, their eyes averted from the defendant and his attorneys. Many had measured and drawn looks on their faces.

Judge Howard confirmed that they had in fact reached a unanimous verdict and then had the foreperson hand the verdict form to the deputy clerk so that it could be read into the record.

“We, the jury,” the clerk read, “find that the defendant should suffer the penalty of death.”

As the clerk’s voice died away, Judge Howard ordered Brewer to enter the well of the courtroom. Brewer dutifully obeyed. Bracketed by security personnel, he slowly stepped forward toward the bench.

“Mr. Brewer,” Judge Howard said, “the jury of citizens of Lowndes County, Mississippi, has found you guilty of the crime of capital murder . . . The jury has pointed to but one conclusion – that Brewer committed capital murder of Christine Jackson while engaged in the crime of sexual battery.” Brewer v. State, 725 So.2d 106, 134 (Miss. 1998).

4 Transcript of Trial at 1087-88, State v. Brewer, 94-162-CR1 (Miss. 1995) [hereinafter Brewer Trans.].
returned that verdict in open court. That verdict was that you should suffer death. Do you have anything you desire to say to the Court before sentence is imposed?”

“No,” Mr. Brewer responded softly.

“I am by law required at this time to set a date for your execution . . . . I hereby direct that the sheriff immediately take custody of your body and immediately transport you to the maximum security unit of the Mississippi Department of Corrections at Parchman, Mississippi. You are to there remain in custody until May the twelfth of nineteen ninety-five, at which time you will be removed to a place where you shall suffer death by lethal injection. May God have mercy on your soul.”

Guards ushered Brewer from court. The jurors’ work done, Judge Howard thanked them for their service and then formally dismissed them. It had been difficult work. The crime had been horrifying. Then there had been the trial, with its ineffably sad moments: the testimony about Christine, Brewer’s mother’s plea to spare her son’s life while being forced by the prosecutor to admit that since his arrest there had not been another three-year old child sexually assaulted, killed, and dumped in the creeks of Noxubee County.

But there did seem to be something hopeful – if that was the right word – about the trial’s end. What with their work done, and seemingly done well, and

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5 Brewer Trans. at 1088-89.
6 Brewer Trans. at 1089.
7 Id. at 1089.
several hours still remaining in the lovely spring afternoon, it did not seem unreasonable to perceive some promise of a new and better season. As the jurors gathered their belongings – some speaking quietly together others choosing to remain alone with their thoughts – they walked down the short flight of stairs and out into the daylight.

Brewer, meanwhile, was already en route to Parchman Penitentiary, where he was fitted with a red jumpsuit and led to a small cell – number 285 – deep in the heart of Maximum Security Unit 32, popularly known as “Death Row.” He faced a bleak future of once-a-week showers, one hour per day of solitary recreation, and a looming execution date. Levon Brooks, Courtney Smith’s convicted killer, was also housed in Parchman, across the prison grounds in a separate unit, finishing year-four of his life sentence. According to actuarial tables for incarcerated prisoners, Brooks would age in prison twice as quickly as he would have on the outside, and be dead in approximately thirty years.

And that would have been that. Except for one thing: Kennedy Brewer and Levon Brooks were both innocent.

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INTRODUCTION

In the fall of 2007, along with several other attorneys, I represented Levon Brooks and Kennedy Brewer in the effort to free them. I was at the time – and still am – the director of the Mississippi Innocence Project. Our offices and legal clinic are housed at the University of Mississippi’s Law School in Oxford, Mississippi. Brooks was our first client. I have since worked closely with both men, not only on their criminal cases, but also on the kinds of issues – legal and otherwise – that the wrongfully imprisoned typically face upon their return to free society. During the course of my representation I have spent significant time with them and their families – as well as with many others who were involved to one extent or another in their cases.

I wanted to understand what happened to them, and why.

My initial impression, shared by many others, was that their stories were the byproduct of a regional criminal justice system that had yet to rid itself entirely of its residue of bigotry and injustice – what some contemporary commentators decry as “The New Jim Crow.” I couldn’t help but think of a passage by the late journalist Marshall Frady, who once described a 1965 trial in Hayneville, Alabama, as a “tribal ceremony, a sedulous, elaborate.” A local deputy sheriff – charged with gunning down two visiting civil rights workers in broad daylight – conspired with his lawyer to ask an eyewitness whether the victims had

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been up to any mischief before they were shot. The witness said he had seen one of the victims kiss a “nigguh gal.” The lawyer wondered aloud whether the kiss had been on the cheek or the mouth. “On the mouth” the witness answered. The all white jury acquitted.\textsuperscript{10} It was, Frady concluded, a “tacit collaboration in falseness, unreality, [and] absurdity.”\textsuperscript{11} In spite of the fact that Frady’s reporting was over fifty years old, his insights seemed entirely applicable to Brooks’ and Brewer’s cases, as did the ghost of Jim Crow.

But on the other hand their cases seemed to come from an entirely different universe. Each was appointed an attorney. One of Brooks’ lawyers was black. So were a number of the grand and petit jurors, who took several days – not minutes – to render considered verdicts in each case. Each of their trials lasted about two weeks. The law enforcement personnel that investigated the cases were almost all black. They were led by a black sheriff who had been elected. Twice. He rode the coattails of Noxubee’s state representative, who is black and female. She has held various public offices in the county since 1979. Neither she nor Noxubee County is unique in that way. In fact, it’s just keeping pace. Mississippi leads the nation, and has for many years, in the number of its black elected officials.\textsuperscript{12} When, in 2006 the United States Department of Justice finally brought a voting rights suit

\textsuperscript{10} \textsc{Marshall Frady, Southerners: A Journalist’s Odyssey} 138-56 (1981).
\textsuperscript{11} \textit{Id.}
in Noxubee. The allegations were that certain black officials were suppressing the voting rights of Noxubee’s white citizens.\textsuperscript{13}

These things complicated matters for anyone – including me – who may have thought that the explanation of what happened to Brooks and Brewer could be understood as an artifact from a more blatantly and violently racist time. Too much had changed. A different accounting was in order.

Of course some of what had occurred – or hadn’t – in Brooks’ and Brewer’s trial was fairly easily understood, with a clear cause and effect. In response to the long history of Southern civil rights outrages, for example – which had resulted in the almost wholesale suspension of fundamental constitutional guarantees for black citizens – the U.S. Supreme Court and Congress in a series of decisions and legislative initiatives moved to reinstitute due process and equal protection that the South had spent close to a century trying to efface.\textsuperscript{14} Take Gideon versus Wainwright, for instance, which had provided the right to counsel in criminal trials, and, further, the guarantee of effective assistance of counsel.\textsuperscript{15} Likewise, the juries in their cases, instead of being composed only of whites – who for almost a century had been the only names listed on local voting roles – were made up of both blacks and whites, men and women, in part the result of cases like Batson

\textsuperscript{15} Strickland v. Washington, 466 U.S. 668 (1984) (holding that a criminal defendant may prove his counsel’s deficient performance by showing that the deficient performance prejudiced the defense and that the errors were so serious that they deprived the defendant of fair trial).
versus Kentucky\textsuperscript{16} – where the Court held that peremptory jury strikes based on race were impermissible.

But to the extent that fundamental structural reform and acts of conscience explained the evolved and deracinated tenor of Brooks’ and Brewer’s trials, they fell short – in some ways even contradicted – the fact that two innocent men were nevertheless convicted for crimes that they hadn’t committed. That development seemed like an important piece of the story, too. For one thing, several of Brooks’ and Brewer’s lawyers – including me – had become involved in the cases precisely because of their work at innocence projects. Post-conviction DNA exonerations are a relatively new phenomenon. Up until just a decade or so ago, the presumption had been that our criminal justice didn’t convict innocent people. Judge Learned Hand, whose legal pronouncements are frequently treated as legal gospel, wrote in a 1923 decision that “our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream.”\textsuperscript{17} Hand’s view prevailed well into the 1990’s, when jurists like Supreme Court Justice Sandra Day O’Connor felt assured enough to write that “[o]ur society has a high degree of confidence in its

\textsuperscript{16} Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State’s case against a black defendant).

\textsuperscript{17} United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).
criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.”

Those assertions seem almost precious now. Upwards of three hundred people have been proven innocent through post-conviction DNA testing. Many more have been freed through other means. Proven cases of actual innocence are only one part of the story. The data mined from them suggests that they are representative, rather than exhaustive, of the hundreds, perhaps thousands, of innocent people who remain incarcerated. And unlike earlier eras of criminal justice history, where anti-immigrant hysteria, social mores, bigotry, or political retribution were some of the root causes of unjust convictions, this contemporary set of post-conviction DNA exonerations indicates that the phenomenon is geographically and racially diverse; its root causes are common to the criminal justice system as a whole.

The more I learned about the cases and the people and places and context involved in them, the less that conventional conceptions about Southern history or

20 See The National Registry of Exonerations at https://www.law.umich.edu/special/exoneration/Pages/about.aspx
the social and legal progress that have recently stemmed from it – or even the
phenomenon of post-conviction DNA exonerations – seemed to have played a role.
Or, put another way, to the extent that those things were important, they were
not important in ways that I had expected. Discovering and understanding that,
though, would take a long time and a lot of trips to Noxubee County. So that’s
where I began, in the small town of Brooksville, in the northern part of Noxubee
where, in the early fall of 1990, three year-old Courtney Smith disappeared
without a trace from her house.

**PART ONE**
**THE MURDERS**

Located eight miles north of Macon, a Works Progress Administration
writer once described the small town of Brooksville as “a quiet old prairie town of
old-fashioned homes softened by an even spread of shade.”22 The houses of whites,
that is. Black folks still live on the other side of town, which for Courtney Smith
meant case in a one story, blue clapboard cottage on Phillips Loop Road. The
house had a single bedroom, living room, small kitchen, and front porch. She and
her two sisters – four year-old Ashley and two year-old Patria – shared it with
their mother, grandmother, and four uncles. On the evening of September 16,
1990, she and her sisters ate a dinner of rice and fresh tomatoes, and then their
mother, Sonya, gave all the girls a bath and put them in bed together in the single

22 MISSISSIPPI: A GUIDE TO THE MAGNOLIA STATE 376 (1938) available at
http://www.archive.org/details/mississippiguid00writmiss.
bedroom. At around eight o’clock she left for the evening. She wouldn’t return until late the following afternoon.\(^{23}\)

Responsibility for the girls’ care was a family affair, but the girls’ grandmother, Ruby Smith, was nominally in charge.\(^ {24}\) Later that night, one of their uncles, Tony Smith, went inside the house and turned on the television to watch a pre-season football game. He stretched out on the couch in the living room and eventually fell asleep. Between eleven or twelve p.m., Ruby Smith left the house for the night to stay with her boyfriend who lived down the road.\(^ {25}\) On the short walk there, she stopped to have a word with her twenty-one year old son, William, who was playing cards with a friend. She told him that his brother was asleep on the couch and that the girls were asleep in the bedroom.\(^ {26}\) He assured her that he’d check on them before he went to bed. She had left the door open, she told him.\(^ {27}\) William didn’t leave immediately. He played a couple more hands of cards and then walked home.

He arrived between two and two thirty a.m. Many months later at Brooks’ trial he would be asked how many children he saw in the bed when he looked into the bedroom to check on them. He testified that “I didn’t know really but I think I seen about two – two or three bodies there ‘cause it was dark and I didn’t cut on

\(^{23}\) Transcript of Trial at 521, State v. Brooks, No. 5937 (Miss. 1992)[hereinafter Brooks Trans.].
\(^{24}\) Brooks Trans. at 522.
\(^{25}\) Id.
\(^{26}\) Id. at 523.
\(^{27}\) Id. at 575.
When pressed as to whether it had been two or three, he admitted that it had been “about two, I imagine.” Asked why he hadn’t raised some sort of alarm about Courtney’s absence, William answered, his voice cracking at the memory, “I thought she was with her ma – her mamma or something.”

The next morning, Courtney’s grandmother, Ruby, returned home and noticed that Courtney was gone. Her concern was measured. Occasionally Courtney woke up early and wandered to a neighbor’s house to play. Ruby kept an eye out for her as she fixed breakfast and straightened the house, but when Courtney didn’t return after an hour or two, she grew concerned and sent Courtney’s older sister, Ashley, to look for her. Likely as not, she assured herself, she had either gone somewhere in the close-knit community to play, or Courtney’s mother had come back to the house and picked her up. It wasn’t until Sonya Smith returned home about seven that evening – without Courtney – that panic set in. The family immediately called the sheriff’s department. When the police arrived, a hundred or so neighbors and friends had already formed search parties. They had called out for Courtney, looked under houses and trailers and abandoned buildings, but with no luck. Just after midnight, the search was halted. Plans were made to reconvene at seven the following morning.

Just before sunrise, as volunteers were reassembling near the house, the chief of police walked to a nearby pond that had been difficult to search in the darkness of the previous evening. An object floating near the edge caught his

28 Id. at 576.
29 Id. at 581.
attention. At first glance he thought it might be a garbage bag, but as he got closer he could tell that it was a child’s body. He waded in up to his knees and took hold of the t-shirt and floated the body to the edge, and pulled it onto the bank. It was Courtney Smith.

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On a hot Sunday morning in May, a little over a year and a half after Courtney Smith’s abduction and murder, Annie Brewer, Kennedy Brewer’s seventy-three year old mother, was at home in the small black community of Pilgrim’s Rest, about eight miles from Brooksville, ”fixin’ to go to church,” she recalls, when her telephone rang. She answered to the voice of one of her daughters. “Christine is missing,” her daughter said. Christine was not actually Annie Brewer’s granddaughter – Kennedy Brewer and his girlfriend, Gloria Jackson, did have a child between them – but Annie Brewer treated Christine like her own. For several months Gloria and Kennedy and the two children had been living together in a rental property a couple of miles away from Annie Brewer’s place. Gloria had a history of mental health issues, and social services had visited their home on several occasions after neighbors reported seeing the children unattended, dirty and unfed. Of the two, Kennedy Brewer was the better parent, but at nineteen and underemployed, most of his efforts consisted of occasionally bringing the children to his mother’s and sisters’ houses to get them fed and bathed.
When Annie Brewer heard the news, she threw down her broom and jumped in her car. By the time she arrived at the house, dozens of neighbors had already formed a search party. They had searched through the house. People were beginning to fan out across the nearby fields and cow pastures. Others hiked down toward Horse Hunter Creek, a small stream that meanders southeast as through the low-lying pastureland. Shortly after the sheriff’s department arrived, so did volunteers with tracking dogs. The dogs used Christine’s clothing for a scent, but the unseasonable heat and dry weather made the trail difficult for them to track. After it grew dark, the searchers decided to quit and regroup the following morning.

The next day a new dog team of three dogs – all bloodhounds – arrived and began searching north of the bridge that crosses over the creek. They worked south, toward the pastures and away from the houses. As the dogs made their way down the creek bed and in and out of the thick brush, they came to a pool of water. One of the dogs reacted – “pawing the water” as her handler described it – and when searchers looked they saw a small opening in the brush on the other side of the creek. Clearly visible on the opposite bank was a slip mark. By then, though, the dogs were tired and it was getting dark again, so the searchers called off the search for a second day.

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30 Brewer Trans. at 605.
31 Brewer Trans. at 588-90.
32 Brewer Trans at 646.
The next morning a helicopter from the Meridian Mississippi Naval base joined the search. The pilot picked up a sheriff's deputy and a couple of members of the dog team near Macon and then flew to the scene. They followed the creek north to Pilgrim’s Rest and tracked south to the pool that had excited the dogs the day before. Someone on the helicopter spotted something in the water but couldn’t tell what it was. As they lowered into position over the pool, the rotors “just boiled that water right up,” one deputy sheriff who was inside the helicopter said, and Christine’s body floated to the top.

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In Brooks’ case, law enforcement officials quickly transferred Courtney Smith’s body to a state-designated pathologist, Dr. Steven T. Hayne, who performed the autopsy. In his report he noted numerous pattern-type injuries. He suspected that they were bite marks and reached out to a friendly colleague and frequent collaborator, a clinical dentist in Hattiesburg, Mississippi named Michael West, who was also a forensic odontologist – a bitemark identification expert. At some point in the early part of the investigation, Courtney’s five year-old sister, Ashley, had allegedly identified Brooks – a family friend – as the person who had come into the bedroom and taken Courtney, and so Brooks had become the chief suspect. Dr. West took a plaster mold of Brooks’ dentition and found that it was

33 Brewer Trans. at 594.
34 Brewer Trans. at 591-92.
an exact match to the wounds on Courtney’s body. The veteran district attorney, Forrest Allgood, announced that he would be seeking the death penalty.\footnote{\textit{MISS. CODE ANN.} § 99-17-20 (West 2011) (“No person shall be tried for capital murder, or any other crime punishable by death as provided by law, unless such offense was specifically cited in the indictment returned against the accused....”}

In Brewer’s case, Christine Jackson’s body produced a similar story. As he performed the autopsy, Dr. Hayne noticed a number of abrasions on the front lateral and posterior surfaces of Christine’s arm, forearm, hand and fingers. They were small – from between three eighths of an inch to about five eighths of an inch.\footnote{Brewer Trans. at 494-95.} Suspecting that they were bite marks, he referred the body to Dr. West.\footnote{Brewer Trans. at 507-08.} As in Brooks’ case, dental impressions taken were taken of Brewer’s teeth.\footnote{Brewer Trans. at 731.} The models were compared to the wounds on Christine’s body. According to Dr. West, there were nineteen areas on Christine’s body that matched the bite pattern.\footnote{Brewer Trans at 745.} Brewer was indicted, and as he had in Levon Brooks’ case, Forrest Allgood announced that he would seek the death penalty.

\textbf{PART TWO}

\textbf{NOXUBEE}

To delve into the Brooks and Brewer cases – to start at their beginnings – really means understanding that when it comes to Southern history, “the present is a fleeting segment of the cumulative past.”\footnote{C. VANN WOODWARD, \textit{THE BURDEN OF SOUTHERN HISTORY} 37 (Louisiana State University Press 2008) (1960).}
And so it is that the 1870 Noxubee County census listed thirty-two blacks with the last name “Brooks”; thirty-five with the last name “Brewer.”\textsuperscript{41} Levon Brooks’ family, as far as he knows, has always lived in or very near the county. Brooks and his brothers and sisters were all born and raised on a large working farm in the eastern portion of the county where his mother and father and several uncles were employed for decades. Kennedy Brewer’s mother, now in her mid-seventies, says she and her family have been chopping cotton in or around Noxubee County for as long as she can remember. When asked how old she was when she began working in the fields, she answers matter-of-factly: “Just old enough.”

Noxubee’s fields are located almost at the exact center of the Black Prairie Belt, an area that the first European explorers extolled for its “extensive and fertile savannas” that produced from its rich soil each season “grass with its seeded tops as high as our heads, when on horseback, and would very likely bear mowing, three or four times in one season.”\textsuperscript{42} By the 1830’s, once the Prairie’s earliest-known residents – the Mississippi band of Choctaws – were forcibly relocated to the Indian Territories in Oklahoma, settlers quickly moved in and

\textsuperscript{41} “Largest Slaveholders From 1860 Slave Census Schedules and Surname Matches for Native Americans On 1870 Census in Noxubee County, Mississippi” (transcribed by Tom Blake, 2001) \textit{available at} http://freepages.genealogy.rootsweb.ancestry.com/~ajac/msnoxubee.htm

quickly began to cultivate the rich soil. Almost all of it was planted in cotton, and it immediately became the region’s primary cash crop.

Within the first three decades of the 1800’s, Mississippi counted a slave population of slightly more than 65,000. Three decades later – on the eve of the Civil War – the number had ballooned to 436,631. Noxubee County’s share was 15,496 slaves, almost three times the size of its white population of 5,171. Slave wealth was concentrated among a relatively small portion of white landowners: 138 whites in the county owned more than forty slaves apiece.

Even though Emancipation and the end of the Civil War ended slavery as an institution, they also marked the commencement of a decades-long effort to salvage the region’s social and economic structure that was based on cheap, expendable labor. In 1865, Mississippi’s newly-elected governor, Benjamin G. Humphreys, called a special session of the state legislature to discuss what he termed the “negro problem.” His solution, quickly adopted by the state legislature, was the “Black Codes” – a series of draconian laws that co-opted the criminal justice system as a means to enforce *de facto* slavery. Instead of ensuring

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43 2 Mississippi: Comprising Sketches of Counties, Towns, Events, Institutions, and Persons, Arranged in Cyclopedic Form (Dunbar Rowland, ed., 1907).
45 Humphreys had been prohibited from participation in the state’s political affairs as a result of his role in the Confederate forces, but President Andrew Johnson had pardoned him.
justice, they traduced it by providing free – inmate – labor. It was all done under the color of state law. The reign of terror would last for nearly a century.\textsuperscript{47}

“The Mississippi Plan,”\textsuperscript{48} as it became known, achieved its apotheosis in Noxubee County. Within a few years of its implementation, Noxubee, along with several other counties in east-central Mississippi, came to the attention of the United States Congress because of concerns that the recently ratified Fourteenth Amendment and its civil rights guarantees were being ignored. Congress convened a joint select committee was to investigate and produce an investigative report. “In the latter part of 1870, and during the early months of 1871,” one of its witness observed, “the Ku-Klux organization began to be very active” and committed “numerous murders and whippings, the character and atrocity of which, and the motives assigned for them, correspond with the deeds and declarations of the organization in other States.”\textsuperscript{49} Incidents in Noxubee – “the whipping of men to compel them to change their mode of voting, the tearing of them away from their families at night, accompanied with insults and outrage, and followed by their murder” – fifteen according to witnesses – was by far the worst “of the affected counties.”\textsuperscript{50} By 1875, claimed E.D. Cavett, a local white citizen, the county had “redeemed . . . [itself] from Radical [Reconstruction] rule . .

\textsuperscript{47} Id. at 20-21 (1996).
\textsuperscript{48} KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-77 at 201 (1965).
\textsuperscript{49} REPORT OF THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, 73 (1872).
\textsuperscript{50} Id. at 80.
. [and] cut out the heads of all the drums owned by negroes and not a radical drum has been heard in Noxubee County since that date.”

During the latter part of the 19th century through the first several decades of the 20th, Noxubee seemed to close in on itself. Reports of happenings within the county were rare, but when they did emerge they were replete with episodes of casual and brutal violence. During the Depression, George B. Mayberry, a black Macon resident, inquired openly about an upcoming meeting of the New Deal Agricultural Adjustment Act. A mob of white planters beat him for his insolence. Not long after, two white men pulled Claudie B. Cistrunk, a twenty-two year old black man, from his milk truck. One stood guard with an axe while the other beat Cistrunk with a pole. When they were done, they told Cistrunk that if he reported the incident he “had better take wings and fly.”

One of the few organizations to have any consistent contact with the area was the Southern Tenant Farmers’ Union, a Depression-era union founded in the Arkansas Delta. A few nascent locals had formed in the Black Prairie, but most members’ communication to the union, often addressed in barely legible script to the farm union’s president, were not so much about plans to organize farm

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51 John Anderson Tyson, Historical Notes of Noxubee County, Mississippi 42 (copied in book form by W.S. Tyson 1928) (on file in the University of Mississippi Archives and Special Collections). These historical notes were originally published by John Tyson in The Macon Beacon and then collected in 1928. A copy of Historical Notes of Noxubee County is on file in the Special Collections of the J.D. Williams Library at the University of Mississippi.

workers as they were desperate pleas for help. In fact, the southern office was overwhelmed with letters written in penciled scrawl on scraps of paper and on the back of outdated calendars that chronicled tales of raw violence “in the hope,” as one archivist of the letters has observed, “that someone in the outside world would at least care.”53 Among the most disturbing was one that described an incident in Brooksville. Butler quoted it verbatim in a letter to Walter White, Executive Secretary of the NAACP, in the hopes of drawing attention to the outrages: “Listen, something happened down here in Brooksville with one of our young men. This young man was courting a girl and was attacked by a mob of three white men, one of them castrated him by cutting the whole sack off.”54

Between 1901 and 1927, white mobs murdered seven Noxubee blacks. Two were lynched for arson, and another, C.W. Edd for murder. In 1927 there were two lynchings; two more victims, whose names were never recorded, were burned to death in Macon. The final lynching was Dan Anderson’s. After allegedly confessing to the murder of a young white farmer, a large mob abducted Anderson and shot him 200 times.55 The following year, Will Davis, a tenant farmer on a plantation in the Prairie Point area in the eastern part of the county, wrote to his mother that “Me and my family are chitchen the devel Down here . . . we Suffers

54 Letter from J.R. Butler to Walter White (Mar. 27, 1940) microformed on STFU Papers 1934-1970, University of Southern Mississippi Collection, roll 14.
for things we are not uster Done withough . . . I would rather Be in Prison then to Be here.” 56 Davis begged for money to escape but warned his mother to be careful as “some one haid oping the Last Letter yo rote me.”

Davis’ mother did not heed the warning. She forwarded the correspondence to the NAACP, which in turn sent it to the Department of Justice in Washington. When Davis found out, he was terror-stricken. “Mama I am sorry you did that,” he wrote, after FBI agents appeared in Prairie Point to question his boss. Telling his mother that the planter had threatened to shoot any black that testified against him, Davis wrote, “Mama you may never see me alive agine[,] the white folks will Kill me if they find out hoo do it.” 57 In a letter from the union offices to the DOJ, Davis’ plight and other incidents of county violence were outlined in a plea for assistance. 58 The DOJ wrote back, noting the atrocities, but claiming that the information was not sufficient to change the opinion of Attorney General Robert H. Jackson 59 who believed that the Department lacked jurisdiction to investigate or prosecute the cases. 60 Nothing more was ever heard from Will Davis, or his mother. The Brooksville castration was never pursued.

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56 MCMLLEN, supra note 70, at 146-47.
57 Id.
59 In 1941, Jackson was nominated to a seat on the United States Supreme Court by President Roosevelt.
60 Letter of O. John Rogge to J.R. Butler (Apr. 9, 1940) microformed on STFU Papers 1934-1970, University of Southern Mississippi Collection, roll 14.
In many ways the epicenter of Noxubee’s pathology was located at a plantation in the eastern part of the county. By the middle of the twentieth century, during the Civil Rights era in particular, the plantation was owned and operated by Boswell Stevens. Stevens later became president of the State Farm Bureau.61 Tens of millions of dollars flowed from the federal government to the Bureau’s coffers every year in the form of agricultural subsidies, most of it from arch-segregationist and Mississippi Senator James O. Eastland and his Agricultural Committee, which he chaired for years. In largely rural Mississippi, Bureau officers were very powerful figures. According to Pete Daniel, former president of the Organization of American Historians and now curator of Work and Industry at the Smithsonian’s National Museum of American History, the power of the national farm lobby ultimately resided in local county elites. “As head of the Mississippi Farm Bureau,” Daniel says about Stevens, Stevens controlled one of the country’s most powerful and wealthy state industries, and with close personal and professional ties to Senator Eastland, and millions to buy or pay for favors, he was able to “spread his segregationist agenda to every county in the state.62

61 TYSON, supra note 69, at 90.
62 PETE DANIEL, LOST REVOLUTIONS: THE SOUTH IN THE 1950s at 195 (2000). Farm Bureau members in Noxubee and surrounding areas tried to force membership in the Bureau as a way to keep tabs on otherwise disgruntled small farmers, both black and white. The Southern Tenant Farmers’ Union was frequently the recipient of letters from such farmers who questioned the accuracy of Bureau members’ claims. In a letter from J.H. Reed of Boyle, Mississippi, a small settlement in the Delta, Reed asks whether, as he and other sharecroppers and tenants had been told, that in order to get their federal crop subsidy checks one
Conditions at Stevens’ own farm were illustrative. As for the system of labor that Will Davis had complained about in his desperate letters to his mother, Stevens’ was of a different opinion. In Stevens’ wife’s memoirs depicting their lives on the farm, she wrote that the “farm system set up in this area was a sharecropper set up. And though now it is deplored by many welfare agents, it was accepted as one of the best systems ever devised to give security and a chance for profit to the simple and unskilled.”63 1959 – his wife recollected – was “an unusually thrilling year. Boswell was elected president of the National Cotton Council . . . The red carpet was rolled out for us, our suite always flower filled and corsages ready for me for all occasions . . . Another equally interesting affair was the Cotton Council’s Congressional reception honoring the current Maid of Cotton held in the ballroom at the Mayflower Hotel in Washington.”64

Also that year, added to the approximately one hundred and fifty black tenants who worked in Stevens’ fields, was a new baby. He had been born in one of the tenant houses just several hundred yards southeast of the main house, in a

first had to be a Farm Bureau member. In a terse response, the secretary of the STFU says that the Mississippi Farm Bureau will take tenant farmers’ money, “but they will give them nothing for it. For instance, you as a Negro will not be permitted to attend or send a delegate to any local county, state or national convention of the Farm Bureau. Ask them and see what they say about this.” Letter from J.H. Reed to J.R. Butler (Apr. 5, 1940) microformed on STFU Papers 1934-1970, University of Southern Mississippi Collection, roll 14; Letter from Blaine E. Treadway to Zero Mumford (Apr. 20, 1940) microformed on STFU Papers 1934-1970, University of Southern Mississippi Collection, roll 14.

63 Id.
64 Boswell Stevens Papers, 1918-1986 (on file in Mississippi State University Library Special Collections).
64 Older, supra note 93.
field alongside of five or six other shacks of the same design, His parents were Rich and Loretta Brooks; they named their new son Levon.

PART THREE
“THE EXTRA MILE”

For much of Southern history, black victims of crime and black perpetrators did not arouse much interest from law enforcement. As the [Jackson] Clarion Ledger reported in 1904: “We had the usual number of [Negro] killings during the week just closed. Aside from the dozen or so reported in the press, several homicides occurred which the county correspondents did not deem sufficient to be chronicled in the dispatches.”65 But when the call came in to the Noxubee County sheriff’s department to report Courtney Smith’s disappearance, it was a different era.

The Brooksville police department did not hesitate to act. It immediately dispatched its burly, white chief – Cecil Russell – to the scene. Russell was in his fifth decade of service. He arrived in a matter of minutes. Russell joined the volunteers and directed them to split into smaller search parties. When it grew dark he called off the search, but instead of leaving, he stayed and dozed in his car so that he’d be close by if something developed.

It was Russell, who before the search party re-formed the next morning, woke and walked to the small pond. It sat behind an embankment that was covered in small trees and brush. Veteran intuition told Russell to look again in

65 OSHINSKY, supra note 58, at 128 (quoting JACKSON CLARION LEDGER (May 19, 1904)).
the morning light. By the time he had waded in and floated Courtney’s body to the edge and pulled it onto the bank, another police officer had arrived and stood watching. He wore a field jacket against the morning chill. Through the thin stand of trees, the two officers could hear car doors opening, and people talking as they began to gather for the search. Russell asked the officer for his jacket. He then took one last look at Courtney Smith and did the only thing he could think to do: he knelt down beside her and gently draped the jacket over her tiny body.

Earlier that morning, Robert William, a local deputy sheriff responsible for interviewing children who were victims of or witnesses to criminal acts, had spoken with Ashley Smith, Courtney’s sister. During their conversation, Ashley identified Brooks, with whom she was acquainted because he and her mother were friends, as the individual who had come into the house. Brooks was taken into custody.

Dr. West arrived at the Rankin County morgue to meet with Hayne the day after Hayne had conducted his autopsy. As Dr. Hayne would later explain in his trial testimony, his determination to associate the forensic odontologist, Dr. West, was based not only on his own suspicions about the marks, but on West’s impeccable credentials. West had recently been named researcher of the year by the American Academy of Forensic Sciences. Not only did he have a thriving clinical dental practice in Hattiesburg, but he was also engaged in ground-breaking forensic bite-mark research that used alternative sources of light to
reveal bite injuries that would otherwise remain invisible during routine post-mortem examinations.66

Courtney’s body had been embalmed at that point, but not yet buried, and West examined the wounds on her wrist and body.67 After photographing them, he excised the affected tissue so that he could compare the tissue samples to the enhanced photographs — and then to the dental mold. West’s technique of comparing the molds to the bite marks was a multi-faceted process. According to the explanation that he provided at Brooks’ trial, he began “with large parameters and worked ... [his] way down.”68 First, he determined the orientation of the person who was bitten — in this case Courtney — to that of the person doing the biting — Brooks. That way, as he explained, he could better determine the anatomical properties of the wound site — was the skin, based on the positioning of the victim and biter — taut, loose, or something else? Having accomplished that, he was in a better position to determine the dynamics that occurred “when the teeth grab[ed] into the skin and pull[ed] across it.”69 Based on his expertise, West determined that the perpetrator had been positioned in front of Courtney and had been bitten down on the top portion of her forearm, just above the wrist.70

With respect to the teeth comparisons themselves, “[t]he first thing . . . [West looked for was whether] the size of his arch [was] consistent with the

66 Id. at 688.
67 Id. at 717.
68 Id.
69 Id. at 724.
70 Id. at 725.
pattern that you see on the wound. Then you look at the shape of . . . [the] arch consistent with the size or shape of the pattern. Then you start going down looking at individual teeth. Are the teeth close together, are they spaced out apart, is one tooth turned crooked or is it lined up properly and as you go down these steps you eliminate individuals . . . . You look for things like flaws in the tooth. Was it chipped or broken cracked? Does it have a sharp edge? Does it have a blunt edge? . . . Is there something unique about this tooth that represents itself in the bite mark pattern?”

Usually when West studied bite marks caused by adults mouths, he was able to study the markings created by the teeth that stretch from eye-tooth to eye tooth, six in all.

But West noted several difficulties with the analysis of the marks on Courtney’s body. Because she was a small child, the adult who presumably bit the portion of her wrist was not able bite down on a surface large enough to have all six teeth leave a mark. The bite marks that West was using as points of comparison were according to his observations caused by “only . . . two teeth.”

Because he recognized “the gravity of the situation – we’re talking about a murder investigation,” West wanted to make “doubly sure that it was these teeth and only these teeth.” As he sat down in his office to work with the molds that he had taken from the suspects arrested by the Noxubee County Sheriff’s Department, he

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71 Id. at 721-22.
72 Id. at 726.
73 Id.
74 Id. at 722.
75 Id.
worked first with the arches. Most of the molds he was quickly able to rule out. But with one of them, even though the entire arch was not present at the wound site because of the site’s limited size, West was still able to note a consistency between the arch of the model and the arch at the wound site.\textsuperscript{76} He was also able to hone in on two of the incisors – the front cutting teeth. He observed immediately that the cutting edge of the incisors had distinctive markings – “fractures and bevels” – and one tooth that had a “scalloped out area with a sharp edge.”\textsuperscript{77} He was also able to document consistencies and precise matches between the wound and the size and spacing of the teeth.\textsuperscript{78}

Finally, as he would explain at the trial, because of his fidelity to his vocation and his recognition of the seriousness of the case, he went “the extra mile on this one.”\textsuperscript{79} On the one hand, he explained, he was cognizant that his expert opinion could likely “cost a man his freedom.” But, separate and apart from that, such an opinion, if wrong, might also “allow an individual to still be loose in the community.”\textsuperscript{80} “For my own satisfaction” he said, “[I] look[ed] for some minute details . . . minor marks that could only be attributed to . . . [this particular individual’s] teeth so I could lay this thing to rest.”

To do that, West used a forensic diagnostic tool that he had invented himself: the use of ultraviolet light combined with precision photography to locate,

\textsuperscript{76} Id. at 726.
\textsuperscript{77} Id. at 723.
\textsuperscript{78} Id. at 726-27.
\textsuperscript{79} Id. at 727.
\textsuperscript{80} Id.
enhance and compare wound markings that would otherwise remain undetected under normal practice.\textsuperscript{81} As he described the process, human skin tissue that has been abraded – cut or crushed by a bite mark – absorbs ultraviolet light, unlike undamaged skin, which does not. When UV light is shined on an area like that, the contrast between the damaged and undamaged skin is increased and, with proper observation, the comparison is easier to make.\textsuperscript{82} After employing the technique in the case, West was firm in his professional opinion that “it could be no one but Levon Brooks that bit this girl’s arm.”\textsuperscript{83}

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In Brewer’s case, West began his examination of Hayne’s initial findings by comparing the unique features present in the marks on Christine Jackson’s body to the unique class and individual characteristics that he could identify in each of the separate suspects. Class characteristics, as West described his experiences with them in his forensic research, were characteristics found in a certain specific group of objects. He often analogized by comparing a box of flat head screwdrivers to a box of Philips-head screwdrivers: Though each of the Philips-head screwdrivers may be different sizes, they all display the same class characteristic – a Philips-head shape – which distinguishes them from flat head screwdrivers.\textsuperscript{84} According to West, these same class differentiations are observable in individuals’

\textsuperscript{81} Id. at 729.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 730.
\textsuperscript{84} Id. at 735.
dentition – in the arch, the shape of the jaw, overbites, underbites, and so forth. 85 Even individual tooth, he explained, may sometimes exhibit class characteristics.

Individual characteristics, on the other hand, West explained, usually occur from of “random wear and tear” – things like chipped or broken teeth. 86 Though these individual characteristics are not always obvious, even small cracks or other imperfections can create visible differences on the biting surface. 87 West also considered additional factors: the relative positioning of the biter and the person being bitten – in this case Christine – the likely reaction of each during a violent struggle, the elasticity, or lack of it, in the skin at the site of the bite. 88

His analysis revealed that five of the nineteen bites were “very good bite marks”; the remaining ranged from “fair to average or – or poor.” All of them, though, West concluded, matched Brewer. 89 On May 14th, just over ten days after Christine had disappeared, West wrote a letter to Noxubee County law enforcement that summarized his findings: The “bite marks found on the body of Christine Jackson were indeed and without doubt inflicted by Kennedy Brewer.” 90

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Because the State of Mississippi had decided to ask that Brooks and Brewer be sentenced to death if convicted, much of what occurred from the moment of their arrest – and then forward through their trials and appeals, was guided by

85 Id. at 736.
86 Id. at 738.
87 Id. at 739.
88 Id. at 744.
89 Id. at 745.
90 Id. at 783.
the United States Supreme Court – in particular its death penalty jurisprudence – that, in short, recognizes that “death is different." 91 Brooks and Brewer were immediately assigned experienced trial counsel – a pair of lawyers, in fact. Among the other safeguards put into place was the composition of the jurors – both grand and petit – who would determine whether Brooks and Brewer should be indicted, and then sit in judgment at their trials.

As a general matter, the South did not have a very good track record of including black representation on its criminal juries. In a 1949 case in Martinsville, Virginia, which is representative of a regional pattern and practice, seven black defendants charged with the rape of a white female victim, and were tried in six back-to-back trials by all-white juries. The blacks who did appear on the venire lists were all struck. All of the defendants were executed two years later, and it remains one of the largest groups of defendants ever executed for a crime against a single victim in this country.

Mississippi nearly perfected the craft of excluding blacks from jury service. As part of its post-Civil War effort to disfranchise blacks and utilize the criminal justice system to perpetuate various forms of servitude and abject terror, the State effectively barred blacks from jury service by reserving qualification for electors of

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91 See, e.g., Furman v. Georgia, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring)(“[d]eath is a unique punishment”; “[d]eath . . . is in a class by itself”); id. at 306 (Stewart, J., concurring) (“penalty of death differs from all other forms of criminal punishment, not in degree but in kind”); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“penalty of death is different in kind from any other punishment”).
“sound judgment and fine character.” Blacks charged with criminal offenses were routinely tried by all white juries, and Mississippi appellate courts – from 1890 well into the second half of the twentieth century – were renown for their determination to choose legal sophistry over empirical evidence in affirming all-white jury verdicts against black defendants.

Similarly, state appellate courts that examined the record of black exclusion from grand and petit juries typically found that the absence of blacks from jury panels was not in and of itself proof of a discriminatory purpose, only that black electors – and by extension eligible jurors – were in short supply. In a typical case from 1946, an all-white grand jury indicted Eddie Patton, a black man from Lauderdale County, who was later tried and convicted by an all-white jury for murdering a white victim. Lauderdale County at the time was 35% black and had not had a black on a jury for 35 years. A lower appellate court denied him relief, but a federal appeals court granted a new trial, where he was convicted again and his conviction upheld because the continued lack of proportional black jurors was found to be merely happenstance.

92 McMillen, supra note 70, at 217-21; Miss. Const. art. 14 § 264 (1890); 1986 Miss. Laws Ch. 84.
93 McMillen, supra note 70, at 217-21.
94 Id. at 222, (citing Lewis v. State, 91 Miss. 505 (1907); Farrow v. State, 91 Miss. 509 (1907); Hill v. State, 89 Miss. 23 (1906)).
95 McMillen, supra note 70, at 222 (1990) (citing Patton v. Mississippi, 332 U.S. 463 (1947)). Patton was convicted at a second trial. His indictment had been returned with three blacks sitting on the grand jury, and his conviction with a single black in the venire. The Supreme Court abetted state appellate courts by holding in a series of cases that though Mississippi’s laws posed the potential for evil use, complaining appellants had failed to demonstrate that “their actual
In contrast, picking a fair jury of Brooks’ and Brewer’s peers appeared routine. In each case a special venire was pulled together – two hundred citizens in Brewer’s case, for example – who had been selected at random from the voting rolls. The defendants and their lawyers were allowed to witness the clerk’s methods. After they all swore to uphold their oaths as jurors – and none raised their hands when the judge inquired whether anyone was a “common gambler of habitual drunkard” – the judge and lawyers began *voir dire*, the question and answer process upon which the lawyers would make their choices.

It was a community affair. In Brewer’s case, in answer to the question about what jurors might have connections to the prosecutor, Forrest Allgood, one juror knew him from a previous trial, another had been friends with his parents since World War Two, one played basketball with him at the YMCA, and one had been his Sunday school student. Many jurors knew Brewer’s lawyers – from prior cases, through family connections, and one each because of membership in the local Soroptimist and Garden Club. One juror had once dated Christine Jackson’s mother and many knew members of both Brewer’s and Jackson’s families.

administration was evil.” *Id.* at 221-22, (citing Gibson v. Mississippi, 17 So. 892 (1895), 162 U.S. 565 (1896); Williams v. Mississippi, 170 U.S. 213 (1898); Smith v. Mississippi, 18 So. 116, 162 U.S. 592 (1896); Dixon v. Mississippi, 74 Miss. 271 (1896)).

96 Brewer Trans. at 177.
97 See MISS. CODE ANN. § 13-5-1 (West 2006).
98 Brewer Trans. at 223-46.
It is tempting to view the role of these jurors through the prism of sentimentality and high moral theater of Noxubee’s, and the South’s, Civil Rights history. In many ways, though, they were no different than their counterparts from an earlier era. The jurors chosen for the Mississippi trial of the murders of the three Freedom Summer workers were comprised of an oil exploration operator, a member of the State Agricultural and Industrial Board, three housewives, a grocery store owner, a pipefitter, a textile worker, an electrician, a production worker, a secretary, a clerk, and a cook at a school cafeteria. And on Brewer’s jury? Most had finished high school; some had college degrees. There was a nurse, a machinist, a welder, a minister, a retired school-teacher, and one who was into her tenth year pressing open seams on men’s pants at American Trouser. There were Episcopalians, Presbyterians, Baptists and one Pentecostal. Almost to a person they attended church regularly, often several times a week. There were Republicans, Democrats, and one Independent. They belonged to the Kiwanis Club, Boys and Girls Clubs, the YMCA and, in true rural Mississippi tradition, numerous hunting clubs.

The most striking difference, of course, was their race. Whereas the Freedom Summer murder trial jurors were all white, as were the juries in virtually every other high profile trial involving a white perpetrator or a black defendant facing the death penalty. Brewer’s jury was comprised of nine whites
and three blacks; eight men and four women. It included seventy-five year old Sadye Guyton, who listed her race on the jury questionnaire as “Negro.” Born in 1920 in east Mississippi she attended all black secondary schools and eventually studied for her bachelors and masters degrees. Her whole career had been spent as an educator.

Brooks’ jury included Bos Stevens, Boswell Stevens’ grandson. He would become the jury’s foreperson. Stevens has come full circle, and in a way the farm where he grew up with Levon Brooks has, too. The farm is mostly rented out now, and the main house, a portion of which had been built by Stevens’ great grandfather upon his return home from the Civil War, recently burned down.

When asked about his role in Brooks’ trial, Stevens pauses, standing in his yard at the farm beside the tenant cabin that Brooks’ uncle and aunt lived in as some of the last workers on the farm. As he leans up against his pick up truck, he thinks for just a moment. “I’m not my grandfather, I guess,” he says. And then he pauses. “And he wasn’t me.”

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As to each side’s strikes, none appeared based on race or gender, practices that have been repudiated by the U.S. Supreme Court in *Batson v. Kentucky* and *J.E.B. v. Alabama*. Some of the strikes, mostly for cause, no doubt had the effect of working disproportionately against blacks – those based on religious beliefs against the death penalty, for example – but in all they seemed mostly to be benign efforts characterized by the small town-ness of the whole process. One juror was struck because she was known to have frequent dizzy spells; another had been in trouble with the law from time to time, and another had the misfortune of having the last name “Rice” – and, according to the prosecutor, who did not recognize the juror, recalled that there were a lot of Rice’s being prosecuted by the worthless check unit. In the end, the State struck eleven jurors – eight of whom were black, three white.
When Forrest Allgood delivered his opening statement to the jury in Brooks’ trial, he spoke without notes. It was unlikely that he needed any; his statement lasted perhaps all of three minutes. As he stepped into the well of the courtroom to begin his case, he explained that the nature of his proof was simple: Sixteen months ago to the day, three year-old Courtney Smith had been put into bed along with her two sisters at their grandmother’s house just up the road from where he was now speaking – in Brooksville.

“And some time that night, ladies and gentlemen,” he continued, “while they slept, a silent evil cloaked in the shape of a man came into the house,” speaking in the mix of high-brow diction and homespun aphorism he favors. “But the man who did this, ladies and gentlemen, left his mark.” He then turned and gestured towards Brooks, who was sitting on the other side of the courtroom. “The State of Mississippi,” he continued, the volume and pace of his voice increasing slightly, “is simply going to prove to you that that man, and the man who left those teeth marks, is Levon Brooks.”100 He then strode back to his place at counsel table and sat down. The presentation of evidence was perfunctory. The State focused on the bite marks; the defense, not very effectively, on Brooks’ alibi.

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There is nothing to indicate that the juries were anything other than fair. Brooks’ jury deliberated for several days, and after convicting him returned with a life sentence. Brewer’s verdicts were returned more quickly. The evidence,

100 Brooks Trans. at 461-62.
especially the forensic work that discovered and then corroborated the matching bite marks, was overwhelming. The verdicts in both cases were a foregone conclusion.

**PART FOUR**

“I DON’T WANT THAT TO HAPPEN TO ME”

Brooks’ appeal was written and filed by one of his trial attorneys. The only issue of merit involved West’s testimony. Having grown weary of what it viewed as baseless challenges to bite mark evidence, the State Supreme Court not only affirmed Brooks’ conviction but also took the time to “state affirmatively that bite-mark identification evidence is admissible in Mississippi.”

After Brewer’s appeal was filed, the Mississippi Supreme Court finally found “no error in the trial of this matter that necessitates a reversal or any other ground upon which Brewer is entitled to relief from the conviction or the sentence of death by lethal injection.” Brewer appealed to the U.S. Supreme Court, which, presumably because it found no error, refused even to hear it. Two days

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101 Brooks v. State, 748 So. 2d 736, 746-47 (Miss. 1999) (Smith, J., concurring). In fairness, one dissenter, Justice C.R. McRae, wrote prophetically that “This Court’s apparent willingness to allow West to testify to anything and everything so long as the defense is permitted to cross-examine him may be expedient for prosecutors but it is harmful to the criminal justice system. I believe it is time we did a careful analysis of bite mark testimony—especially that coming from Dr. West—now rather than later or we risk having West become the Ralph Erdmann [exposed for engaging in forensic fraud] of Mississippi with the attendant consequence of having to reexamine every case in which West has ever testified.” Id., at 748-50.

102 Brewer v. State, 725 So. 2d 106 (Miss.1998).

103 In order to grant a petition for certiorari, which is what Brewer sought from the Court, at least four of nine justices would have had to agree that the Mississippi Supreme Court had decided an important question of federal law that should be addressed by the Supreme Court or answered a federal question that is
after the Supreme Court denied his appeal, Mississippi sought permission to re-schedule Brewer’s execution date.

For all intents and purposes, Levon Brooks’ fight was over. The Sixth Amendment right to counsel does not provide a lawyer for post-conviction claims, so any challenge would have to be drafted by Brooks himself. That kind of legal training is beyond the ability of most attorneys. Levon Brooks didn’t even try. Instead, he settled in to serve his life sentence. He honed his self-taught artistic skills and drafted homemade greeting cards that he sold or traded to fellow inmates and dwelled on his mother’s parting advice: “You go on up there and do right, and the Lord will bring you home.”

Brewer wrote to his lawyer. “[C]ould you send me about $60.00 to get me a type writer[?]” he asked. “[W]hat I am doing is fixing to get involve in learning the law because I just can’t spend my life in prison for nothing that’s why I try to learn more and about the law each day . . . “104 His lawyer never sent him one, so Brewer, pulled out a clean piece of lined notebook paper and wrote a letter. He addressed it to an organization that he had heard about in the back of a magazine.

“Dear Mrs. Greene,” he began in careful script, “how are you today? I know

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104 Letters from Kennedy Brewer to Thomas Kesler (undated) (on file with author).
you probably don’t know me but the reason am writing is can you . . . help me out concerning my case . . . I really, really, really would highly appreciated.”

Four days later, Brewer’s letter arrived at the Innocence Project in New York.

**PART FIVE**
**THE TRUTH**

On the night that Courtney Smith was abducted and murdered, Levon Brooks was at work. He was a jack-of-all-trades at the Santa Barbara nightclub, a sort of modern-day Mississippi juke joint east of Brooksville. (During the day Brooks worked as a custodian at a local public school). Soon after Brooks arrived at the Santa Barbara that evening for his shift, the club filled quickly. He knew almost everyone there. He recognized friends and the faces of regulars. Virtually every patron who came to the club that night had contact with him. Some handed him their cover charge at the door. Others noticed him during his rounds on the club floor. In the small hours of the morning just before the club closed, remaining customers – and there would have been a lot of them – would have waited around for Brooks to begin in his favorite task: cooking up fried fish dinners. It was close to the perfect alibi.

And so, when Forrest Allgood completed his opening statement in Brooks’ trial, it was Brooks’ lawyers’ turn to answer, their first opportunity to let the jury how and why their client was factually innocent. But they did nothing. They did

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not stand. They did not say anything to the jury. The moment no doubt passed quickly; defense counsel’s decision not to respond takes up just over a line of the trial transcript. But the effect was devastating. The message to the jury could not have been any clearer: Brooks’ lawyers said nothing because they had nothing to say. It was the functional equivalent of endorsing Allgood’s opening statement. If a criminal trial is an exercise in granting a defendant his day in court, Levon Brooks had just watched his come and go in a matter of seconds.

After the State presented all of its evidence and rested its case several days later, Brooks’ attorneys received their second opportunity to present an opening statement. Here it is, in full:

[W]e are representing Mr. Levon Brooks who’s been charged in this matter. At this time – uh – the – uh – defense has a right to make a brief opening statement so I’ll try to be brief because – uh – the evidence we put on we hope will – uh – help prove our case. We want to make sure that you look at the time that’s involved in this particular – uh – day when this happened. . . . As you already know the sequence of events that happened on that particular day, the day of the fifteenth and the sixteenth when this happened – uh – some time between – uh – I think between eleven and – and two-thirty or thereabouts – uh – eleven p.m. and two-thirty a.m. – Courtney were (sic) discovered missing. Courtney being the victim in this particular crime – uh – particular uh – crime. Uh – what we intend to show that at the time period when Courtney was abducted or taken from her house, the defendant was at his place of employment and we intend to show by various witnesses that he could not have and did not have the opportunity to leave that particular place, that when this abduction took place he was at his place of employment working and we will provide witnesses to that effect showing that he did not have the opportunity nor the time to have been at that particular place when this had to have occurred. Uh – thank you.\(^\text{106}\)

\(^{106}\) Brooks Trans. at 767-78.
It appeared that even Brooks’ lawyer himself was not persuaded. About a third of the way through it the judge had to have him pause in order to turn off the noise from a courtroom heater so that the jury could hear what the lawyer had to say.\footnote{Id.} It got worse.

Forrest Allgood argued to the jury during the trial that Ashley, Courtney’s older sister, had “consistently from start to finish [said] this is the guy that took my sister”\footnote{Id. at 1029.} and that she “knew the man and his . . . [nickname] was Titee” – which was, in fact, Brooks’ nickname. Allgood’s assertion was confident and left no room that Ashley’s statement was anything other than a rock-solid identification.

But as numerous witness statements and police reports made apparent, Ashley had been sent by her grandmother the morning of her sister’s disappearance to go and find her. There was absolutely no evidence that during any portion of that time – the whole day, in fact, or during any conversation with the people that she asked and who later helped search for her sister – that Ashley ever said anything about anyone, let alone Levon Brooks, as the person who abducted her sister. It’s unclear precisely when and under what circumstances Ashley first claimed that she had seen the person who abducted her sister.\footnote{At trial Allgood claimed that Ashley had mentioned it to Noxubee County Sheriff’s Deputy Ernest Eichberger soon after Courtney’s body was pulled from the pond. In the extant files in my possession, there is no police report or prosecution document that supports that. Allgood tried to elicit the statement}
There is no indication in the dozens of pages of police reports from the days surrounding the search and discovery of Courtney’s body that she said anything to anyone during the initial search for her sister, or during the full-blown effort that took place all that day. Had she in fact said something as definitive as Allgood claimed, law enforcement would have detained Brooks immediately. What seems much more likely is that at some point Ashley mentioned something to someone — perhaps to her grandmother\textsuperscript{110} — and then whomever she mentioned it to referred her to law enforcement.

What is true is that a couple of days after the recovery of Courtney’s body, Ashley did sit down for an interview with a deputy sheriff from neighboring Lowndes County. It would, of course, turn out to be a critical interview because it was during this interview that she allegedly identified Brooks as the person who abducted her sister.

The deputy sheriff Ashley spoke to was Robert Williams. But most people knew him by another name, though: Uncle Bunky. In his role as Uncle Bunky, Williams was a well-known and beloved figure – the longtime host of Fun Time, a regionally-broadcast Saturday morning children’s television show.\textsuperscript{111} Interspersed between cartoons – Terrytoons like Heckle and Jeckle and Deputy Dog to She-Ra Princess of Power – the local affiliate which carried his program would break and

\textsuperscript{110} Interview with Ashley Smith (on file with author).
\textsuperscript{111} TIM HOLLIS, HI THERE, BOYS AND GIRLS!: AMERICA’S LOCAL CHILDREN’S TV SHOWS, 161-62 (2001).
cut live to Uncle Bucky in the studio. The set consisted of a simple set of bleachers where guests of the show – typically small children celebrating a birthday – were seated. Uncle Bunky’s specialty was sketching zoological freaks – compendiums of hilariously – for his little guests, anyway – funny animals: a beast comprised of a cow’s body, lion’s head and an alligator tail, for example. His schtick worked so well that his act never varied much in the decades that he hosted the show – not even enough to stop touting the benefits of his show’s sponsors, like Burger King, even after the National Association of Broadcasters prohibited such overt commercial sponsorship.\footnote{Id.}

In the late 1950’s when Williams first started hosting the show at WCBI in Columbus, Mississippi, he had a partner, Ed Prescott, who later became the county sheriff. In the late 1970’s Prescott hired Williams as a juvenile outreach officer. His specialty was taking his ability to interact with children, combine it with his notoriety, and speak to them about the evils of drugs and alcohol.\footnote{Carol Mason, “Just say No” for Uncle Bunky, TUPELO DAILY JOURNAL, C1 (June 29, 1990).} His forensic interviewing skills seemed like a natural progression. “These kids listen to him,” Sheriff Prescott said about his former Saturday morning colleague. “They’ll open up to him. And the kids won’t talk to just anybody, especially when it comes to something like abuse,” he added. “It’s like this,” said Forrest Allgood, in an interview about Uncle Bunky’s forensic interviewing abilities, “if we don’t know anything about it, we can’t do anything about it. We need the kids to say,
“This man did this to me.’ It’s fundamental in getting any case started.”\textsuperscript{114} He may have been a nice man, but his technique seemed to be purely seat-of-the-pants intuition. “I’ll sit down with them, draw for them,” he explained. “And before long, they’re telling me everything – who’s done what to them. It’s amazing sometimes what happens when I sit down and draw a few cartoons.”\textsuperscript{115}

Uncle Bunky interviewed Ashley twice. One of the interviews – a rambling eighteen page typed document – is undoubtedly the first of the two.\textsuperscript{116} In it Ashley says that several people are involved in the abduction, including one named “Trayvon.” She knew, she said, because he went to a local community college – Riley College – with her mother, and he had a son named Travis. When Brooks came into their room he was wearing a dark purple short sleeve shirt with a collar. For her second interview a few days later, police prepared a photo array that included Brooks’ photo. Ashley reportedly chose his photo from the group and identified him for the first time by his nickname, “Titee.”

\textsuperscript{115} Watkins, \textit{supra} note 183, at 2E.
\textsuperscript{116} Interview by Deputy Sheriff Robert Williams with Ashley Smith (Sept. 23, 1990) (on file with author); Interview by Deputy Sheriff Robert Williams with Ashley Smith (undated) (on file with author). The September interview is much briefer and mentions Levon Brooks only by his nickname, Titee. The other interview mentions a person who Ashley refers to as “Trayvon.” In numerous interviews with people in Macon and in Brooksville, many remarked that they did not know Levon’s real name; they only knew him as Titee. In the September interview no one refers to Trayvon but they do refer to other details from the other interview. What seems likely is that after Ashley mentioned Trayvon to the authorities, they went in search of someone by that name and discovered Levon Brooks – who knew Ashley’s mother and had dated her for a period of time around the abduction and murder.
As for Allgood’s claim that Ashley had consistently identified Brooks, it was demonstrably false. Brooks never attended college at all, much less Riley College with Ashley’s mother. Brooks does not have a son named Travis. In fact, Brooks does not have a son at all. In addition, no one ever referred to Brooks by his given name “Levon.” Most people who knew him didn’t even know him by that name; everyone called him “Titee.” Ashley never mentioned the name “Titee” in her first interview with Uncle Bunky – or the name “Levon Brooks” for that matter.

When they decided to forego their opening statement, Brooks’ lawyers missed the opportunity to explain to the jury that the eyewitness identification was not all that Allgood claimed. But they also neglected the opportunity later, too, in an ineffectual cross-examination of Ashley. Though the information about Brooks’ purported attendance at Riley College and his son, Travis, was brought out, it meant nothing to the jury because the jury had been given no context to understand its significance. Worse, Brooks’ lawyers never put on any evidence to demonstrate that Ashley’s claims were mistaken or impossible. About Uncle Bunky and the rigor of his interview, not a word was mentioned. Nothing was made, either, about the lack of effort by Uncle Bunky or anyone else to clarify the gaping inconsistencies in the statements, or about how Brooks could have had the opportunity to get from work to Courtney’s house and back – or from his home in Macon to her house and back – given the time frame when her uncle, William, noticed that only two girls were in the bed. It is hardly surprising, either, that no one remarked upon an article that had appeared the previous June in the Tupelo-
based *Northeast Mississippi Daily Journal* about Uncle Bunky. The article was an appreciation for his years of service. The lead claimed “For generations Robert Williams has been able to get children to say anything.”

Of course what should have concerned everyone – and not just Brooks’ lawyers – was the forensic fraud being perpetrated in the case. That type of fraud has a long tradition in Mississippi, and its courts have been willing participants when it comes to admitting it into evidence. For years forensic fraud was often used to whitewash civil rights abuses. In some instances the fraud was of morbid interest, as in the official medical reports about the death of Robert Johnson, the fabled Mississippi Delta bluesman. Johnson was most likely poisoned by strychnine or lye by a jealous husband at a juke-joint near Greenwood, Mississippi, in 1938. His death was reputedly horrible and protracted. He vomited for hours, bled from his mouth and crawled around on the floor howling like a dog. He died about three days later. The coroner’s report listed the cause of death as “No doctor.”

At other times, particularly during the Civil Rights movement, the death investigation system was almost exclusively controlled by small-town, elected county officials, frequently county coroners – who formed a mostly hidden but murderously powerful good old boy network. Issues of public health, including criminal culpability in suspicious deaths, were frequently sacrificed to advance

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broader efforts to maintain racial codes. In 1955, three shotgun blasts to the head killed Reverend George Lee, a black Baptist minister who had the temerity to found a local NAACP chapter in rural Humphrey’s County, Mississippi. At the all-white inquest into Lee’s death, the coroner determined that the mortal injuries were indeed sustained in an unfortunate car accident, but that the shotgun blasts were merely the sound of blown tires. As for the lead pellets removed from Lee’s head? The inquest’s report explained that they were merely tooth fillings. The coroner concurred with the findings, and the official cause of death was listed as “unknown.” No criminal investigation was ever opened, and the case remains unsolved to this day.

By the time of Brooks’ and Brewer’s trials, Dr. Steven Hayne, the forensic pathologist, had secured for himself through a series of orchestrated maneuvers a virtual monopoly on the State’s autopsy needs. As a result, the State medical examiner office was essentially vacant, and so Hayne could operate with no official oversight. Among the public health disasters that occurred was that Hayne and West, the forensic odontologist, formalized their business relationship. Hayne performed autopsies in bulk with West’s help, and West, with Hayne supplying

122 Letter from Dr. Michael H . West to Dr. Stephen Hayne (June 15, 2006) (on file with author).
him a steady stream of bodies, was able to practice his unique brand of forensic wound identification. The two also cultivated their favorite customer base: law enforcement. They took out ads in law enforcement trade journals touting their services. According to one ad, retaining their services would “achieve higher conviction rates” by using a novel forensic investigation tool – alternative light imaging – that involved using ultraviolet light to enhance wound markings. “[I]t could become a valuable asset to your department, too,” they claimed.123

By the beginning of the 1990’s, Hayne had cornered the market in autopsy referrals, and, according to his own calculations, was performing anywhere from twelve to eighteen hundred per year for years, an average of almost five autopsies per day – every day – for nearly two decades. With no days off for vacation, a forty-hour work-week provides two thousand and eighty work hours annually. Hayne claimed to clock almost sixty five hundred hours – one hundred and ten hours per week – not counting related travel and other consulting time. In the event that anyone wondered how it was humanly possible to physically complete – let alone competently complete – such a vast amount of labor, he had a ready answer: “Some people were put on this earth to party, and some people were put on this earth to work.”124

The hazards that flowed from Hayne’s assembly line body farm were well-known dirty secrets among those who had observed his work: corpses lined up like

123 Dr. Michael H. West & Dr. Steven Hayne, Alternative Light Sources for Trace Evidence Can Lead to Higher Conviction Rates, 1 KODAK PUBLICATIONS 911 (1992).
124 Jerry Mitchell, State pathologist has sent innocent people to prison, group charges, JACKSON CLARION LEDGER (Apr. 9, 2008).
cordwood on the loading dock; forensic reports claiming that organs had been observed and weighed but that in reality had never been removed. But prosecutors and more than a few plaintiffs’ lawyers were willing to overlook these issues because Hayne was the only game in town and an effective co-conspirator in winning a conviction or attaining a lucrative judgment in a wrongful death case. Remarkably, courts also accepted Hayne’s testimony despite his grandiose claims and documented mistakes. Even worse, he was accepted as an expert despite the fact that he has failed to obtain a license from the American Board of Pathology – the field’s premier peer-governed association. He had sat for – but failed – the Board’s exam. Or, in Hayne’s version, decided not to finish it.

“The questions [on the exam] were absurd . . . ludicrous, absolutely absurd,” he has explained when asked about the incident. What irked him the most and caused him to storm out of the examination room in a fit of pique was the exam’s last question. It asked what color was most associated with death and as possible answers offered a choice between black, white, red, or green. What troubled Hayne was not any lack of knowledge on his part, but the cultural ignorance inherent in the answer. “In Western civilization, black is associated with death,” he explained. “In the Orient, white is associated with death. Green is a color of decomposition, certainly associated with death. Blood is obviously associated with

125 See Weiner v. Meredith, 943 So. 2d 692 (Miss. 2006). See also Brief for Appellant Roger Weiner, M.D., Weiner v. Meredith, 943 So. 2d 692 (Miss. 2006); Brief for Appellees Scotty A. Meredith & Mississippi Dept. of Health, 943 So. 2d 692 (Miss. 2006); Radley Balko, In Mississippi, the Cause of Death is Open to the Highest Bidder (June 5, 2008) available at http://www.reason.com/blog/printer/126887.html.
death. To me, it was just the final absurd question. So I got up, handed my paper to the proctor and said, ‘I leave, I quit. I’m not going to answer this type of material.”

After the Clarion-Ledger reported Hayne’s version of the event in 2008, Board officials contacted the newspaper. “As the executive director of the American Board of Pathology I was surprised by Dr. Hayne’s description of the ’stupid question’ (related to colors associated with funerals) on his forensic pathology examination that caused him to walk out of the exam,” wrote Dr. Betsy Bennett. “Dr. Hayne took the forensic pathology examination in 1989. I pulled the text of this examination from our files, and there was no question on that examination that was remotely similar to Dr. Hayne’s description.”126

Dr. West’s claims were similarly suspect. As practiced by Dr. West, the forensic odontology sub-specialty of matching bite marks does not possess any of the hallmarks that would distinguish it as a true science.127 Even the discipline’s practitioners disagree about whether the field is even legitimate. If nothing else, the error rates among practitioners do not inspire much confidence. For one thing, even though aspects of the field have been around for decades, there are few reported error rate studies but those that exist suggest rates as high as 60-70 per cent.

The risk of error did not faze West, however, even after he became the poster-boy for forensic odontology’s increasingly outrageous claims about its ability to solve crimes. In 1991, someone stabbed Kim Ancona to death at the bar in Phoenix, Arizona, where she worked as a cocktail waitress. Ray Krone was arrested for the crime because witnesses claimed that Ancona closed up the bar that evening with a man named “Ray,” and also because Ancona had a bite mark on her breast that resembled Krone’s odd tooth structure. Krone had been involved in a traumatic car accident as a child that required extensive reconstructive surgery. Dubbed the “Snaggletooth Killer,” he was convicted and sentenced to death based almost entirely on the testimony of a forensic odontologist who claimed that “the teeth of Ray Krone did cause the injuries on the body of Kimberly Ancona to a reasonable medical certainty. This represents the highest order of confidence that no other person caused the bite mark injuries.” A decade later, DNA tests – from trace amounts of saliva on Ancona’s tank top left by the biter – excluded Krone, and he was exonerated.

One of Krone’s appellate lawyers was so disturbed by the self-assuredness of the bite mark expert relative to the field’s lack of scientific bona fides that he decided to conduct an external blind proficiency test of his own. Wanting to find an odontologist who was unfamiliar with the case, he looked east of the Mississippi – and happened upon West. Using the photographs of Ancona’s injuries, as well as dental molds from a “suspect” who had no connection whatsoever to the case, the lawyer sent material to West for an opinion about the
existence, or non-existence, of a match between the molds and the injuries. He paid West a $750 retainer for his services and told him that the evidence was from a three year-old murder case of a college student from Idaho that had gone unsolved because of a lack of evidence against the prime suspect.

West quickly produced a videotaped report that demonstrated in detail how the “suspect’s” dentition lined up with the injuries on Ancona’s breast. He confidently claimed that the teeth conformed to the wounds and that the “odds of that happening if these weren’t the teeth that created this bite would be almost astronomical. I feel very confident that there are enough points of unique individual characteristics in this study model to say that these teeth inflicted this bite mark.” When informed of this type of gross error, any legitimate forensic scientist would have tried to figure out where his methodologies and analysis had gone wrong. West remained undaunted by the setback. In fact, if anything, he seemed emboldended. So were those in need of his expert services.

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By the time his trial in the spring of 1995, some of Hayne’s and West’s work was beginning to catch up with them. Slightly more than a week after Brooks’

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128 Christopher Plourd solicitation of Michael West regarding Kim Ancona case (1991) (DVD and assorted documents on file with author).
129 Emboldened by his success, West expanded his areas of expertise beyond bite mark identification. Almost overnight he became a self-proclaimed expert in wound pattern, blood spatter, and footprint analysis, videotape enhancement, crime scene reconstruction, and other esoteric disciplines, including in at least one case each, foot-stomp and fingernail-scratch matching. State of Louisiana v. Abadie, No. 90-5161 (24th Jud. Dist. Ct. of La., Div. A 1990), Letter from Michael
conviction, the Ethics Committee of the American Association of Forensic Scientists (AAFS) received a formal complaint about West from a lawyer who had been involved in some of West’s earlier Mississippi cases.\textsuperscript{130} That complaint was soon followed by another to the American Board of Forensic Odontology (ABFO) in August of 1993.\textsuperscript{131}

The letters contained serious allegations. They claimed not only that West’s methods were not based in science, but that he was making claims that were unsubstantiated – in short, that he was engaging in fraud. After a 1994 hearing, the AAFS was unanimous in its conclusions that West should be expelled. He resigned before that could happen.\textsuperscript{132} The ABFO’s conclusions were also unanimous: after determining that among other things that he had materially misrepresented evidence, it recommended that West be suspended for a year.\textsuperscript{133}

Neither law enforcement nor Forrest Allgood had any reservations about continuing to use West in Brewer’s case investigation or trial, though. In fact, Allgood questioned West for the jury on the previous years’ professional

\textsuperscript{131} AAFS Ethics Committee Report, Case No. 143, April 13, 1994, (on file with author).
\textsuperscript{132} ABFO Ethics Committee Report, Complaint 93-B, March 25, 1994, contained in letter from Dr. Richard Souviron, Chairman ABFO Ethics Committee, to Gary L. Bell, president American Board of Forensic Odontology, (on file with author).
\textsuperscript{133} Am. Acad. of Forensic Science Ethics Comm., Case No. 143 (1994). (On file with author).
difficulties. The two of them chalked it up to West being a scientist ahead of his time, surrounded by professional jealousy. “Much has been made of our use of Dr. West in . . . [the Brewer trial],” Allgood has recently explained. “Dr. West was, at the time, one of the foremost names in forensic odontology . . . He enjoyed an international reputation and was lecturing in London and China. . . . It was not ‘junk’ science.”

Mississippi courts welcomed West’s testimony. Brooks’ lawyers’ efforts to bar it in his case testimony were tepid, at best. Not only did they fail to raise much in the way of a substantive objection, they acted reflexively and hired a forensic odontologist of their own. To make matters worse, their expert was firmly in the professional sway of West. He agreed with West’s findings that of the approximately one dozen tooth molds that had been taken from the suspects in Courtney’s death, all could be excluded save one: Levon Brooks’. He also agreed that Brooks’ dentition matched – although he was only willing to say that the match was consistent with Brooks’ dentition, not “indeed and without doubt,” as West claimed. He did add that the marks on the body may not have been bite marks at all – that they could have been made by “gravel or – or fingernails or – or I don’t know, any number of things.”

Given how much Brooks’ expert actually buttressed the State’s case, Allgood’s cross-examination was more like the direct examination of a

134 Forrest Allgood, District Attorney offers comments on Brewer, Brooks cases, MACON BEACON 7 (Aug. 7, 2008).
135 Brooks Trans. at 778.
corroborating expert. In response to his claim that the marks could have been caused by any number of items, Allgood asked him if, “However, . . . [he] nonetheless found that there were consistencies with these marks with the teeth of Levon Brooks, is that correct?” he asked Brooks’ witness.

“Yes,” the expert answered.

“No, Doctor, what is the – just – just out of the sake of clarifying, what is the nearest animal that has teeth like a human being?”

“Well I suppose an ape,” he said.

“We don’t have many of those running loose in – in the United States, is that correct?” Allgood asked. At which point, the expert finally located within himself a modicum of professional discretion.

“I could make a joke,” he said, “but I won’t.”

With that answer, Brooks’ lawyers rested their case.

Brewer’s lawyers’ challenge to West’s testimony was more spirited than Brooks’ lawyers, but it met with the same result: West was allowed to testify.

What Brooks needed as much as anything was for his lawyers to provide an alternative explanation for how Courtney was abducted, and, if possible, who might have done it. To be fair, they were getting a late start. The quality of the law enforcement investigation brought to bear on the case certainly hadn’t helped develop anyone else as a suspect. Officials never bothered to corroborate Brooks’ alibi, and they were too willing to rely on an unqualified interviewer to speak with...
the five year-old witness whose claims were not only contradictory but suspiciously timed and uncorroborated by the physical evidence.\textsuperscript{137} In most cases of wrongful conviction, particularly those that occurred prior to the advent of sophisticated DNA technology, the real perpetrator is extraordinarily difficult – often impossible – to identify. There is no physical evidence or witnesses that offer a different version of events than the one that the prosecution adopts. But Brooks’ case was different.

Not long before Courtney Smith was abducted, there had been another similar incident in Noxubee County – involving a nighttime home invasion and attempted sexual assault. The perpetrator had broken into an elderly woman’s house not far from Courtney’s home and attempted to assault her. He was arrested. His name was Justin Albert Johnson. Among the things that witnesses reported seeing the night Courtney was abducted was a certain car parked near the pond where her body was eventually discovered. The car belonged to Johnson. Deputies interviewed him. His explanations for how his car could have been there were enigmatic, to say the least. Johnson told the deputies that if “someone say they saw my car over there, I can’t say they didn’t see it, but I am saying I wasn’t over there. I know I wasn’t over there.”

“Have you ever been arrested?” one of the interviewing officers asked.

“Yes,” he said, and then offered that it had been for a sex offense – breaking into an elderly woman’s house and attempting to sexually assault her. Shortly

after Johnson provided blood and hair samples, though, Hayne’s and West’s findings implicated Brooks, and Johnson was dropped as a suspect.

By the time Brooks went to trial, Johnson had been involved in another incident. On June 18, 1991, Verlinda Monroe had fallen asleep with her clothes on in her bedroom in Crawford, Mississippi. (Crawford is a small town just off of Highway 45, about fifteen miles north of Macon.) Moore was in her twenties and lived in the house with her brother, who worked at Bryan Foods, a nearby chicken processing plant. At about two in the morning, Monroe woke up because she felt something on her stomach. When she opened her eyes she could see a figure standing over top of her. She screamed and the individual ran off and out of the back door. Monroe’s brother, who was asleep in the next room, woke up and turned on the lights. He saw a figure heading out the back door and gave chase but couldn’t catch him. Monroe noticed that her pants had been unbuttoned and zipped down and that she had scratches in her pubic area. Though her brother was not able to catch the intruder he did get a glimpse of his face. He recognized him as a co-worker from Bryan Foods. It was Justin Johnson.138 Johnson was arrested that same day and charged with sexual assault, a felony that, unlike the earlier incident that had reduced to a non-serious misdemeanor charge, exposed

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him to serious jail time. Johnson was able to make bail and was released while he waited for the grand jury to return an indictment.\textsuperscript{139}

Johnson was a plausible alternate suspect and critical to Brooks’ defense theory. He was also affirmative evidence of law enforcement’s rush to judgment. Police and prosecutors had traded a known sex offender whose car was in the area of the pond the night Courtney disappeared and who could provide no reasonable explanation of why it – and he – had been there for two quacks peddling their pseudo-science. But there was a problem: Brooks’ attorney had also been appointed by the court to represent Johnson in his two sex assault cases.

This type of conflict of interest is not uncommon, especially in smaller jurisdictions where the usual suspects are appointed to represent indigent defendants charged with crimes. Brooks’ and Johnson’s attorney was required to provide both of them a professional standard of care that included a duty of loyalty and confidentiality that he could not possibly provide to both. That the conflict of interest existed was obvious – Brooks’ lawyer recognized that it “had jumped out of the book at . . . [him]”.\textsuperscript{140} What escaped him, and everyone else, was how it should be handled.

Instead of keeping the conflict confidential – which was especially critical in his ongoing representation of Johnson – Brooks’ lawyer informed Brooks in a

\textsuperscript{139} Lowndes County, Mississippi Notice to Commissioner of the Department of Corrections, Cause No. 12,385 (May 21, 1992). Johnson would later serve six years in the Mississippi State Penitentiary. Though the judge sentenced Johnson to a ten year term, four of which were suspended and to be served on probation, a clerical error listed the sentence as four years with six suspended.

\textsuperscript{140} Brooks Trans. at 69.
letter that he represented both Brooks and Johnson, and then sent copies of the letter to the prosecutor and to the judge. The import of the conflict – that Johnson was a central part of Brooks’ defense – never occurred to him and, as it turned out, to anyone else either. Instead of correcting Brooks’ lawyer’s professional and ethical gaffes, the trial judge turned to Brooks – in open court and minutes before his trial commenced – and asked if Brooks had had a chance to read the letter. Brooks said that he had. His attorneys told the court that they had each spoken with Brooks and fully explained the ramifications of the conflict. Leaving aside the fact that Brooks’ attorneys were the last people that should have been discussing the substance of their conflict with him, precisely what they had discussed was never articulated. Instead, the following colloquy took place between Brooks and the court:

Court: You understand what . . . [your lawyer] has brought out, that he has represented some of these individuals [Johnson], is that correct?

Brooks: Yes, sir.

Court: And you understand that he – do you have any objection to him continuing the work as your co-counsel with . . . [your other attorney] in this case?

Brooks: No, sir.

Court: And you feel that he’s looking out for your best interest and he’s protecting your rights here today?

Brooks: Yes, sir.

Court: And you know what you’re doing?
Brooks: Yes, sir.\textsuperscript{141}

Brewer’s case – like Brooks’ – would have also been aided by evidence that someone else had the motive, opportunity and ability to commit the offense. And like Brooks’ case, Brewer’s attorneys did not have to look far. Police reports provided to Brewer’s lawyers included police reports listing Justin Johnson as a suspect. His inclusion made intuitive sense. He lived a stone’s throw from Brewer’s house. At the time of Christine’s murder he had not yet pleaded guilty to the sexual assault in the trailer. He was out on bail.

After his detention as a suspect in Brewer’s case, Johnson underwent a medical examination to check for lacerations or bruising – presumably because anyone who had cut through the thick brush to deposit Christine’s body in the creek would have minor cuts and scrapes.\textsuperscript{142} Of all the examined suspects, including Brewer, Johnson was the only one who had any sort of noticeable wounds. A nurse who observed his arms noted superficial scratches. When asked the cause, Johnson explained that they were “self-inflicted.”\textsuperscript{143} Law enforcement never followed-up. Though the report was in the pre-trial discovery provided to defense counsel, Brewer’s lawyers didn’t either.

During the penalty phase of Brewer’s trial, his lawyers called his mother, Annie Brewer, as a witness. She begged the jury to spare her son’s life: “Please,
please, sir, and please, ma'am, don’t put the death penalty on Kenny. Please. I’m askin’, please. Please, don’t.” When Allgood cross-examined her on her plea, he asked her whether there had been “any three year old girls sexually assaulted, killed and dumped in creeks in Noxubee County” since her son had been locked up. She had to agree that there hadn’t been.

What she had no way of knowing, but that Allgood and law enforcement did, was that Justin Albert Johnson, with Levon Brooks’ lawyer standing beside him, had pleaded guilty shortly after Christine Jackson’s murder to the sexual assault of Verlinda Monroe in her trailer in Crawford. He could not have assaulted anymore Noxubee victims even had he wanted to – he was serving a sentence at Parchman Penitentiary. But he had been out when Christine was murdered. And had anyone bothered to look at the court jackets kept as a public record in the clerk’s office, they would have discovered something else of interest: receipts for the hospital’s examinations in both the Brooks case and Brewer cases. They had one name in common: Justin Albert Johnson.

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After Innocence project lawyers asked that DNA from Brewer’s case be tested, the request was granted, and in the late fall of 2007, Noxubee County law enforcement sent several boxes of physical evidence to a lab in California. The evidence included material from Brooks’ case, too, because Brewer’s lawyers were of the mind that the true perpetrator had likely committed both crimes. The lab began its testing on the semen from Brewer’s case and quickly identified a single
profile – a profile that did not match Brewer. That wasn’t enough for Allgood, however. Because he remained convinced of Brewer’s involvement, it was imperative that the source be identified, if at all possible.

The cheek swabs taken from the suspects in Brewer’s case were still testable. So the lab went to work on those. After locating useable DNA, he began his analyses. “Part of my role in the investigations is to take the data and go through and analyze it and inter-compare the samples,” he explains. “And so, I’m sitting at my computer and I’m going through this data – and, can I use a four-letter word? – I’m sitting at my computer and I’m going ‘Holy Shit!’ we’ve identified the sperm source. It’s Justin Johnson.”

When Brewer’s attorneys were notified of the results, they kept the news from Allgood and Noxubee law enforcement and turned instead to the Mississippi Attorney General’s office for help. Investigators traveled from their offices in Jackson to Pilgrim’s Rest and turned left about a half mile after passing Kennedy.

There had been earlier testing of the DNA in Brewer’s case. It had revealed that Brewer was not the source of the sperm. The lab that had conducted the testing, however, claimed that there were two contributors. Forrest Allgood, however, because of his continued belief in law enforcement’s claim that there was no sign of forced entry, decided to re-prosecute Brewer for capital murder and once again seek the death penalty. Allgood’s case was buttressed by a jailhouse snitch, who claimed that Brewer had told him that he had not committed the sexual assault, but that two other individuals had. Brewer’s role, according to the snitch’s improbable claims, was to have aided the perpetrators – though much of the time he had done so while they held a gun to his head. The two teens who had visited the house seemed like the likely culprits. Allgood had their DNA tested. They were excluded. Allgood continued his case against Brewer under the theory that Brewer had to have played some direct role in Christine’s abduction and murder. It is a theory that he still maintains. He never re-opened the case.

Interview with Dr. Edward Blake (June 26, 2009) (on file with author).
and Gloria Jackson’s old house. Less than a quarter mile later they pulled up beside small, dark green cottage. Some of the agents covered the rear of the house while two others knocked on the front door. Justin Johnson answered. After being confronted with the DNA test results and placed under arrest, he agreed to return with the investigators to the crime scenes.

At Brewer’s old house he showed them how he had walked up to the bedroom window, quietly opened it and reached in and taken Christine, sexually assaulted her, strangled and thrown her, still alive, into the creek. He admitted driving his car to Brooksville and parking near the pond. He described walking to Courtney’s house, through the unlocked door, past the sleeping figure of Courtney’s uncle, and into the bedroom. He had acted alone, he said. He didn’t know Levon Brooks or Kennedy Brewer. He didn’t bite either girl.\footnote{Interview by Mississippi law enforcement officer with Justin Albert Johnson (Feb. 5 & 7, 2008) (on file with author).}

Brewer was exonerated in Noxubee County Circuit Court in February, 2008. Levon Brooks a few weeks later – in early March. Together, the two had spent almost thirty years imprisoned for crimes that they did not commit.

**EPILOGUE**

A recent study by the American Bar Association showed that 80% of respondents, representative of national race and gender demographics, agreed with the following proposition: “[I]n spite of its problems, the American justice...
That view is understandable. On the face of it, our criminal justice system is replete with guarantees that are the envy of much of the world.

Take *Gideon* itself for example. It is commonly and correctly understood that the case stands for the right to the assistance of a lawyer in a criminal trial. *Strickland v. Washington*, *Gideon*’s appellate counterpart, is supposed to ensure *Gideon*’s promise by affording rigorous review of the effective assistance of the counsel when a convicted defendant appeals his trial counsel’s performance. As a concept, *Gideon* was in full force in Brooks’ and Brewer’s case. They were each

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147 American Bar Association Report on Perceptions U.S. Justice System, 62 ALB. L. REV. 1307 (1999), available at http://www.abanow.org/wordpress/wp-content/files_flutter/1269460858_20_1_1_7.Upload_File.pdf. One of the more recent iterations of this trope comes up in conversations about the prosecution of the War on Terror. Opponents to the war, particularly as it was practiced by the Bush administration, argue that the United States’ long-standing commitment to human rights and due process was dishonored by the Bush Administration’s approach that, among other things, sacrificed fundamental constitutional guarantees in order that convictions of dangerous terrorists could occur more expeditiously. See, James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & Soc. Change 331 (2009). As Forman writes, Neal Katyal, now acting assistant solicitor general, but who at one point represented Salim Hamdan, Osama bin Laden’s driver, has described explaining to his client at their first meeting that the “reason that I am here is that my parents came to America with eight dollars in their pocket. . . . They came to America for a simple reason: they could land on its shores and they’d be treated fairly and their children would be treated fairly. And when the president issued this military order, which said ‘If you’re one of them, if you’re a green card holder . . . (as Katyal’s parents were) or if you’re a foreigner . . . you get the beat up Chevy version of justice. . . . But if you’re an American citizen, accused of the most heinous crime imaginable, the detonation of a weapon of mass destruction, you get the Gold Standard. ‘You get the American Civilian Trial.” *Id.* at 331-32 (quoting Neal Katyal, Paul & Patricia Saunders Professor of Nat’l Sec. Law, Georgetown Univ. LawCtr., Investiture and Inaugural Lecture for the Center on National Security and the Law: The Principled War on Terror (Apr. 10, 2008), http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=543.
immediately appointed lawyers who showed up and acted the part. One could argue that much of the blame – maybe most of it – for Brooks’ and Brewer’s wrongful convictions falls other than on their defense lawyers, but their lawyers’ role was certainly a key component and, maybe more importantly as a fundamental, equitable matter, their lawyers were really not present in any meaningful way.

Leaving aside the reticence of reviewing courts to grant convicted prisoners’ *Strickland* claims, Justice Thurgood Marshall, who dissented in *Strickland*, anticipated the practical difficulties that reviewing courts would face in determining whether there had been constitutional error on the part of trial counsel: “[I]t is often very difficult to tell whether a defendant convicted after a

148 According to the Court, trial lawyers’ actions are to be given great deference and presumed to fall “within the wide range of reasonable professional assistance;” in almost every case gainsaying lawyers’ conduct is difficult, most actions being considered “sound trial strategy” and not ineffective assistance. Take, for example, the legions of lawyers who slept during trial, see People v. Tippins, 570 N.Y.S. 2d 581 (1991); see also Burdine v. Johnson, 231 F.3d 950 (5th Cir. 2000) (vacated and remanded); Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001), (rehearing en banc, affirmed); Cockrell v. Burdine, 122 S. Ct. 2347 (2002), (cert. denied). Although the District Court in *Burdine* had found that “[a sleeping counsel is equivalent to no counsel at all,” Burdine v. Johnson, 66 F.Supp. 2d 854, 866 (S.D. Tex. 1999) (quoting Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984)), a Fifth Circuit panel in a two to one decision reversed because the trial record did not indicated when court-appointed attorney Joe Frank Cannon slept, so the court could not presume that his sleeping affected the trial. In the en banc decision, the Fifth Circuit reversed Burdine’s capital murder conviction. Still, it is important to note that five of fourteen federal appeals court judges believed that a lawyer sleeping during a capital murder case is not per se ineffective under *Strickland* and would have allowed Burdine’s execution to go forward, or used illegal drugs, see People v. Badia, 552 N.Y.S.2d 439 (1990), or allowed clients to wear the same clothes in court that the perpetrator was alleged to have worn at the crime, see People v. Murphy, 464 N.Y.S.2d 882 (1983),
trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. . . . The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. 149 His observations were precisely the difficulty that Brooks’ and Brewer’s trial lawyers created and that their appellate attorneys would have had to overcome if they had raised claims of ineffective assistance of counsel. Assuming that they had even raised them. Brewer’s lead appellate lawyer, who has probably been sanctioned by the State Bar more times than any other lawyer in the modern era, 150 was hardly the type to raise the issue or undertake the necessary investigation to support it. In Brooks’ case, raising a claim would have required Brooks’ lawyer to fall on his sword: his trial lawyer and appellate lawyer were one and the same.

149 Strickland 466 U.S. at 711, (Marshall, J., dissenting) (footnote omitted).
150 See, e.g., Mississippi State Bar v. Burdine, No. 89-B-164 (Mar. 14, 1990); Mississippi State Bar v. Burdine, No. 96-135-1, (Apr. 18, 1997); Amended Complaint, Mississippi State Bar v. Burdine, No. 2005-B-1003 (June 6, 2005); Mississippi State Bar v. Burdine, No. 2008-B-0930 (Oct. 28, 2008). The record would suggest that he saves his most egregious performances for the most serious cases. In reviewing one of his trials, the Mississippi Supreme Court described the attorney’s performance the case this way: his efforts, or lack thereof, were “descriptive of the failure . . . of the defense attorney to perform any act basic to the defense of the accused.” Triplett v. State, 666 So. 2d 1356 (Miss.1995). In another capital murder trial, the same attorney failed to interview or call witnesses on behalf of his client during the penalty phase of the death penalty phase. His opening statement was eight-lines long. His client was sentenced to death. Manning v. State, 929 So. 2d 885 (Miss. 2006).
In fact, in the close to thirty years since Strickland, findings of ineffective assistance of counsel have been extraordinarily rare, and, as far as Supreme Court cases on the subject are concerned, nearly nonexistent. In all of the criminal cases that the Court has been asked to review – not including those involving murder charges, where ineffective assistance of counsel was the main issue – the Court has refused consideration. In capital cases, the Supreme Court has ruled defense counsel’s conduct ineffective only three times. Criminal defense in this country is almost exclusively indigent criminal defense, and so the Supreme Court’s Strickland admonitions fall almost exclusively on poor criminal defendants who are at the mercy of lawyers whose trial skills are, like Brooks’ and Brewer’s lawyers, grossly deficient but still presumed to be sound.

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151 Some might point out that Padilla v. United States, 132 S.Ct. 254 (2011) changes this calculus slightly because the issue – a lawyer’s failure to advise a client about immigration consequences of a plea offer – actually considers for the first time a lawyer’s advisory role vis a vis a client, as opposed to a purely outcome determinative approach. Even if this view of Padilla is accurate, the overall approach to the lawyering process is not viewed any differently by the Court, nor is the test to determine whether counsel was ineffective; see, Abbe Smith, Strickland v. Washington: Gutting Gideon and Providing Cover for Incompetent Counsel, WE DISSENT: TALKING BACK TO THE REHNQUIST COURT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS 188-226 (2009). See also Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1858 (1994).

The likelihood of any court granting Brooks or Brewer relief from their convictions based even on a claim of actual innocence was distressingly thin. To begin with, after *Herrera v. Collins*, most post-conviction exonerees never even raised a claim of innocence because doing so seemed fruitless. The Supreme Court has denied thirty petitions for certiorari filed by actually innocent exonerees. In one case, Larry Youngblood’s, the Court granted certiorari but denied relief for his claim that law enforcement had failed to properly preserve biological evidence that could, if tested, have proven his claim of innocence.

Youngblood had been charged and convicted for the abduction and rape of a ten year-old boy from a carnival grounds in Pima County, Arizona. The boy was taken to a hospital where semen samples and his clothing were collected as

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153 *Herrera versus Collins*, 506 U.S. 390 (1993). *Herrera* asked a simple question of the Supreme Court: “whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death.” Chief Justice William Rehnquist, writing for the majority determined that the execution of an innocent person, fairly tried, would not offend any fundamental principle of justice “rooted in the traditions and conscience of [the American] people.” *Id.* at 411. The majority noted the “elemental appeal” of Herrera’s question but took pains right away to underscore its understanding of Herrera’s posture as a convicted criminal. In short, the Court wrote that in the eyes of the law Herrera did “not come before the Court as one who is ‘innocent,’ but on the contrary as one who has been convicted by due process of law of two brutal murders.”


Based on the victim’s of the assailant as a man with one disfigured eye, Youngblood was charged with the crime. Youngblood maintained his innocence, but no forensic testing was conducted on the evidence because the police had improperly stored the evidence and allowed it to degrade. Youngblood was convicted and sentenced to a lengthy prison term.156

On appeal, Youngblood argued that he should be allowed post-conviction testing because an expert witnesses at his trial had testified that, had it been stored correctly, test results on the evidence might have conclusively demonstrated his innocence. The Court disagreed. Absent bad faith destruction of evidence, the Court wrote, law enforcement had no duty to preserve evidence in criminal prosecutions. In Youngblood’s case, the “failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent.”157

Not only did the decision affect Youngblood, but it offered no incentive for law enforcement to adopt procedures to ensure preservation of critically important evidence.158 Fortunately for Youngblood, in 2000, at the request if his attorneys, new DNA technology permitted the testing of the damaged evidence. The results exonerated Youngblood, and he was released. Early the following year, the DNA profile that had been generated was found to match the DNA profile of Walter

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157 Id. at 334.
Cruise, who, blind in one eye, was then serving time in Texas on unrelated charges. In 2002 Cruise was convicted of the offense and sentenced to twenty-four years in prison.

For me, it is the broader context of the Brooks and Brewer cases that holds the most resonance. Brooks’ and Brewer’s lives spanned some of the most turbulent and troubling incidents in our nation’s history, as well as the efforts – and successes – that envisioned something far different and better. The prediction that Levon Brooks, born in 1959 in a tenant shack on a plantation overseen by one of Mississippi’s most strident racists, would one day be caught up in the criminal justice system would not have been a surprising one. The prediction that his arrest and prosecution would have comported with the Constitution – that his trial would have been “full and fair,” and not only deracinated but judged by a jury of his peers who themselves had made momentous personal sacrifices to sit in judgment – that would have seemed a long shot. But it happened. For Brewer, too. And yet the result was no different: The only thing that separates what happened to Brooks and Brewer from an old-style lynching is semantics. What happened to them occurred inside and with the blessing – and not outside and without – of the legal system. Which makes it worse.

Recent discussion and scholarship – some of it very contemporary – have employed the term “Jim Crow” to describe today’s criminal justice system and its disproportionate effects on blacks. In her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander argues that “mass
incarceration in the United States . . . [has] in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.” Alexander describes not just the sheer numbers of incarcerated individuals in this country, and the disproportionate jailing of blacks, particularly for drug offenses where virtually every study indicates that whites commit a far larger portion of criminal drug offenses, but she also makes a good case for what she refers to as the “birdcage” metaphor to make clearer the extent of the destructive effects. That cage consists not simply of the incarceration itself, but also includes the cascading series of collateral effects that consign individuals caught in the criminal justice system to a lifetime of second-class citizenship.


160 Of the more than 9.25 million imprisoned in the world, 2.19 million are in the United States, making it the leader in per capita incarceration, close to 738 per 100,000 of the national population. See ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, KING’S COLL. LONDON WORLD WORLD PRISON POPULATION LIST 1 (8th ed. 2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf.

161 Alexander, supra note 9, at 96-98.

162 Alexander actually borrows the term herself from theorists whose school of thought is referred to as “structural racism.” See, e.g., IRIS MARILYN YOUNG, INCLUSION AND DEMOCRACY (New York: Oxford University Press, 2000).
Take, for example, the right to vote, remain eligible for health and welfare benefits, qualify for public housing, student loans, or a host of even subsistence-level jobs. Each of these – some of which are so basic to

163 See, Forman, supra note 9, at n.26, referencing THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011) available at http://sentencingproject.org/doc/publications/fd.bs_fdlawsinusMar11.pdf (describing felon disenfranchisement laws state-by-state). Thirteen states bar convicted felons from voting during their period of incarceration. Id. Most others include the prohibition during probation, parole or both. Id. In some states, disenfranchisement may last forever. Id.

164 See, Forman, supra note 9, at n.27, noting that 28 U.S.C. § 1865(b)(5) (2006) excludes persons convicted of felonies punishable by at least one year in prison and those with pending felony charges against them from federal grand and petit jury service, unless the person’s civil rights have been restored.

165 See, Forman, supra, note 9, at n.28, discussing Temporary Assistance for Needy Families (TANF). Section 115 of the 1996 welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act, that prohibits anyone convicted of a drug-related felony from receiving Temporary Assistance.

166 See, Forman, supra note 9, at n.30, discussing the fact that federal law requires permanent disqualification of individuals who are subject to a lifetime sex offender registration requirement, 42 U.S.C. § 13663 (2006), and individuals convicted of manufacturing or producing methamphetamine on public housing premises, 42 U.S.C. § 1437n (2006). In addition, the Department of Housing and Urban Development (HUD) requires, among other penalties, that Public Housing Authorities establish standards that prohibit admission to public housing if any household member is using or has recently used illegal drugs, or if there is reasonable cause to suspect that an individual’s illegal behavior will threaten the health and safety of the premises. 24 C.F.R. § 960.204 (2010).


168 See, Forman, supra note 9, at n.32, explaining that approximately 20% of the national workforce possesses an occupational license of some type. Statutory
our ability to survive in the world, much less establish the bases of a productive
life – are effectively placed beyond the reach of anyone with a criminal record.
These collateral consequences are not enumerated in state or federal criminal
codes, but they are in many ways more damaging than the statutorily prescribed
sentence for the underlying offense.

Alexander is not wrong about these consequences and their debilitating
effects on all of us. However, referring to the era and effects as “The New Jim
Crow” is too atavistic. It mostly misses just how pernicious and cynical the system
has become. Though current state and federal criminal codes have become
increasingly punitive, both in the conduct they cover and law enforcement’s
prosecution of them, there is nothing dishonest in their purpose or the
justification for public policy supporting them. This is true even though there are
strong arguments to be made that certain criminalized conduct and the
enforcement of it have a disproportionate, likely even discriminatory, effect on
certain groups, particularly blacks.\footnote{John Schwartz, Drug Terms Reduced, Freeing Prisoners, New York Times, Nov. 1, 2011, discussing the Fair Sentencing Act of 2010, Pub. L. No. 111-220, which reduced significantly the sentencing disparity between crack and powder cocaine. And, as Professor James Forman has often remarked, “even if . . . [all] drug offenders were released tomorrow, the United States would still have the world's largest prison system.” Forman, supra note 9, at
requirements for obtaining occupational licenses vary from state to state, but a
criminal conviction will bar a license in many.}

The mechanisms that worked to ensnare Brooks and Brewer, though, were
in many ways the opposite. They were envisioned as part of a multi-faceted effort
to defeat inequality and to make equal justice a reality for all. On the surface,
they did that. They were the reason why Brooks and Brewer both received appointed counsel; why no one referred to them as “niggers” during the trial; and why they received appellate review of their convictions. They were also why each was indicted and then judged by a jury of their peers; why the verdicts were the result of true and honest deliberation as opposed to simply a bigoted effort to ensure the status quo. They were also why the law enforcement officers who investigated the cases were black; why the county has a black state representative; and why Emory University historian Joseph Crespino, a native of Noxubee and author of a seminal work on Mississippi politics,\(^\text{170}\) said in a recent *New York Times* article about race and politics in the New South that “[a] new generation’s come up. You never would have had white folks supporting a black candidate 20 years ago. It’s a notable change, a big, interesting change for the long term.”\(^\text{171}\)

But on another level these things are nothing but falseness and absurdity. Brooks was convicted of a crime that he did not commit. A homicidal pedophile remained at large in the community long enough to assault other victims and murder Christine Jackson, a crime that Kennedy Brewer nearly paid for with his life. The juries in both cases, in some ways the physical embodiment of so much that has gone right with race and class in a place that for so long had been a place where everything had gone wrong, walked out of the courthouse after their service

\(^{170}\) *In Search of Another Country: Mississippi and the Conservative Counterrevolution*, supra note 82.

believing in that they had participated in rendering just verdicts. They hadn’t. Worse, they were complicit in a contemporary version of the same old story. In other words, these things that we believe are hallmarks of fairness and guarantors of justice, that we rely on to ease or consciences and justify our actions, are in reality employed to mask a much more sinister effort: the cynical manipulation of what were once true gains in due process and equal protection into measurable false promise and palpable human tragedy. Over time, the efforts to rid the system of bias and bigotry – of “Jim Crow” – have been used instead to mask the fact that they are now built into its very structure and doctrine.

And yet, because we define ourselves as a society that values fairness and decency, the specter of a wrongful conviction remains at some fundamental level deeply disturbing to us. No matter what a majority of the Supreme Court or its adherents might say to rationalize, innocence cases, wrongful convictions – and the processes that caused them – are not us. At some point, we will no longer find it intellectually honest to arrogate to ourselves the false comfort that comes from believing simultaneously that ours is a system of justice unmatched in its guarantees of fairness with our sincere concern and sympathy for people like Levon Brooks and Kennedy Brewer. But until we get to that point, the prominent players in these cases will continue to produce this peculiarly American brand of justice, day after day, case after case. The innocent and guilty will suffer alike, the circle of victims will continue to grow larger, and our rationalization more complex. There will be no reckoning, no accountability. Or, to the extent that
there is, it will be the kind that exists here: Of all the people who were involved, the one who has the most at stake – his life – is the only one who has come clean. When law enforcement officers surrounded Justin Johnson’s house in early February of 2008, he identified himself and admitted to being the perpetrator in both cases.

For that, Forrest Allgood has announced, he will seek the death penalty.