



Christopher Ochoa

On October 24, 1988, 20-year-old Nancy DePriest was working alone in a Pizza Hut restaurant in Austin, Texas, when she was tied up, raped and murdered.

Days later, an employee at the restaurant saw two men, Christopher Ochoa, 22, and Richard Danziger, 18, eating pizza, drinking beer in the restaurant and seemingly raising toasts in DePriest's honor.

Because police believed that a master key had been used to gain entrance to the restaurant and because their behavior seemed suspicious, the two men, roommates who worked at another Austin area Pizza Hut, became the lead suspects.

In November, police questioned both men and Danziger denied having anything to do with the crime, although, according to police, he seemed to know details about the crime that were not public knowledge.

Ochoa was interrogated separately and police said he confessed, saying that Danziger shot DePriest and that both men had raped her.

Ochoa, who was facing the death penalty, accepted an offer from the prosecution and pleaded guilty to murder in May 1989. He agreed to testify against Danziger at trial.

Danziger went to trial in Travis County in January 1990. Called to the witness stand, Ochoa contradicted his confession, saying that he, not Danziger, had shot DePriest.

Ochoa testified that the two had planned to rob the Pizza Hut, had tied up and raped DePriest, and that he shot her because she recognized him. He testified that he and Danziger sexually assaulted the victim eight times.

The only forensic evidence that linked Danziger to the crime was a pubic hair found near the blood in the restaurant that was said to be microscopically consistent with Danziger's pubic hair.

A lab analyst from the Texas Department of Public Safety also testified that semen was detected on the vaginal swab from the rape kit. The blood type detected from this sample was similar to the blood types of Danziger and the victim.

In fact, because the tests fail to reveal a blood type dissimilar to a victim, no potential source of the semen could be excluded because the victim's blood group markers could have "masked" the perpetrator.

Danziger presented an alibi defense, claiming to have been with his girlfriend that night.

On February 1, 1990, Danziger was convicted of rape. Both men were sentenced to life in prison.

State:	Texas
County:	Travis
Most Serious Crime:	Murder
Additional Convictions:	Rape
Reported Crime Date:	1988
Convicted:	1989
Exonerated:	2002
Sentence:	Life
Race:	Hispanic
Sex:	Male
Age:	22
Contributing Factors:	False Confession, Official Misconduct
Did DNA evidence contribute to the exoneration?	Yes
:	

In February 1998, Achim Josef Marino, a convict who was serving three life sentences in a Texas prison for aggravated robbery – and who had become a born-again Christian – wrote a letter to Gov. George W. Bush. It began: “Re: Murder Confession.”

In the letter, Marino said “my conscience sickens me” because he alone raped and murdered DePriest. Danziger and Ochoa were not involved.

“I tell you this, sir,” wrote Marino. “I did this awful crime and I was alone.”

Marino said evidence tying him to the crime—including DePriest’s keys—could be found at his parents’ home. Marino said he had begun writing and confessing to the police in 1996, but after getting no response, was appealing to Bush to take action.

After the police received another letter from Marino that contained a detailed description of the scene, they began re-investigating. Officers went to his parents’ home and found the keys and other evidence, including bank pouches and a pistol.

Investigators approached both Danziger and Ochoa again. By then Danziger was housed in a mental institution because he had sustained severe and permanent brain damage after he was attacked by another inmate in prison. Ochoa, who later said he was still intimidated by the police who interrogated him, told the same story he had told at trial.

In June 1999, Ochoa reached out to the Wisconsin Innocence Project, headed by Keith Findley and John Pray. Students there began investigating his claim of innocence.

In November 2000, DNA tests on the semen recovered from the victim excluded Ochoa and Danziger, and matched Marino DNA.

Ochoa was released on bond January 16, 2001. Danziger was released on March 22, 2001. Both were exonerated on February 6, 2002.

Both men later filed wrongful conviction lawsuits against Travis County and the City of Austin.

Danziger, who requires lifelong care due to his brain damage, received \$9 million from Austin, \$1 million from Travis County and \$500,000 from Ochoa for wrongfully implicating him in the crime. Ochoa received \$5.3 million from the City of Austin.

– *Maurice Possley*

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project of the University of the Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law.

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No. 08-6

In the
Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL
DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF *AMICI CURIAE* OF JEANETTE POPP,
JENNIFER THOMPSON-CANNINO, MELINDA
ELKINS, TRACY KANELLOPOULOS, STACY
FIERGE, MICHELE MALLIN, AND MARK
TOKARSKI IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI*¹

Amici are individual crime victims or family members of crime victims whose lives have been profoundly impacted—not only by the crimes perpetrated against them or their loved ones, but by the results of post-conviction DNA testing. Because the interests of other people impacted by crime are likely to be affected by the resolution of this case, *amici* submit this brief to offer this Court a view of the ways in which post-conviction DNA analysis serves and supports victims' rights.

SUMMARY OF ARGUMENT

The federal government and all fifty states have passed legislation recognizing the rights of crime victims. This Court has likewise recognized that the finality of convictions is part of the moral dimension of the criminal law that is shared by victims and the state. Underlying that moral dimension is the bedrock principle that innocent defendants should not be punished for crimes they did not commit.

Neither the government nor the victims of crime have any interest in punishing the innocent. DNA testing is a revolutionary truth-seeking tool with the power to determine innocence or guilt and to provide victims, defendants, and society with finality. *Amici* have all suffered in some way at the hands of

¹ The parties have consented to the filing of amicus briefs in this case and filed consent letters with the Clerk. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

criminals, but they have also experienced the power of post-conviction DNA testing to rebalance the scales of justice.

The stories of *amici* provide a tapestry of the real-life experiences of victims and defendants who have been impacted by post-conviction DNA testing. It is against this human backdrop—not in the realm of the hypothetical—that the core issues of finality, truth, and justice should be evaluated in this case.

ARGUMENT

I. DNA Testing Provides A Gold Standard For Victims to Know That The Moral Judgment Of A Criminal Conviction Has Been Meted Out On The Guilty Party.

All fifty states and the federal government have enacted some form of victims' rights legislation. See Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) (listing victims' rights statutes). Thirty-two states have enshrined victims' rights in their constitutions. *Id.* at 527 n.14. While the exact contours of these provisions differ, they represent a fundamental recognition of the role of the crime victim in the criminal justice system. Although none of these laws specifically provides crime victims with the right to have post-conviction DNA testing conducted, such testing is consistent with the rights of crime victims, including their right to be protected from further harm from the persons who actually victimized them, and their right to be treated with fairness and respect for their personal dignity.

This Court has noted that the finality of criminal proceedings has a “moral dimension” that is

often shared by the state and the victims of crime. *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). “Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the ‘powerful and legitimate interest in punishing the guilty[.]’” *Id.* (internal citations omitted).

Satisfying this moral interest depends on a fundamental, yet simple condition—that the defendant who is punished is not factually innocent of the crime charged. “[N]o one, regardless of his political, philosophical, or jurisprudential disposition, should otherwise be troubled that a person who was convicted in accordance with law might thereafter be set free, either by the executive or by the courts, because of evidence that provides absolute proof that he did not in fact commit the crime for which he was convicted.” *Harvey v. Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). Neither the state nor the victims of crime can claim any legitimate interest in inflicting punishment on factually-innocent persons. *Cf. Herrera v. Collins*, 506 U.S. 390, 417 (1993) (recognizing “that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional”); *id.* at 420 (same) (O’Connor, J., concurring).

Twenty years ago, a New York Court recognized that “[DNA testing] constitute[s] the single greatest advance in the ‘search for truth,’ and the goal of convicting the guilty and acquitting the innocent,

since the advent of cross-examination.” *People v. Wesley*, 533 N.Y.S. 2d 643, 644 (Albany County Ct. 1988). The state of the art has made significant progress in the last two decades. It allows an effectively unique profile to be generated from even the smallest and most degraded of samples. This technology is different from all that preceded it, in that it is capable of discerning the essential facts to “a practical certainty.” *Harvey*, 285 F.3d at 305 & n.1 (Luttig, J., respecting the denial of rehearing en banc). Victims of crime should be entitled to the greatest degree of certainty that society can muster.

II. The Experiences Of *Amici* Demonstrate The Power of Post-Conviction DNA Testing To Ensure That Justice Is Served And To Provide Crime Victims With Closure And Finality.

Victims of crime have a profound interest that those being punished are actually guilty of the crimes for which they were convicted. The life experiences of *amici* demonstrate the salience of this point.

Melinda Elkins saw her husband spend seven years in prison after he was wrongfully convicted of the rape and murder of her mother and the rape of her niece.

Tracy Kanellopoulos was raped by a man with a history of rape who remained at large because an innocent man was wrongly convicted for his crimes.

Jennifer Thompson-Cannino twice testified against an innocent man she was convinced had raped her. She was victimized not only by the crime against her, but by her own guilt when she learned that she had misidentified her assailant.

Jeanette Popp thought the men who raped and murdered her daughter had been tried, convicted, and sent to prison. She suffered through the experience of the murder trial, believing justice had been done, only to have her world turned upside down when the real killer was found.

Stacy Fierge identified the man she believed had raped her. He was convicted and sent to prison. Although the defendant claimed he was the victim of mistaken identity, post-conviction DNA testing ultimately confirmed that justice had been done.

In the first four examples profiled in this brief, post-conviction DNA testing led to the exoneration of a falsely convicted individual and to the discovery of the true perpetrator. In some cases the DNA testing vindicated a long-held belief in truth that was denied by the justice system, while in others the DNA testing overturned long-held beliefs that the right person or persons were being held to account for the crimes. In Ms. Fierge's case, post-conviction DNA testing confirmed that the right person had been convicted and laid to rest any doubt about mistaken identity.

Amici Michele Mallin and Mark Tokarski are also victims or family members of victims of violent crimes that led to the conviction of innocent persons who were ultimately exonerated by DNA testing. Although the guilty have not yet been brought to justice in these cases, DNA testing affords *amici* their best hope that moral justice will be properly brought to bear.

Victims deserve to participate in the criminal justice system confident that it will correct "fundamental miscarriage[s] of justice," see *Engle v.*

Isaac, 456 U.S. 107, 135 (1982), thus “guaranteeing that the ends of justice will be served in full.” *McCleskey v. Zant*, 499 U.S. 467, 495 (1991).

Each of these interests is fostered by the recognition of a fundamental due process right to post-conviction access to biological evidence for testing. And indeed, even when that evidence does not establish the convicted defendant’s innocence—or perhaps especially in those cases—DNA testing provides a gold standard for victims to know that the moral judgment inflicted by society’s punishment will be carried out on the correct person. This moral concern takes on an added dimension of finality in capital cases.

With the foregoing in mind, we set forth the personal stories of *amici* to illustrate the shared interest of crime victims in using post-conviction DNA testing to secure justice and true finality in their cases.

A. Melinda Elkins: *Endured Her Husband's False Conviction For The Rape And Murder Of Her Mother And The Rape Of Her Niece.*

On June 7, 1998, an assailant entered Judy Johnson's home in Barberton, Ohio.² He savagely beat her, raped her and strangled her to death. He also raped and beat her six-year-old granddaughter, Brooke Sutton,³ whom Ms. Johnson was babysitting. The assailant left Brooke for dead. Brooke told her mother that she recognized her attacker as her uncle, Clarence Elkins. Mr. Elkins was arrested.

Brooke's aunt, *amicus* Melinda Elkins, is the daughter of the murder victim and the wife of the accused. Ms. Elkins was certain of her husband's innocence and determined to find her mother's real killer. At her mother's graveside, Ms. Elkins made a promise: "Mom, I will fight for the rest of my life to figure this out and to find out who did this to you."

² Ms. Elkins's story received extensive coverage in the media. See, e.g., *Dateline NBC: Killer Instinct; Melinda Elkins Works Seven Years to Prove Her Husband's Innocence in Murder of Her Mother, Judy Johnson, and Rape of Her Niece, Brooke Sutton* (NBC television broadcast June 3, 2007).

³ Brooke Sutton is now sixteen years old. She has previously consented, both personally and through her guardian, to the use of her full name and picture in various news accounts. She has also appeared, using her full name on television. For these reasons, *amici* forgo the common practice of referring to a child victim with a pseudonym.

Mr. Elkins had alibi witnesses who could account for his whereabouts throughout the night of the attack. Moreover, the state conceded that there was no physical evidence connecting Mr. Elkins to the crime. Although biological evidence was collected from the crime scene and the victims' bodies, none of it matched Mr. Elkins. For example, mitochondrial DNA testing was conducted before trial on pubic hairs found on each of the victims' bodies. The tests ruled out Mr. Elkins as the source of the hairs.

Despite the absence of physical evidence linking him to the crimes, Mr. Elkins was convicted of murder, aggravated assault, and three counts of rape—primarily on the strength of Brooke's eyewitness identification. He was sentenced to life in prison.

Ms. Elkins eventually convinced prosecutors to release the DNA evidence to her for testing. Improvements in technology since 1998 allowed testing of evidence taken directly from Ms. Johnson's body and from Brooke's underwear. This more sensitive testing revealed additional DNA present in skin cells collected at the scene. The DNA did not match Mr. Elkins. Nevertheless, the court denied a motion for a retrial.

Shortly thereafter, Ms. Elkins read about the rape conviction of Earl Eugene Mann, one of Ms. Johnson's former neighbors. In a twist of fate, Mann was imprisoned in the same cell block as Mr. Elkins. Aware of his wife's suspicions that Mann was the true killer and rapist, Mr. Elkins kept an eye on Mann and waited for an opportunity to gather a DNA sample. That opportunity came when he saw Mann drop a cigarette butt.

Tests on the cigarette butt showed that Mann's DNA matched the DNA recovered from both Ms. Johnson's body and from Brooke's underwear. Mr. Elkins was eventually exonerated and released from prison on December 12, 2005. At a television press conference given on learning of her husband's exoneration, Ms. Elkins prayed for her mother: "We got him, Mom. You can rest in peace now." She then looked to the camera and said: "And I'd like to say to Earl Mann: We got you."

Mann ultimately pled guilty to aggravated murder, attempted murder, aggravated burglary and rape in connection with his crimes. He was sentenced to fifty-five years to life in prison.

Had the technology been available in 1998, an innocent man may never have been convicted. And had the DNA evidence remained out of reach in 2005, the criminal justice system would have failed the victim of the crime not once, but twice. Not only would Mr. Elkins still be in prison, but Mann—who raped at least three children *after* committing the rapes and murder in the Elkins case—would soon be free.

B. Tracy Kanellopoulos: *Raped Because The Wrong Man Was Sent To Prison.*

On July 31, 1981, a man in a cowboy hat approached a car that sat idling in the parking lot of an Atlanta Kentucky Fried Chicken. The man brandished a pistol and said to the woman sitting in the driver's seat, "Slide over or I'll blow your brains out." The man entered the car and forced the woman to drive to a remote part of Cobb County, Georgia. He beat her severely, raped her three times, stole the car and left her for dead on the side of the road.

In her initial interview with the police, the victim described her abductor as five-feet-seven-inches tall. But in a later photo array and live lineup, she was “fairly positive” when she identified six-foot-one-inch tall Robert Clark. At Clark’s trial, the victim testified that “I will never forget the face, the skin color and his voice.” Clark was convicted of rape, abduction, and armed robbery and sentenced to two life terms plus twenty years in prison.⁴

But Clark did not commit any of those crimes. Twenty-four years later, DNA testing cleared Clark, and implicated Floyd Antonio Arnold. While Clark was serving a twenty-five year sentence for Arnold’s crimes, Arnold committed numerous other crimes. Among those crimes was the rape of *amicus* Tracy Kanellopoulos in Fulton County, Georgia in 1993. Arnold committed another rape in DeKalb County in 1996. Both rapes were “cold cases” that were ultimately solved because of Clark’s efforts to secure DNA evidence to prove his innocence.

Had the DNA evidence been available and tested in 1981, Arnold likely would have been caught and imprisoned before he committed his other crimes. An innocent man would not have gone to

⁴ This case was covered extensively in the news media. See, e.g., Don Plummer, *A Free Man; Robert Clark Spent Nearly 25 Years Behind Bars for a Rape He Didn't Commit. He Knew He Was Innocent, and Now the Rest of the World Knows It, Too*, Atlanta J. Const., Dec. 9, 2005 at 1A; Bill Tropy & Bill Rankin, *A Crime, then a Tragedy; Twists in Rape Case Snared Wrong Man*, Atlanta J. Const., Dec. 11, 2005 at 1A.

prison. And Ms. Kanellopoulos would not have been raped.

C. Jeanette Popp: *Watched Two Innocent Men Go To Prison For Her Daughter's Rape and Murder.*

On October 24, 1988, in Austin, Texas, Nancy DePriest was raped and murdered at the Pizza Hut where she worked.⁵ She was twenty years old. A couple of weeks later, Christopher Ochoa and Richard Danziger (who worked at another area Pizza Hut) visited the restaurant where DePriest had been murdered. Danziger proposed a toast to DePriest and discussed the killing with a security guard. Pizza Hut employees alerted police, who approached Ochoa at work two days later. Ochoa willingly accompanied them to the police station.

After two days of interrogation and threats, and with the assistance of detectives, Ochoa gave a false confession. He admitted entering the Pizza Hut with Danziger, binding Ms. DePriest, and repeatedly raping her. Ochoa initially claimed that Danziger killed her but, after a polygraph test, Ochoa changed his story and claimed that he was the shooter.

Ochoa pled guilty and avoided the death penalty in return for his testimony against Danziger. His confession was corroborated by DNA tests linking semen collected from the crime with a Hispanic perpetrator. Ochoa testified and described the killing

⁵ This case has been the subject of numerous news articles. See, e.g., Jason Shepard, *Finding Justice*, Isthmus, May 12, 2006, at 13; Mark McDonald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002.

in grisly detail. The jury convicted Danziger and sentenced him to life in prison.

DePriest's mother, *amicus* Jeanette Popp, attended each day of Danziger's trial. After the conviction, she met with the jury and, as she put it: "I couldn't have thanked them any more for the justice they had given my child." Diane Jennings, *Mother of '88 Murder Victim Says Her Faith in Justice System Shattered after Exoneration*, Dallas Morning News, Feb. 24, 2008. She was certain that justice had been done, and "wouldn't have questioned the police or the prosecution . . . the evidence was so overwhelming, so overwhelming." *Id.*

As later events would demonstrate, however, the proceedings in the courtroom did not lead to justice for Ms. Popp, her daughter, or the defendants. Notwithstanding Ochoa's testimony, both Ochoa and Danziger were innocent of any involvement in the rape and murder of Ms. DePriest. In a further tragedy, not long after his conviction, Danziger was brutally attacked in prison. He survived, but lost part of his brain and is permanently disabled.

The real rapist and murderer was Achim Josef Marino, who had selected his victim at random as part of a satanic ritual. Marino—who was later sentenced to two life terms in prison for robbery—learned of Ochoa's and Danziger's story from a fellow inmate. In 1996, Marino wrote a letter to the police and to a newspaper confessing to the killing and informing them of the location of the handcuffs he had used. Two years later, Marino wrote to the district attorney's office and again confessed to Ms. DePriest's murder. Despite Marino's confession, Ochoa did not recant his prior testimony.

In 1999, however, Ochoa reached out to the Wisconsin Innocence Project, which located the DNA evidence from the 1988 crime scene. The district attorney's office tested the DNA and, in September 2000, notified Ochoa that the test results pointed to Marino as the culprit. In early 2001, both Ochoa and Danziger were released from prison.

Twelve years after her daughter's death, Ms. Popp was faced with the fact that the two men she thought had killed her daughter were innocent. She was understandably anguished that they had spent years in prison for a crime they did not commit—yet relieved that DNA testing had finally revealed the truth. Ms. Popp met with Ochoa's mother and accompanied her to his release. Ms. Popp said that her "heart was just filled with joy" when he was freed from prison. She also met with Marino, who apologized to her, but refused her request that he plead guilty so that she would not have to go through another trial over her daughter's rape and murder. Marino was subsequently tried, convicted and sentenced to life in prison.

Speaking about Ochoa and Danziger, Ms. Popp explained that "I knew we had done a horrible thing. I say 'we' even though I was not involved in sending them to prison. I somehow feel responsible." Henry Weinstein, *Freed Man Gives Lessons on False Confessions*, L.A. Times, June 21, 2006. Those feelings of tremendous guilt would have been even further compounded had Ochoa or Danziger been executed.

While post-conviction DNA testing could not prevent the brutal crimes perpetrated on Ms. DePriest, it provided Ms. Popp with the finality of

knowing that her daughter's true murderer would never kill again, and that justice had been done.

D. Jennifer Thompson-Cannino: Spent Eleven Years Believing That An Innocent Man Raped Her.

In July 1984, *amicus* Jennifer Thompson-Cannino was raped in her Burlington, North Carolina home.⁶ She was awakened around 3:00 A.M. by an intruder who held her captive. She was able to catch brief glimpses of the man and, throughout her ordeal, she made an effort to remember the details of his appearance so that she could later identify him. Ms. Thompson-Cannino eventually escaped from her captor and fled to a neighbor's house. Another woman in a nearby home was raped under similar circumstances that same night.

Ms. Thompson-Cannino was taken to the hospital, where biological evidence from the attack was collected. She was then taken to the police station to give a statement and to help police make a composite sketch of her assailant. She was confident that she could identify the man. Police set out a dragnet for a black male, with a light complexion, around six feet tall, 170 to 175 pounds with short hair and a thin moustache.

The police received a tip identifying a man named Ronald Cotton, who matched the physical description of the assailant. Cotton had been

⁶ This case is the subject of an in-depth PBS *Frontline* program and web site. See *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997).

convicted as a teen for attempted rape and was on parole for breaking and entering. Police had Ms. Thompson-Cannino review a set of mug shots and she identified Cotton as her assailant.

When Cotton learned that he was being sought, he voluntarily went to the police station. He was put in a police line-up with six other men. Ms. Thompson-Cannino again selected him as her assailant. She was certain Cotton was the man.

The case against Cotton went to trial in January 1985, with little physical evidence. Blood typing of the semen sample collected that night was inconclusive. In addition, the trial judge excluded evidence that the other rape victim (who had been raped the same night as Ms. Thompson-Cannino) did not identify Cotton as her assailant. On the weight of Ms. Thompson-Cannino's testimony, Cotton was convicted and sent to prison.

On September 30, 1986, Cotton wrote his lawyer from prison because he was certain he had met the man who actually committed the rapes. That man was Bobby Poole. Poole worked with Cotton in the prison kitchen and shared a dorm with him. Soon thereafter, Cotton was granted a new trial on the basis of the excluded evidence about the second rape.

At the preliminary hearing, Poole testified and denied involvement in the crimes. Despite seeing Poole at the hearing, Ms. Thompson-Cannino remained steadfast in her belief that Cotton was her assailant. Moreover, the second rape victim changed her mind and also identified Cotton as her assailant. No evidence about Poole was presented at the second trial. Cotton was convicted of both rapes.

Ms. Thompson-Cannino celebrated Cotton's conviction. She said at the time: "I hated him worse than I hated anything in my whole life." She prayed that Cotton would be raped and killed in prison. Ruben Rosario, *'Sequential Lineups' Help Police Find the Right Suspect*, Saint Paul Pioneer Press (Minnesota), Feb. 11, 2005, at B1.

In 1995, prompted by inquiries from law professor Rich Rosen, the police and prosecutor raised the issue of DNA testing with Ms. Thompson-Cannino, who "agreed [to the tests] because [she] knew that Ronald Cotton had raped [her] and DNA was only going to confirm that. The test would allow [her] to move on once and for all." Jennifer Thompson, Editorial, *"I Was Certain, but I Was Wrong,"* N.Y. Times, June 18, 2000. Despite policies that allow for the destruction of old DNA samples—spurred by an intuition that there may be some issues in the future involving DNA—the police had kept evidence from the case.

The DNA tests exonerated Cotton and proved that Poole was the rapist in both of the 1984 rapes. This was a stunning turn of events for Ms. Thompson-Cannino, who "will never forget the day [she] learned . . . [that] the man [she] had identified so emphatically on so many occasions was absolutely innocent." *"I Was Certain, but I Was Wrong,"* N.Y. Times, June 18, 2000. This revelation, together with her role in the false conviction, led Ms. Thompson-Cannino to work as a speaker and advocate on the inherent unreliability of eyewitness identifications.

If the police had not opted to save the DNA, and if Cotton had never obtained access to post-conviction DNA testing, Ms. Thompson-Cannino

might have spent the rest of her life consumed with the hatred of a man who never hurt her, while the man who raped her would have gone unpunished for his crime. Her mistaken identification would have been the cause—however inadvertent—of a profound miscarriage of justice. Fortunately, she now has peace of mind knowing that, in the end, justice was done.

E. Stacy Fierge: *Verified That Justice Had Been Done.*

On the evening of October 12, 1997, *amicus* Stacy Fierge returned home to her apartment in rural Missouri. She was met there by a man with a pillowcase over his head, holding a knife. He taped a pillowcase over Ms. Fierge's head and raped her twice. Police were able to gather blood from her clothes and semen from a rape kit taken at the hospital. Ms. Fierge told police that her attacker was black and around 5'8" tall.

Police suspected that the ex-husband of one of Ms. Fierge's neighbors could be the assailant. The man matched the physical description and had visited his ex-wife on the night of the attack. Police recorded his voice and Ms. Fierge identified the voice as that of her assailant. The relatively rudimentary blood and semen testing performed at the time suggested that the semen and some blood had come from her neighbor's ex-husband.

Circumstantial evidence also pointed to the ex-husband as the attacker. He had left his wife's apartment with a putty knife and screwdriver, ostensibly to help a neighbor with some handy work, but more likely to pry open Ms. Fierge's window. He also seemed to have knowledge of the crime before

police approached him. The defendant was tried and convicted. His defense at trial was based on mistaken identity.

The defendant eventually sought access to his DNA to prove his claim of innocence. The prosecutor consented to the testing. When Ms. Fierge learned of the attempts to perform post-conviction DNA tests on the evidence from her rape, she contacted the defendant's attorney and informed counsel that she was certain that she had identified the correct assailant. Ms. Fierge agreed that the DNA testing should go forward, however, because the results could prove the defendant's guilt or innocence to a scientific certainty, which was in everyone's best interest.

The DNA testing proved conclusively that the man Ms. Fierge had identified was indeed the rapist. Ms. Fierge, like Ms. Thompson-Cannino, had been certain of the identity of her rapist. Here, that belief was ultimately vindicated by post-conviction DNA testing, which further laid to rest the defendant's false claims of mistaken identity.

* * *

The tragic experiences profiled above illustrate the tremendous truth-finding power of post-conviction DNA testing. While in each of the examples above, the actual perpetrator was found, that is not always the case. Indeed, the victimizers of the other *amici* named in this brief have not yet been brought to justice. Nevertheless, post-conviction DNA analysis is still of great importance to victims even when exoneration results in an unsolved crime.

Amicus Michele Mallin misidentified Timothy Cole as her attacker. Cole died of an asthma attack

in prison in 1999, after serving thirteen years of a twenty-five-year sentence. DNA testing posthumously proved his actual innocence. Ms. Mallin now speaks out publicly on his behalf.

Amicus Mark Tokarski is the father of an eight-year-old girl who was raped by an intruder in 1987. Based on the young girl's identification and forensic hair science later proven to be erroneous, Jimmy Ray Bromgard was convicted and sentenced to forty years in prison. Post-conviction DNA testing proved Bromgard's innocence, and he was released in 2002, having served more than fourteen years in prison. Mr. Tokarski now speaks out publicly on behalf of the wrongly convicted.

CONCLUSION

Proof to a "moral certainty," *cf. Victor v. Nebraska*, 511 U.S. 1, 15–17 (1994), is imperfect; it admits a possibility of doubt. It "is not an indictment of our system of justice [that it] does not . . . require proof beyond *all* doubt, and therefore *is* capable of producing erroneous determinations of both guilt and innocence." *Harvey*, 285 F.3d at 306 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc) (emphasis in original).

But these errors have consequences. Just as there is a cost on society from wrongful acquittals, *see Patterson v. New York*, 432 U.S. 197, 208 (1977), there is likewise a cost from wrongful convictions. That cost is not paid only by the convicted; erroneous convictions also come at the cost of the victims of crime. Indeed, false convictions provide victims and society at large with false assurance that justice has been done. And when the innocent go to jail, the

guilty remain free. Indeed, the guilty often go on to create more victims by committing more crimes.

Early in the last century, Judge Learned Hand observed that “[o]ur procedure has been always haunted by the ghost of the innocent man convicted.” *United States v. Garsson*, 291 F. 646, 649 (D.C.N.Y. 1923). Today, the availability of DNA testing provides a unique truth-finding tool in the service of both justice and finality. Recognition of a due process right to post-conviction access to DNA serves crime victims’ interests both in obtaining protection from those who would harm them, and in seeing justice served on those who have. For these reasons, *amici* respectfully request that this Court affirm the ruling of the court below.

Respectfully submitted,

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February 2, 2009

<http://cpainnocenceproject.wikispaces.com/Texas+v.+Christopher+Ochoa+and+Texas+v.+Richard+Danziger>

Texas v. Christopher Ochoa and Texas v. Richard Danziger

Background of the Cases:

In October 1988, a woman named Nancy DePriest was raped and murdered while alone at the Austin area Pizza Hut where she worked. [1] Two weeks after her brutal rape and murder, Austin was still “buzzing” about what had happened and no suspects had been named.[2] Two roommates, Richard Danziger, and Christopher Ochoa worked at a different Pizza Hut in the Austin area and were both pretty fascinated by the case. Danziger suggested that Christopher and himself grab a beer and go by the scene of the crime one day. When the two went to the Pizza Hut, there was a security guard posted there to watch over the crime scene, and Danziger stopped and chatted with him about the rape and murder. The two men did not think anything of going to the crime scene, but apparently some Pizza Hut employees were suspicious of their visit and Danziger’s discussion with the security guard and called the police.[3]

The police came by the Pizza Hut where Christopher Ochoa and Richard Danziger worked and Ochoa did not think anything of it and assumed they were going to interview all of the Pizza Hut employees. Christopher was taken to the police station still not suspecting that he was a suspect. Ochoa was placed in an interview room and questioning began. He told the Detectives that the only reason himself and Danziger went to the crime scene was because they were “curious.”[4] The officers were convinced that Christopher Ochoa was hiding something. It is reported that one of the detectives told Christopher that “somebody’s gotta die” because the case was very much in the public eye.[5] Ochoa was unsure how long he spent being interrogated and says that he requested an attorney but was denied. After relentless questioning, Ochoa finally confessed that Richard Danziger was the person who had given him information about the Pizza Hut rape and murder. After confessing the information, Ochoa was taken to a Motel for the weekend by the interrogators and told not to speak to anyone. The officers picked him up on Monday, and the questioning continued.[6]

The detectives had made their mind up that Ochoa was an accomplice to Richard Danziger. They threatened the Death Penalty and even told him “that that he'd never hug his mother again.”[7] Ochoa kept saying he did not know anything, and the officers became infuriated and violent with chairs and other things in the interrogation room. After a while, Christopher made a statement that gave specific details about the crime. When Ochoa got details of the crime wrong, the officers helped him change them until they matched up with the crime. He told them that Richard Danziger was the person who shot Nancy DePriest. Christopher had been urged by the officers, his attorneys and even

by his mother to plead guilty in order to avoid the Death Penalty as part of a plea bargain. Months after his confession, Ochoa was forced to take a polygraph test and he was asked if Richard Danziger was the killer. After the results of the test showed deception, Ochoa changed his story and said that he himself was the person who killed Nancy DePriest. After this development, Christopher was told that if he testified in Richard Danziger's trial that Danziger sexually assaulted DePriest that he would not receive the death penalty. Ochoa, in the interest of sparing his life agreed to do that.

When the Trial of Danziger came about, Danziger presented an alibi that he was with his girlfriend at the time of the crime, but Ochoa's detailed accounts of what supposedly had happened that day and other physical "evidence" overshadowed that alibi.[8] The jury concluded that Danziger was guilty of raping Nancy DePriest. After both of the trials of Danziger and Ochoa were over, they both received sentences of life in prison. About a year into his time in prison, Danziger was repeatedly kicked in the head by another inmate to the point that he had to have brain surgery.[9] He lost much of his ability to function normally and made several suicide attempts. Ochoa contemplated suicide as well, but stopped himself because of his strict Catholic upbringing.

Innocence:

In 1996, a Texas inmate by the name of Achim Marino, wrote a letter to the Austin-American Statesman, and to the Austin Police Department confessing that he had in fact raped and murdered Nancy DePriest. During his time in prison he had become a born again Christian and decided he needed to confess to what he had done. The letter stated where to find the handcuffs he had used when he had raped DePriest as well as the gun he had used.[10] The Police found the evidence right where Marino had told them it was but they did not take any other action. Ochoa did not change his story even though he was asked about third accomplice in the hopes that he would get out on parole. Once he realized he was truly stuck in prison, he contacted the Innocence Project that was located at the University of Wisconsin. The Innocence Project workers pushed for the testing of forensic evidence, and consistently pushed the Austin Police Department to further investigate the case. Their hard work eventually led to the exonerations of both Richard Danziger and Christopher Ochoa in 2002 after they spent twelve years in prison.[11]

Factors Showing Innocence:

In the beginning of building the cases against Christopher Ochoa and Richard Danziger, a serious error was made. The Austin Police Department did not take into account how much information regarding the rape and murder of Nancy DePriest was well known by the public. Had APD bothered to investigate how much the common person knew about the murder, they would not have found the discussion between Danziger and the security guard as suspicious. In the questioning of Christopher Ochoa, the detectives recorded the interrogation and had a written transcript of it that they used in the trial. The issue with

the recording was that three hours of it was missing and the recording was repeatedly stopped and taped over. No one really knows what happened during those three hours of missing tape, except the detectives and Ochoa, but it has been alleged that the detectives fed Ochoa information about the crime when he would get details of it wrong. Despite the fact that the recording was clearly messed with, both the transcript and the recording were used as evidence in trial. Ochoa has repeatedly stated that he plead guilty to being an accomplice and to the murder of DePriest to avoid the death penalty.[12]

During the trial, a strand of hair without a root from the scene of the crime was compared to one of Ochoa's and used against him as evidence. That kind of evidence is now often regarded as "junk science" because based off the justification used behind the evidence, that piece of hair could have convicted one third of the Hispanic male population in the United States of the crime.[13]

Ochoa's changing of his story after his first polygraph test showed deception that should have poked holes in the prosecution's case. No follow up polygraph test was ever taken to determine if Christopher Ochoa was being truthful when he changed his story saying that he, and not Danziger, had killed Nancy DePriest. It has been noted that Ochoa and Danziger's attorneys were not very experienced when they took on their cases. This did not help them when they were trying to make a case against the experienced prosecutors. After Mr. Marino sent a letter confessing that he had acted alone in the rape and murder of DePriest, and after the Innocence Project got involved, new evidence surfaced regarding what had actually happened to Nancy DePriest.[14] The initial autopsy of DePriest stated that saudomy had occurred during the course of the crime and that it was plausible that DePriest's hands could have been tied up by articles of clothing. Christopher Ochoa had stated in his false confession that they had tied her hands together with clothing and that she had been saudomized. After this evidence was reviewed thanks to the work of The Innocence Project, it was determined that the only reason why it looked like saudomy had occurred was because when DePriest was at the hospital after her murder, her temperature had been taken with a rectal thermometer. It is not uncommon for there to be bruising after temperature is taken with that kind of thermometer. Pictures of DePriest's hands also showed clear markings that matched the handcuffs that Achim Marino had told the cops he had used. Had the Autopsy been done more carefully, it would have been apparent that Christopher Ochoa's story did not match up with what actually happened to Nancy.

Where are they now?

Following his exoneration, Christopher Ochoa went on to Law School in 2003. [15] He began working for the Innocence Project at the University of Wisconsin while in school is now a practicing attorney.[16] He is now an advocate for abolishing the death penalty.[17]

Richard Danziger now lives in a home with a full time staff to look after him. He uses his money from the civil suit that he won to pay for his medical care.

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<http://www.pbs.org/wgbh/pages/frontline/shows/burden/innocents/danziger.htm>

^ http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-ochoa_24met.ART.State.Edition2.4657628.html

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http://www.innocenceproject.org/Content/Christopher_Ochoa.php

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<http://www.cbsnews.com/stories/2006/05/12/eveningnews/main1616355.shtml>

^ <http://www.news.wisc.edu/12591>

^ <http://www.truthinjustice.org/ochoa.htm>

Ochoa



Incident Date: 10/24/88
Jurisdiction: TX
Charge: Murder, Sexual Assault
Conviction: Murder
Sentence: Life

Year of Conviction: 1989
Exoneration Date: 2/6/02
Sentence Served: 11.5 Years
Real perpetrator found? Yes
Contributing Causes: False Confessions / Admissions
Compensation? Yes

Nancy DePriest was raped and murdered in her work place in Austin, Texas in 1988. Chris Ochoa pled guilty to the murder of DePriest and his friend, Richard Danziger, was convicted of rape. Ochoa had confessed to the crime and had implicated Danziger. It would be discovered, however, that his confession was coerced and that neither man had anything to do with the slaying or raping of DePriest.

The victim worked at a Pizza Hut in Austin, where she had been tied up with her bra, raped, and shot in the head in the wake of an early morning robbery. She was still alive when the police arrived but died later that night. The police began investigating local Pizza Hut employees on the theory that a master key was used to gain entry.

Christopher Ochoa and Richard Danziger were roommates who also worked at an Austin area Pizza Hut. They were observed by a Pizza Hut waitress eating and drinking beer in what she surmised to be a toast to the victim. Police questioned Ochoa and Danziger in November 1988, and the two subsequently became the main suspects.

In their interviews, the police noted that Danziger seemed to know much about the crime that was not public knowledge.

Ochoa was questioned separately and the police reported that he had confessed his involvement in the crime, pointing to Danziger as the assailant who shot DePriest after they robbed the restaurant. The state offered to give him a life sentence if he agreed to plead guilty and testify against Danziger at trial. Under threat of receiving the death penalty and by the advice of his attorney, Ochoa agreed to their terms. At trial, Ochoa changed his story and claimed that he, not Danziger, had shot DePriest. Consequently, prosecutors charged Danziger with rape instead of the murder.

Ochoa testified that the two had planned to rob the Pizza Hut, had tied up and raped DePriest, and that he had shot her because she recognized him. Danziger presented an alibi defense, claiming to have been with his girlfriend that night. He could give no reason for why Ochoa would testify against him. The only forensic evidence that linked Danziger to the crime was a pubic hair found near the blood in the restaurant that, when microscopically examined, was consistent with Danziger's pubic hair. There was semen evidence collected but the crime laboratory reported that the amount was very small. Though no experts testified that the semen could link Danziger, one expert claimed that the semen on a vaginal swab was compatible with Ochoa. Both men received life sentences.

Years later, letters were sent to the police, then Governor Bush's office, and the District Attorney's Office.

The letters revealed detailed knowledge of the crime. The author of the letters, Achim Marino, was in prison on other convictions with three life sentences. He had apparently undergone a religious conversion while attending an Alcoholics/Narcotics Anonymous program whereby he was obligated to confess his responsibility for the DePriest murder. He also wrote that he did not know either Ochoa or Danziger and did not know why they would confess to a crime that he had committed. Marino also stated that he had sent confessions to other offices, including a newspaper and the ACLU, but that his letter had not been answered.

After police received another letter from Marino that contained a detailed description of the scene, they began investigating the case again. Marino's letter told them how to locate items that were stolen from the Pizza Hut, which the police obtained. Investigators approached both Danziger and Ochoa again. Danziger had sustained injuries to his head while in prison and was housed in a mental institution. Ochoa gave them the same story he had told at trial.

Ochoa went on to contact the Wisconsin Innocence Project, headed by Keith Findley and John Pray. Students there began investigating his claim of innocence. The prosecution had some of the evidence that excluded Ochoa and possibly Danziger as well, and inculpated Marino. This evidence was purportedly contaminated in testing.

Forensic Science Associates, a private forensic laboratory in California, had retained a sample from testing performed at the time of the trial in 1989. Using newer testing methods, FSA was able to exclude both Ochoa and Danziger as sources of the spermatozoa. Chris Ochoa and Richard Danziger were exonerated in 2002.

Ochoa was greeted by the Wisconsin Innocence Project staff and students who helped him prove his innocence. Ochoa now states that his confession and implication of Danziger were the results of police pressure and fear of the death penalty, citing periods of time when they harassed him and threatened him with the consequences of not confessing.

<http://groups.yahoo.com/group/PrisonNewsNetwork/message/33656?var=1>

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Triumph, tragedy mark lives of men exonerated in '88 murder

In 1988, one man confessed to a murder he didn't commit – and accused an innocent friend

01:13 AM CST on Sunday, February 24, 2008

By DIANE JENNINGS / The Dallas Morning News

djennings@...

MADISON, Wis. – How could you do it?

The question dogs Christopher Ochoa. It always will.

In 1988, Mr. Ochoa, then a naive 22-year-old, confessed to a brutal rape and murder he didn't commit, and accused an innocent friend,

Richard Danziger, of the same crime to avoid the death penalty.

The two men were sentenced to life in prison. Twelve years later, they were exonerated by DNA evidence and among the first of a parade of people who have made Texas the national leader in acknowledging wrongful convictions. Their shocking tale still reverberates around the state Capitol, where legislators keep passing laws to fix flaws that the case revealed in the criminal justice system.

Mr. Ochoa, now 41, triumphed over his past. He is now a criminal defense attorney, having graduated from the University of Wisconsin Law School – the same school that helped free him. Thanks to a multimillion-dollar civil settlement, he has set up a modest office across from the scenic Wisconsin Capitol, where he can pick and choose cases. He's planning to buy a house and get married.

Also Online

Victim's mother says exonerations shattered her faith in justice system
"This is what I dreamed of" during years hemmed in by guards and razor wire, he says softly.

But Mr. Danziger's story is one of tragedy. Mr. Danziger, who always maintained his innocence, suffered brain damage when another inmate repeatedly kicked him in the head with steel-toed boots. He now lives under his sister's guardianship in Florida, his multimillion-dollar settlements providing medical care and personal assistance.

"Everybody involved in this case has drug himself through the desert

behind a Jeep trying to figure out what happened," says Travis County District Attorney Ronnie Earle. "It is far and away the strangest case I can remember."

The real killer came forward and is in prison. The criminal justice system has changed for the better. But many affected by the Ochoa-Danziger case say their faith in the system was permanently shaken. "In the end, justice did prevail," says John Pray, a law professor at the University of Wisconsin. But "you look at both those [men] and you don't know what to make of it. ... One is very exhilarating, and the other is just downright depressing."

The confession

How could you do it?

It's one thing to make a false confession about yourself; it's another to implicate someone else.

Mr. Ochoa responds patiently. Being threatened with the death penalty during interrogation, the choice seemed clear: lie or die.

Shy by nature, Mr. Ochoa says, "I never liked conflict. I always wanted to make people happy."

He'd been a good student at an El Paso high school, never in trouble with the law.

He moved to Austin to make money for college, getting a job at Pizza Hut. He shared an apartment with fellow employee Richard Danziger, 18, and another restaurant worker.

In the fall of 1988, Austin was buzzing about the brutal rape and murder of 20-year-old Nancy DePriest. Early one October morning, the young wife and mother was assaulted while alone mixing dough at a different Pizza Hut. She was bound, raped and shot in the back of the head.

A couple of weeks later, Mr. Danziger suggested that after work, he and Mr. Ochoa grab a beer at the restaurant where the killing occurred. "I found that strange," Mr. Ochoa says. "I just wanted to go home."

But he went along, joining Mr. Danziger in a toast to the dead woman's memory. Mr. Ochoa says he was nervous because Mr. Danziger was underage.

On their way out, Mr. Danziger chatted with a security guard about the killing.

Suspicious employees called the police.

When officers approached Mr. Ochoa two days later on a Friday at work, he assumed they were interviewing all employees. He went willingly to the police station.

"Aren't we all taught that police officers are there to protect you, if you haven't done nothing wrong?" he said. "And I hadn't done nothing wrong."

In an interview room, Mr. Ochoa says, one detective introduced himself by slamming his fist on the table and telling him he was known as el cucuy on the streets – "the boogeyman" in Spanish. Officers asked him why he and Mr. Danziger had inquired about the robbery.

"Just curious," Mr. Ochoa responded.

"Nobody is just curious," an officer replied. "You've got to know something."

The detectives soon told him "somebody's gotta die" in such a highly publicized case.

"Police officers form a tunnel vision that they think, 'This is our guy,' " Mr. Ochoa explains with the clarity of hindsight. "They're not looking for the truth. They're just trying to find something."

Mr. Ochoa doesn't know how long he sat in the interrogation room because it was "like Vegas casinos – no clocks."

He says he asked for an attorney, but he was wrongly told he couldn't have one unless charged.

Finally, an exhausted Ochoa told them Mr. Danziger had told him about the crime. "At some point you think, 'If I just get out of here, if this will just stop, I can go talk to an attorney,' " he now says.

That night, he says, the officers took him to a motel for his safety because he'd "cooperated."

When the two officers picked him up Monday morning, Mr. Ochoa still hoped the system – a judge, a prosecutor, a defense attorney, somebody – would realize a mistake was being made.

But that morning, officers suggested he'd been the lookout. As his denials continued, so did the specter of the death penalty.

"By then, I am really mentally exhausted," Mr. Ochoa recalls. "I think back on this and sometimes it just gives me the chills."

The hours dragged on.

Through the two days of interrogation, detectives showed him autopsy pictures, pointed to the vein where the lethal injection would be administered, told him that he'd never hug his mother again and that he'd be "fresh meat to prisoners."

"I kept telling them I didn't know what they were talking about," Mr. Ochoa says.

Once, an officer threw a chair, which bounced off the wall above Mr. Ochoa's head. "That scared me even more."

When another officer offered to "bring out the typewriter and help you with your statement," Mr. Ochoa finally gave in.

His second statement was written with details about the crime apparently provided by the police – such as how the restaurant had been flooded in an effort to destroy evidence. When Mr. Ochoa got a detail wrong, he said, officers went over it with him until it fit

the evidence.

That second statement said Mr. Ochoa and Mr. Danziger entered the building, tied Ms. DePriest's hands behind her back, and raped her repeatedly. Mr. Danziger shot Ms. DePriest, Mr. Ochoa said.

That statement came after two days and at least 15 hours of interrogations.

Mr. Ochoa says he knows people look at him expecting to see shame or guilt for confessing falsely. "But you know what?" he says. "In your mind, you were trying to survive."

An Austin Police Department review later found "strong indications that investigators supplied Ochoa with information," but there wasn't enough evidence to prove that the confession was coerced.

Two of the detectives could not be reached for comment. A third has since died.

Jamie Balagia, a police officer-turned-defense attorney and the brother of the deceased detective who interviewed Mr. Ochoa, frequently represents police officers. Courts have ruled that it's acceptable for officers "to yell, to scream, to threaten the death penalty," he says, "but never, ever should an officer feed not even one detail."

Michael Burnett, who represented another of the detectives in subsequent civil suits, which were settled by the city and county with no admission of wrongdoing, said some of the blame lies with Mr. Ochoa. Some also lies with the Police Department "for having an understaffed homicide department that relied too heavily on confessions."

Any mistakes were unintentional, both men say.

The plea bargain

Even after his arrest, Mr. Ochoa thought someone in the criminal justice system would realize an injustice was occurring.

He says he told his court-appointed attorney, Erik Goodman, why he'd confessed. But he says Mr. Goodman told him there was "no way an innocent person would give such a detailed statement."

Mr. Goodman declined to comment.

Mr. Ochoa says he also told a second attorney he was innocent.

That attorney, Nate Stark, says he can't recall Mr. Ochoa telling him he had falsely confessed. "That's far too long ago," he says.

But "I never believed that anyone would, No. 1, testify against another person in the compelling way he did and also testify basically against himself, unless a person's committed the crime,"

Mr. Stark says.

Mr. Ochoa had already confessed when Mr. Stark took the case. Mr. Stark says he performed his job as he should have.

Mr. Ochoa says he felt pressured by his attorneys to plead guilty,

"probably because they believed I was guilty – but also because it was easier for them; it was less work," he says. And he admits, "They were trying to save my life."

Mr. Stark denies pressuring any client to plead.

Mr. Ochoa's mother, who believed in his innocence, also encouraged him to take a plea bargain, he says, because "they're going to kill you." When her health deteriorated, possibly from stress, Mr. Ochoa said, he finally agreed.

Four months after his confession, Mr. Ochoa took a polygraph exam as part of the plea bargain, Mr. Stark says. When the examiner reported "deception" to the question of whether Mr. Danziger had been the shooter, Mr. Ochoa changed his confession yet again: He identified himself as the killer.

Mr. Ochoa was offered a life sentence if he testified at Mr. Danziger's trial for aggravated sexual assault. "It was a really hard decision," he says.

He took it.

The trial

Chris Ochoa was a meek, mild-mannered young man. Richard Danziger was an angry one.

Mr. Danziger is the youngest of four in a military family. His world collapsed when his parents waged a nasty divorce, says his sister, Barbara Oakley.

Ms. Oakley declined an interview on her brother's behalf. He "doesn't talk to the media," she explains. "He finds them just as much at fault as he does Chris."

Mr. Danziger dropped out of high school in Beeville but earned a GED. His criminal record was short: five years' probation for forging a \$55 check from his mother.

She pressed charges because "she was trying to prove a point to him," Ms. Oakley says. "I think it just made him angrier."

That anger probably kept him from caving in when questioned about the murder. "He was more angry than Chris was," Ms. Oakley says. "More defiant, less willing to give in to authority."

But with the naiveté of youth, Mr. Danziger didn't seem overly concerned when charged. His attitude was, "I didn't do it, so don't worry about it," Ms. Oakley says.

He told police he was asleep with his girlfriend at the time of the murder.

Ms. Oakley, who is five years older, knew her brother wasn't capable of that kind of violence. "You figure the system is going to work," she says.

It didn't.

When the state's star witness took the stand to lie about his friend,

press accounts, largely from the Austin American-Statesman, painted Mr. Ochoa's testimony as riveting. According to reports about trial testimony, he concocted an elaborate, excruciating tale:

Mr. Danziger planned the robbery, because he needed cash. Mr. Danziger told Ms. DePriest "to shut up and give him the money." He pointed the gun at her, hit her, pulled off her pants and blouse and made her lie down.

Mr. Ochoa tied Ms. DePriest's hands with her bra and Mr. Danziger raped her. "He got me to sit down on her shoulders. ... She was kicking. He told her not to move or he'd blow her away."

Then Mr. Danziger told her, "It's your turn now. ... You're going to have fun with her, too."

"She was scared, she was crying. She was asking for help. ... Mr. Danziger said, 'You kill her.' ... I pulled the trigger." Then, he said the two men raped her again.

In contrast, when Mr. Danziger took the stand – wearing a bulletproof vest because of death threats – he was "flat, no passion there," says Judge Bob Perkins, who presided over the trial.

"I just thought, 'Man, this guy is a coldblooded killer.' "

Mr. Danziger simply told jurors he didn't know why Mr. Ochoa and other witnesses were lying.

In about three hours, jurors returned a guilty verdict; they took less than eight minutes to sentence Mr. Danziger to life in prison.

Days later, Mr. Ochoa received the life sentence he expected.

Life in prison

After his conviction, Mr. Danziger's letters home were mostly about working out. The mind-numbing monotony of daily prison life didn't have much chance to sink in because, about a year after he was sentenced, "he got hurt," Ms. Oakley says.

"Hurt" doesn't begin to describe what happened to Mr. Danziger, who, while watching TV, was attacked from behind by another inmate in a case of mistaken identity. The inmate kicked him in the head repeatedly with steel-toed boots.

He survived brain surgery, but he wasn't the same cocky young man. Part of his brain had been removed, leaving him subject to seizures, impairing his mobility, causing memory lapses and slurred speech.

Back in prison, Mr. Danziger found coping difficult. Sometimes he fell out of his bunk, once fracturing his skull. At other times he would get lost, and guards would find him crying in a corner.

Sometimes he refused to shower because he was afraid of other inmates. If he didn't take his medication, he suffered from depression and hallucinations.

In December 1991, Mr. Danziger cut his wrist. Other suicide attempts followed.

Meanwhile, Mr. Ochoa learned to survive prison life. He was warned to be ready to fight, but it only happened once. "Then they respect you and you settle down," he says.

His low point came in December 1996. For years, he'd marked the weddings, births and job promotions of old friends through his hometown newspaper.

"A man usually looks at life when he's 30 and [asks] ... 'What have you done? Where are you at? How successful are you?' " he says. "I was a failure but not through fault of my own."

When Christmas Eve came and went without a card from his family, Mr. Ochoa says, he broke open a razor and planned to kill himself. A cut across the wrist is "a cry for help," he explains dispassionately.

"Up [the arm] will do it."

But he remembered Catholic nuns telling him no one had the right to take a life, including his own.

"I dropped the blade in the toilet water, and the rest of the night I just cried," he says.

Despite his circumstances, Mr. Ochoa managed to make a life in prison. He renewed his faith, joined a prison choir and earned an associate's degree.

Today, no prison mementos decorate his law office. But a large, framed picture of an eagle in flight – a gift from law school friends – dominates one wall.

"When I was in prison, I would think how nice it would be to be an eagle," Mr. Ochoa says softly, "to be able to go wherever I wanted."

The real killer

Mr. Danziger and Mr. Ochoa were not the only inmates struggling because of the DePriest murder. So was Achim Josef Marino. But Mr. Marino wrestled with guilt.

That morning in 1988, Mr. Marino, an assistant manager at a flower shop, posed as a soda machine repairman. He talked his way into the Pizza Hut, bound Ms. DePriest's arms with handcuffs, raped her and shot her in the head as she knelt beside a sink.

Ms. DePriest was selected at random, Mr. Marino says. The killing was part of a satanic ritual, as well as an effort "to get back at society."

Mr. Marino says he showed symptoms of mental illness – torturing animals, destroying property, assaulting others – from an early age. He's been in and out of the legal system for decades.

In an interview at the South Texas prison where he's serving multiple life sentences, Mr. Marino, who has thick black glasses and the pasty complexion of someone who rarely sees the sun, was articulate and quick. But he's no criminal mastermind.

Still, no one ever suspected him in the DePriest killing.

Shortly after the murder, he was arrested in El Paso for carrying a

weapon, which is illegal for ex-felons. The gun was the one used to kill Ms. DePriest, but no connection was made.

A couple of years later, Mr. Marino landed in the Travis County Jail. He received two life sentences for robbery and three more 10-year sentences for sexual assault, possession of a firearm and retaliation. While in jail, another inmate told him about the confession in the DePriest killing.

"That's impossible," he says he replied. "I know the person who did that."

In prison, he joined Narcotics and Alcoholics Anonymous and embraced Christianity. Both groups and his new faith mandated that he "make amends to the persons you have hurt in the past."

Prison conversions aren't unusual, but they don't always last. Mr. Marino says he "decided to make a real conversion, not a shallow one." In 1996, he wrote to Austin police and the American-Statesman, confessing to the DePriest rape and murder. "Chris and Richard needed to get out of prison," he says. "They didn't belong here."

"I don't like innocent people being hurt," he says, in spite of what he did to Ms. DePriest.

In his letter, Mr. Marino told police where to find the bank bag and handcuffs used in the attack. Authorities collected the evidence – but inexplicably did nothing else.

Two years later, the Travis County district attorney received a letter. "I do not know these men nor why they plead guilty to a crime they never committed. I can only assume that they must have been facing a capital murder trial with a poor chance of acquittal," Mr. Marino wrote. "But I tell you this sir, I did this awful crime and I was alone."

Mr. Marino surmises Mr. Ochoa confessed after aggressive questioning. He's never met Mr. Ochoa but believes "he was very weak and not very assertive."

The district attorney's office interviewed Mr. Ochoa in prison. Without mentioning Mr. Marino's name, new investigators asked Mr. Ochoa about a third party to the crime.

Mr. Ochoa told them there was none. "I did this crime," he reiterated. "I did it, and let me do my time."

Mr. Ochoa says he stuck to his confession because acknowledgement of your crime helps at parole reviews. He says he also feared that remaining evidence might be destroyed if police realized they'd made a mistake. "I just wanted them to think I'm guilty" while getting help from outside the system.

In June 1999, he contacted the Innocence Project at the University of Wisconsin. Most requests for assistance are rejected because evidence often isn't available, says co-director John Pray. But in Mr. Ochoa's

case, DNA was available.

False confessions are "a leading cause of wrongful convictions," Mr. Pray says. "We also knew that the reason that Chris gave was the death penalty. ... In Texas, it's not an idle threat. ... I can see how you confess to try to save your own life."

After the Innocence Project located the DNA evidence, the district attorney's office tested the material. About then, Mr. Ochoa's lawyers learned that someone else had confessed to the crime.

In September 2000, Mr. Ochoa was notified that DNA tests excluded him and Mr. Danziger. But they included Mr. Marino.

Mr. Ochoa was confused.

"Who's Marino?" he asked.

Authorities eventually sifted through all the evidence and conflicting stories, and in January 2001, Mr. Ochoa walked out of a courtroom and into the arms of his mother.

"She was happy," Mr. Ochoa remembers. "She was crying. She wouldn't let go of me."

Danziger's life

Richard Danziger's mother was not there to watch her son walk free a few weeks later. His release took longer because officials had to find a place for Mr. Danziger to stay until guardianship could be arranged. His mother had died three months earlier.

"What happened to you was horribly wrong," Judge Perkins told Mr. Danziger, according to the American-Statesman. "I can't say it enough, but we are sorry for what happened to you."

Mr. Danziger, who recovered more than anyone expected, said he didn't want "to be an object of pity."

When asked about Mr. Ochoa, he told reporters that he was "a pretty stupid dude."

Mr. Ochoa soon met with him and his sister to "make peace."

"Richard wouldn't talk to him," Ms. Oakley says. "Richard was in the room but he wouldn't acknowledge him."

Today, Mr. Danziger "has the best quality of life that he's capable of having," Ms. Oakley says. He can't drive and suffers from short-term memory loss. He may leave the stove on or forget to take his medication.

Mr. Danziger now lives a few blocks away from her, where he has a staff to look after him. That was made possible by civil lawsuit settlements – \$9 million from the city of Austin, \$950,000 from Travis County and \$500,000 from Mr. Ochoa. A suit against the state is pending.

The money pays for not only medical care but for the video games he enjoys. Sometimes Mr. Danziger visits a friend at the Skyview prison in Rusk, Texas.

"Most of the staff there knows him," Ms. Oakley says. "They go out of their way to be polite to him. But when he goes to the bathroom, he still goes to the guards to ask permission. It makes me mad."

Ms. Oakley would like to thank Mr. Marino for his role in releasing her brother.

Despite the likelihood that he'll die in prison because of his confession, Mr. Marino says, he doesn't regret it. "No, I was deep in the faith," he says.

He's never heard from either Mr. Ochoa or Mr. Danziger.

Mr. Ochoa has no desire to contact him.

"I'm not a fan," he says. "He still took a life. And it was because of him ... me and Danziger lost our freedom."

Ochoa's life

As soon as Mr. Ochoa regained his freedom, he got an inkling of how the outside world had changed when a student handed him a cellphone.

"I'm like, 'Whoa, this is cool. I'm talking on this little thing without a cord,'" he remembers.

The thrills kept coming – quiet moments at church; a steak instead of prison 'meat substitute'; a trip to Wal-Mart, where he marveled at the merchandise; his first new pair of pants with pockets and a belt.

"In prison, you don't have pockets" says law professor John Pray.

"That was a moment of amazing joy."

After Mr. Ochoa's release, the only place he felt comfortable was in the company of lawyers, so he applied to the University of Wisconsin Law School.

His settlement money paid for school and made it possible to open his practice.

Today, he enjoys a few luxuries such as his \$40,000 truck, a flat-screen TV and international travel. But he occasionally flashes back to his days behind bars. If he's pulled over for a traffic violation, he gets nervous. And walking into a police station makes him uncomfortable.

Gradually, with therapy, he's put those prison years behind him.

He'll always be an exoneree, he says. "But I want to be respected as an attorney first. ... I want to do more."

Practicing criminal law with his unique perspective is one way to do that, he says. He also speaks about his experience, about how false confessions occur, and makes occasional appearances with Nancy DePriest's mother, now a friend, in opposition to the death penalty. Everyone agrees the person most wronged was Mr. Danziger.

"What happened to Richard Danziger is a crime," Judge Perkins says. He blames the injustice primarily on police officers who crossed the line by feeding details to Mr. Ochoa to fit the evidence, and partially to Mr. Ochoa, who made the confession.

The system "worked ultimately," Judge Perkins says, "but it took way too long."

Mr. Danziger's sister is angry at the system that failed her brother, but not at Mr. Ochoa.

She says she understands Mr. Ochoa feared for his life, but "it's not right to lie and destroy somebody else's life."

Still, Ms. Oakley is glad Mr. Ochoa has done well after exoneration becoming a criminal defense lawyer.

"Maybe Chris can help somebody else," she says, "to where they're not in the same situation him and Richard were."

Mr. Balagia, the brother of one of the detectives, says Mr. Ochoa bears some responsibility for the lost years. "If Ochoa had just said, 'Screw you, get your needle,' he couldn't have been convicted," he says.

Mr. Ochoa says the police are to blame, but he's reflected on how much responsibility he bears. "I used to wrestle with it," he says.

"Two percent? Three percent? That's logical, right?"

REFORMS UNDER WAY

The murder of Nancy DePriest left a trail of broken lives – but it also changed the criminal justice system. "Everybody has a horror of convicting the wrong person," says Ronnie Earle, Travis County district attorney. Changes include:

Austin Police Department: After a series of troubling cases, reforms had already begun in Austin by the time Christopher Ochoa and Richard Danziger were exonerated. Today, Austin is one of a handful of departments that videotapes interrogations. Unlike some states, Texas has not passed a law requiring taping.

Travis County district attorney's office: After the Ochoa/Danziger wrongful convictions, and two others, Mr. Earle's office reviewed 445 cases dating to the 1970s where DNA evidence had been preserved. No other mistakes were found. The office also established a protocol to examine innocence claims.

State of Texas: Texas is one of 22 states, plus the federal government and the District of Columbia, that provides financial compensation for wrongful convictions. The compensation was increased last year after Mr. Ochoa and others testified before the state Legislature. Today, Texas offers \$50,000 for each year of wrongful imprisonment – \$100,000 if time is served on death row. The state also provides some funding for mental health counseling, medical expenses, child support and attorney fees.

SOURCE: Dallas Morning News research

A LOOK AT EXONERATIONS

Number of people exonerated by post-conviction DNA testing nationwide since 1989: 213

Number of states with DNA exonerations: 31

Number of people exonerated in Texas: 32

Number of people exonerated in Dallas: 15

Average length of time served by exonerees:

12 years

Average age at time of wrongful conviction: 26

Factors in wrongful convictions:

77% include eyewitness testimony

65% include lab error or junk science

25% include false confessions

15% include jailhouse informants

SOURCES: The Innocence Project; Dallas Morning News research

Life after exoneration:

About 66% are not financially independent

Almost 50% depend on others for living arrangements

About 25% suffer from some form of anxiety, depression or post-traumatic stress disorder

SOURCE: Life After Exoneration Program 2005 study

<http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/022408dntexochoa.2a691c6.html>

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Currently **1,067 Exonerations**

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Richard Danziger

On October 24, 1988, 20-year-old Nancy DePriest was working alone in a Pizza Hut restaurant in Austin, Texas, when she was tied up, raped and murdered.

Days later, an employee at the restaurant saw two men, Christopher Ochoa, 22, and Richard Danziger, 18, eating pizza, drinking beer in the restaurant and seemly raising toasts in DePriest's honor.

Because police believed that a master key had been used to gain entrance to the restaurant and because their behavior seemed suspicious, the two men, roommates who worked at another Austin area Pizza Hut, became the lead suspects.

In November, police questioned both men and Danziger denied having anything to do with the crime, although, according to police, he seemed to know details about the crime that were not public knowledge.

Ochoa was interrogated separately and police said he confessed, saying that Danziger shot DePriest and that both men had raped her.

Ochoa, who was facing the death penalty, accepted an offer from the prosecution and pleaded guilty to murder in May 1989. He agreed to testify against Danziger at trial.

Danziger went to trial in Travis County in January 1990. Called to the witness stand, Ochoa contradicted his confession, saying that he, not Danziger, had shot DePriest.

Ochoa testified that the two had planned to rob the Pizza Hut, had tied up and raped DePriest, and that he shot her because she

recognized him. He testified that he and Danziger sexually assaulted the victim eight times.

The only forensic evidence that linked Danziger to the crime was a pubic hair found near the blood in the restaurant that was said to be microscopically consistent with Danziger's pubic hair.

A lab analyst from the Texas Department of Public Safety also testified that semen was detected on the vaginal swab from the rape kit. The blood type detected from this sample was similar to the blood types of Danziger and the victim.

In fact, because the tests fail to reveal a blood type dissimilar to a victim, no potential source of the semen could be excluded because the victim's blood group markers could have "masked" the perpetrator.

Danziger presented an alibi defense, claiming to have been with his girlfriend that night.

On February 1, 1990, Danziger was convicted of rape. Both men were sentenced to life in prison.

In February 1998, Achim Josef Marino, a convict who was serving three life sentences in a Texas prison for aggravated robbery – and who had become a born-again Christian – wrote a letter to Gov. George W. Bush. It began: "Re: Murder Confession."

In the letter, Marino said "my conscience sickens me" because he alone raped and murdered DePriest. Danziger and Ochoa were not involved.

"I tell you this, sir," wrote Marino. "I did this awful crime and I was alone."

Marino said evidence tying him to the crime—including DePriest's keys—could be found at his parents' home. Marino said he had begun writing and confessing to the police in 1996, but after getting no response, was appealing to Bush to take action.

After the police received another letter from Marino that contained a detailed description of the scene, they began re-investigating. Officers went to his parents' home and found the keys and other evidence, including bank pouches and a pistol.

Investigators approached both Danziger and Ochoa again. By then Danziger was housed in a mental institution because he had sustained severe and permanent brain damage after he was attacked by another inmate in prison. Ochoa, who later said he was still intimidated by the police who interrogated him, told the same story he had told at trial.

In June 1999, Ochoa reached out to the Wisconsin Innocence Project, headed by Keith Findley and John Pray. Students there began investigating his claim of innocence.

State: Texas

County: Travis

Most Serious Crime: Sexual Assault

Additional Convictions:

Reported Crime Date: 1988

Convicted: 1990

Exonerated: 2002

Sentence: Life

Race: Caucasian

Sex: Male

Age: 18

Contributing Factors: False or Misleading Forensic Evidence, Perjury or False Accusation

Did DNA evidence contribute to the exoneration?: Yes

In November 2000, DNA tests on the semen recovered from the victim excluded Ochoa and Danziger, and matched Marino DNA.

Ochoa was released on bond January 16, 2001. Danziger was released on March 22, 2001. Both were exonerated on February 6, 2002.

Both men later filed wrongful conviction lawsuits against Travis County and the City of Austin.

Danziger, who requires lifelong care due to his brain damage, received \$9 million from Austin, \$1 million from Travis County and \$500,000 from Ochoa for wrongfully implicating him in the crime. Danziger also received \$250,000 in state compensation. Ochoa received \$5.3 million from the City of Austin.

– *Maurice Possley*

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Exoneration News

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About the Registry

The National Registry of Exonerations is a joint project of the University of the Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law.

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