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### Film Review: Mississippi Innocence and the Prosecutor's Guilt

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# FILM REVIEW

## Film Review: “*Mississippi Innocence* and the Prosecutor’s Guilt”

*Mississippi Innocence*. A documentary film by Joe York. Media and Documentary Projects at the University of Mississippi (2011)

REVIEWED BY ANGELA J. DAVIS\*

“ . . . he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”<sup>1</sup>

### I. INTRODUCTION

Kennedy Brewer and Levon Brooks were the 214th and 215th wrongfully convicted individuals exonerated based on post-conviction DNA testing.<sup>2</sup> Their story, like the stories of so many wrongfully convicted men and women, is a frightening one. Both men were the victims of the unethical, arguably criminal behavior of two doctors and a prosecutor. But for the heroic efforts of lawyers from the Innocence Project, Kennedy Brewer would have been executed and Levon Brooks would have spent the rest of his life in prison.

The extraordinary story of the wrongful convictions and exonerations of Brewer and Brooks is dramatically portrayed in a powerful and disturbing documentary called *Mississippi Innocence*. Of all the injustices in the criminal justice system,<sup>3</sup> few would disagree that there is no worse failure than a wrongful

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1. *Berger v. United States*, 295 U.S. 78, 88 (1935).

2. Since their exonerations, the number has risen to 289. *Know the Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Feb. 27, 2012).

3. See KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 53-74 (2d ed. 2009) (describing racialized fears of criminals and the relationship between race and allegations of crime); MARC MAUER, *RACE TO INCARCERATE* 130-56 (2d ed. 2006) (describing the socioeconomic trends that excluded minorities from participating in the work force in the 19th and 20th centuries and the development of the popular association of nonwhite race with

conviction, especially when the accused ends up on death row or is sentenced to life in prison. Kennedy Brewer and Levon Brooks were not the first to meet this fate, yet their story is unique in many ways. Most wrongful conviction cases involve some level of incompetence, laziness, or misconduct by police, prosecutors, judges, and sometimes even defense attorneys. However, the behavior of the criminal justice officials and so-called “forensic experts” in these cases was extreme and shocking.

*Mississippi Innocence* is an extraordinary film that makes a lasting impact on its viewers. It is extraordinary not only because of the story that it tells, but because of the way the story is told. The film not only includes interviews with Brewer and Brooks and their families, but amazingly candid interviews with the Noxubee County prosecutor and law enforcement officials and the Mississippi Attorney General. The film also includes eerie footage of one of the forensic experts performing the “junk science” tests that led to the wrongful convictions of Brewer and Brooks.

This review will discuss the film and why it was so successful in achieving its goal of—in the words of filmmaker Joe York—“breaking down barriers to understanding, celebrating simple human decency and triumph, creating mutual accountability, illuminating social injustices that betray our most basic guarantees of fairness, and, finally, offering a path forward.”<sup>4</sup> The review will also discuss what the film only touches upon briefly: the role that the prosecutor Forrest Allgood played in the wrongful convictions of Brewer and Brooks. Part II will discuss the film and its importance to the innocence movement. Part III argues that of all the criminal justice officials, lawyers, and law enforcement agents involved in the Brewer and Brooks cases, the prosecutor, Forrest Allgood, bears the most responsibility for the wrongful convictions leading to the near execution of Kennedy Brewer and life imprisonment sentence of Levon Brooks. Part IV exposes Forrest Allgood’s ongoing pattern of misconduct. Finally, Part V calls for reform.

## II. THE FILM

### A. THE WRONGFUL CONVICTIONS

The film starts by taking the viewer to Noxubee County in Mississippi. It is 1992, but it feels like a much earlier time. The first scene is ominous—the

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vagrancy); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 132-53 (1999) (analyzing the direct correlation between harsher jury sentences and the nonwhite race of the defendant). See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing the expansion of collateral consequences for convicts in the 20th and 21st centuries); ANGELA J. DAVIS, ARBITRARY JUSTICE (2007) (detailing abuses of prosecutorial discretion that result in failures to disclose exculpatory evidence, witness- and evidence-tampering, selective and vindictive prosecution, and the lack of a check on such prosecutorial power).

4. Joe York, *Filmmaker’s Statement*, <http://mississippiinnocencefilm.com/the-film/>

Mississippi backwoods with Slade Lewis’s haunting musical refrain setting the scene. Filmmaker Joe York begins the film by telling Kennedy “Kenny” Brewer’s story. Brewer was convicted of the rape and murder of a three-year-old girl named Christine Jackson. The investigation of Christine Jackson’s murder is explained through a series of interviews with law enforcement agents, Innocence Project lawyers Peter Neufeld and Tucker Carrington, journalist Radley Balko, and prosecutor Forrest Allgood. The interviews are interspersed with grisly photographs from the crime scene and Christine Jackson’s autopsy.

The film’s narrator explains that the sheriff quickly focused on Kenny Brewer and his girlfriend Gloria Jackson, who was Christine’s mother. Though Christine lived with them, there was no evidence connecting them to her death. Christine was taken from Brewer and Jackson’s home in the middle of the night, and they promptly reported her disappearance. After Christine’s body was found in a nearby creek, the sheriff’s office rounded up all the men who lived in that area and took blood, head, and pubic hair samples, and cheek swabs. Despite the fact that there was no direct or circumstantial evidence connecting Brewer and Jackson with Christine’s death, they were arrested, primarily because they were the last people to have seen her.

This portion of the film not only provides the facts and timeline of the initial investigation, but it also introduces Dr. Steven Hayne and Dr. Michael West. Much of the film focuses on these two men and their pivotal role in the wrongful convictions of Brewer and Brooks. Dr. Hayne performed the autopsy on Christine Jackson and claimed that he believed the injuries on her body were human bite marks. He then solicited the advice and assistance of Dr. West, a dentist who purported to be an expert in bite marks. Dr. West secured a denture mold of Kenny Brewer’s teeth and attempted to compare the denture mold to the marks on Christine Jackson’s body. The film reveals footage of Dr. West performing these tests during the autopsy. Dr. West concluded that the bite marks matched Kenny Brewer’s dental mold.

On this evidence alone, Allgood indicted Kenny Brewer for Christine Jackson’s murder and sought the death penalty. Brewer was convicted and sentenced to death on March 24, 1995. The Mississippi Supreme and the United States Supreme Court denied Brewer’s appeals.<sup>5</sup>

Even though Kenny Brewer was sentenced to death, he never gave up hope. He had been on death row for about five years when he learned about an organization called the Innocence Project in New York. Brewer wrote to the Innocence Project, and they decided to take his case. A rape kit had been completed in Brewer’s case, but at the time of his trial, DNA testing was not very widespread and certainly was not done in Noxubee County, Mississippi. The Innocence Project had DNA testing done, and the test results unequivocally

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5. *Brewer v. State*, 725 So. 2d 106, 117, 136 (Miss. 1998), *cert. denied*, 526 U.S. 1027 (1999).

excluded Kenny Brewer.

Remarkably, the prosecutor Forrest Allgood refused to dismiss the case. According to Allgood, the DNA may have excluded Kenny Brewer as the rapist but not as the murderer. Allgood claimed, "It is difficult for me to see how the child got out of that house without Brewer's assistance."<sup>6</sup> So the case was rescheduled for trial, and Brewer had the benefit of new counsel. Innocence Project lawyers Peter Neufeld and Vanessa Potkin agreed to serve as Brewer's trial lawyers.

The film illustrates the difference a good defense attorney can make. Unlike Brewer's previous lawyers, Neufeld and Potkin thoroughly investigated the case. During the course of the investigation, they discovered that there was another very similar case in that same part of the county; this discovery would turn out to be key in the exonerations of Brewer and Levon Brooks.

Neufeld and Potkin found out that on September 15, 1990, about eighteen months before Christine Jackson was killed, a three-year-old girl named Courtney Smith had been abducted from her home, raped, killed, and thrown in a pond. The crime was almost identical to the facts in Brewer's case. The Noxubee County Sheriff's office had responded exactly as they had done in Brewer's case. They rounded up all of the men who lived in the area, and did the same tests—blood, head, and pubic hair samples, and cheek swabs. The main difference was that in this case there supposedly was an eyewitness. Courtney's five-year-old sister Ashley claimed that she saw "Tie Tee" come into the house and take Courtney.<sup>7</sup> "Tie Tee" was a nickname for Levon Brooks, Courtney's mother's boyfriend. Levon Brooks was arrested based on Ashley's account.

Dr. Hayne also did the autopsy in this case and remarkably reached the same conclusions that he reached in the Brewer case. He claimed to see what he believed to be bite marks, and called his good friend Dr. West, who requested a dental mold from Levon Brooks. He performed the same tests on Courtney Smith's body and concluded that the marks on her body were bite marks made by Levon Brooks. The prosecutor, Forrest Allgood, indicted Levon and sought the death penalty. Levon Brooks presented an alibi defense, but the jury rejected his defense and found him guilty. The jury sentenced him to life in prison.

When Neufeld and Potkin discovered these facts about Brooks's case, they were astonished. They went to the sheriff's office, shared their discovery, and asked if they thought the same person might have committed both crimes. After all, both cases were abductions of toddlers in the middle of the night who were sexually assaulted, murdered, and dumped in bodies of water. To their amazement, an agent in the sheriff's office said, "Oh no, it couldn't be the same person

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6. MISSISSIPPI INNOCENCE at 18:50 (Univ. of Miss., Media & Documentary Projects 2011) (statement of Forrest Allgood).

7. Ashley was eventually discredited. See *infra* pp. 1002-03.

because we had the first person locked up.”<sup>8</sup>

Neufeld and Potkin were able to get DNA testing done on the evidence from Brooks’s case because they would have been able to present that evidence in Brewer’s trial to show that someone else committed the crime. The evidence was sent to Dr. Ed Blake in Richmond, California, where he made the discovery that ultimately freed both Brewer and Brooks. Dr. Blake’s testing revealed that there was only one sperm source and that it was not Kenny Brewer. Fortunately, the law enforcement agents in Mississippi sent Dr. Blake additional evidence that the lawyers did not know existed. The boxes of evidence included the cheek swabs from all of the suspects that had been rounded up in both cases. The evidence in the Brooks case was too degraded for testing, but the evidence in the Brewer case was in good shape. Dr. Blake compared the DNA profile he had created from the Brooks evidence to the profiles from the cheek swabs in the Brewer evidence. He was stunned that he was able to identify the sperm source—a man named Justin Johnson.

As it turns out, Justin Johnson was a suspect in both cases. He previously had been arrested for sexually assaulting a young girl. Johnson was the only man who was rounded up and tested in both cases. He was the one common denominator, but law enforcement agents either ignored this fact or were too lazy to discover it.

Armed with this evidence, Neufeld and Potkin decided to go straight to the Attorney General of Mississippi, Jim Hood, out of concern that they could not trust Forrest Allgood. Brooks’s case was closed at that point, and since the evidence in his case was too degraded for testing, his freedom depended on what Justin Johnson would admit. After Johnson was arrested, he confessed to both crimes, clearing Brooks and Brewer. Both men were exonerated on February 15, 2008. Brooks had spent sixteen years of his life in prison, and Brewer served fifteen years, seven on death row waiting to die.

The film does not simply tell the story of the wrongful convictions of Kenny Brewer and Levon Brooks. That story alone would have made the film remarkable, especially because it was told through powerful interviews with people directly involved in the cases and remarkable video footage of Dr. West performing faulty tests during the autopsy of Christine Jackson. But the filmmakers decided to go further—first by showing the viewer a slice of the lives of Brooks and Brewer after they were freed, and second by providing some insight into how these innocent men could have been so easily convicted on such flimsy evidence.

#### B. LIFE AFTER EXONERATION

This part of the film demonstrates the power of the human spirit. Levon Brooks and Kenny Brewer are able to go on with their lives and find happiness, as shown

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8. MISSISSIPPI INNOCENCE, *supra* note 6, at 30:00.

through footage of their daily lives, despite the time they lost and hardship they endured. The viewer gets to see Levon Brooks hunting for deer and hear him describe how much he missed it. Brooks narrates a scene from his mother's funeral, where he shares that he was sad that he lost her but grateful that he was able to spend a year with her before she passed. The filmmakers share video footage of Kenny Brewer's wedding—a joyous affair with many loved ones.

Brooks and Brewer receive some compensation because of a Mississippi law that provides \$50,000 a year for each year that a person is wrongfully incarcerated, with a cap of \$500,000. Robert McDuff, a lawyer in Mississippi who worked to get the law passed in 2009, explains that the compensation is not enough, but that “it's better than nothing.”<sup>9</sup> The scenes with Tucker Carrington delivering Levon Brooks's first \$50,000 check to him and Brooks depositing his check at the bank are heartwarming.

Interviews with Brooks and Brewer reveal a theme that is surprising but all too familiar with exonerees<sup>10</sup>—there is no anger or expressions of hatred or a desire for revenge. Both men express a desire to move on with their lives and leave the past behind them.

### C. A SYSTEMIC PROBLEM

Through a series of interviews with the lawyers and others involved in the Innocence Movement, the last part of the film provides some analysis of what went wrong and why. Peter Neufeld focuses on the extraordinary “junk science” presented in the Brooks and Brewer cases. He states that there is “a very serious and systemic problem in criminal and capital justice . . . in Mississippi.”<sup>11</sup> Neufeld points out that the dentist, Dr. West, testified in twenty to twenty-five capital murder cases and Dr. Hayne did 1,500 autopsies a year for twenty years. Of the sixty-two people on death row in Mississippi, Hayne testified in about forty cases.

Reporter Radley Balko noted that the National Association of Medical Examiners established standards suggesting that a doctor should not conduct more than 250 autopsies a year. If a doctor does more than 325 autopsies a year, the organization will refuse to certify him, no matter the circumstances. Dr.

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9. MISSISSIPPI INNOCENCE, *supra* note 5, at 47:45.

10. For example, Robert McClendon was exonerated after serving seventeen years of a life sentence for allegedly raping his daughter. When faced with the troubles of readapting to life after prison, McClendon stated to *The Columbia Dispatch*, “You can't take the attitude that society owes us something because of what happened . . . We owe it to ourselves to make the right choices.” Michael Towler, wrongfully convicted for kidnapping, rape, and assault, was exonerated after serving nearly thirty years behind bars. He stated he felt lucky to have found a job as a mail clerk, and upon hearing his story, the CEO of Medical Mutual gave Towler the opportunity to pursue a career with his company, where Towler is said to have a positive impact. See *Three Ohio Exonerees Adjust to Life Outside of Prison*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Three\\_Ohio\\_Exonerees\\_Adjust\\_to\\_Life\\_Outside\\_of\\_Prison.php](http://www.innocenceproject.org/Content/Three_Ohio_Exonerees_Adjust_to_Life_Outside_of_Prison.php) (last visited Feb. 27, 2012).

11. MISSISSIPPI INNOCENCE, *supra* note 5, at 49:25.

Hayne was doing between 1,500 and 1,800 autopsies a year by his own admission. Dr. Hayne was never board certified in forensic pathology; he walked out of the exam in the 1980s, failed it, and never took it again. Yet, he repeatedly testified in court that he was board certified in forensic pathology. The American Board of Pathology never took action against him. Dr. Hayne testified in 80 to 90 percent of the homicide cases in the state of Mississippi over a period of twenty years.

As for Dr. Michael West, his “bite mark” testimony was totally false. Potkin and Neufeld retained the leading odontologists in the country to examine the materials in Brewer’s case. These doctors unanimously concluded that the marks on Christine Jackson’s body were not human bite marks and that Dr. West had in fact created marks on her body when he pressed Brewer’s dental mold against her body.

Barry Scheck, the founder of the Innocence Project, is interviewed in this part of the film. He notes that there still has not been a systematic review and evaluation of the cases that these doctors worked on. He points out that when these kinds of disasters take place in other fields, there is a systematic review of what went wrong to make sure it does not happen again—for example, when airplanes crash, trains derail, or even when financial institutions find evidence of fraud. Scheck notes that there are most certainly other people who have been victims of West’s and Hayne’s invalid scientific methods.

Vanessa Potkin explains that lawyers at the Innocence Project see the same pattern in cases around the country, in large part because the police officers, prosecutors, and forensic scientists involved are almost never held accountable. Instead, many go on with their careers and are often promoted. Dr. Blake, the scientist whose testing freed Brooks and Brewer, calls for the criminal prosecution of “fraudulent scientists who bring junk science into the courtroom.”<sup>12</sup> When asked if he believes there may be innocent people in prison in Mississippi, Attorney General Jim Hood admits that there may be.<sup>13</sup>

The film’s final interview is with Forrest Allgood, the prosecutor who presented and sponsored all of the junk science evidence that led to the wrongful convictions of these men and the near execution of one of them. Forrest Allgood does not apologize for his role in the grave injustices. In fact, he says, “In a very real sense, the system failed in both these cases. But then yet and still, in a very real sense, the system worked. Nobody died.”<sup>14</sup> Immediately after these chilling words, the filmmakers show the gravestone of Christine Jackson, who died because the system failed. She died because Forrest Allgood prosecuted Levon Brooks instead of the real killer, Justin Johnson. Had Justin Johnson been arrested and prosecuted for the murder of Courtney Smith, he would not have murdered

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12. *MISSISSIPPI INNOCENCE*, *supra* note 6, at 55:00.

13. *Id.* at 56:46.

14. *Id.* at 57:38.



Christine Jackson.

*Mississippi Innocence* is an extraordinary and important film that will hopefully effect systemic change in the criminal justice system in the state of Mississippi. It reveals a level of incompetence, fraud, and injustice that few would believe possible in the American criminal justice system today. It is a frightening notion that the law enforcement agents, medical examiner, odontologist, and prosecutor all failed to notice what was patently obvious to Mr. Brewer's defense attorneys—the same man murdered and raped those two girls. It is difficult to believe that with even a minimal effort, they would not have at least considered that possibility. Is it possible that they did, but didn't care enough to investigate further? It is also shocking that, until very recently, Dr. Steven Hayne performed autopsies in 80 to 90 percent of the homicides in the state of Mississippi over the past twenty years. How many other wrongfully convicted people are in prisons in the state of Mississippi? How many have been executed?

The film is so effective because the individuals responsible for the wrongful convictions of Levon Brooks and Kenny Brewer reveal their own incompetence and wrongdoing in the film. We hear from the deputy sheriff and the unrepentant prosecutor in their own words. We see Dr. West actually performing his fraudulent teeth mark tests on the body of Christine Jackson. We hear the attorney general admit that there are probably innocent people in prison in Mississippi. Yet none of these people seem concerned that there is a problem.

An hour-long documentary could not possibly provide all the details of every misstep in the investigation and trial of these two cases. However, the filmmaker's decision to focus on Dr. Hayne and Dr. West and the extent to which their fraudulent testimony has been used in criminal cases throughout the state is an important step towards improving the criminal justice system in Mississippi. The film does not explore the incompetence of Brooks's and Brewer's defense attorneys; neither lawyer presented a strong defense nor challenged the government's weak evidence.<sup>15</sup> It does reveal the incompetence of the Noxubee County Sheriff's office, and it touches upon the actions of the individual with the most responsibility to assure that justice was done in these cases—the prosecutor, Forrest Allgood.

### III. FORREST ALLGOOD'S ROLE IN THE WRONGFUL CONVICTIONS OF LEVON BROOKS AND KENNEDY BREWER

There was certainly enough blame to go around in the Brooks and Brewer cases. The Noxubee County Sheriff's office failed to adequately investigate the cases or even consider the possibility that the two very similar crimes may have

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15. See, e.g., *id.* at 25:23; Tucker Carrington, *Mississippi Innocence: The Convictions and Exonerations of Levon Brooks and Kennedy Brewer & the Failure of the American Promise* (forthcoming) (manuscript at 115-16) (on file with author).

been committed by the same person. Doctors Hayne and West played a pivotal role by presenting bogus scientific evidence that purported to prove that Brooks and Brewer committed the crimes. The defense attorneys in both cases failed to zealously challenge the evidence or even present an adequate defense. However, the person who bears the most responsibility for the wrongful convictions of Levon Brooks and Kenny Brewer is the prosecutor, Forrest Allgood.

Prosecutors are the most powerful officials in the criminal justice system.<sup>16</sup> They decide whether a person should be charged with a crime and what the charge or charges will be. Although police officers ordinarily initiate investigations and make arrests, they do not file charges against suspects. It is the prosecutor who makes that all-important decision. Prosecutors frequently choose not to bring charges in a case, even when there has been an arrest supported by probable cause. Their discretion at the charging and plea-bargaining stages of a criminal case is almost absolute.<sup>17</sup>

Just as prosecutors have total discretion in deciding whether and what to charge, they also have total discretion to dismiss a case at any stage of the proceeding.<sup>18</sup> Prosecutors frequently dismiss cases after bringing charges, for a variety of reasons. The victim or another witness may become uncooperative and a prosecutor may decide that compelling the witness’s testimony is not in the interest of justice.<sup>19</sup> Prosecutors also frequently dismiss cases as part of a plea bargain. Of course, if there is not sufficient credible evidence to prove the case beyond a reasonable doubt, the prosecutor should dismiss the case.<sup>20</sup>

Of all the individuals involved in the Brooks and Brewer cases, Forrest Allgood was the individual who had the most power and responsibility to prevent the wrongful convictions of Levon Brooks and Kenny Brewer. In both cases, Allgood knowingly presented the testimony of witnesses whose credibility was questionable, at best. He failed to even explore the obvious likelihood that the same man committed both crimes. If that possibility never occurred to Allgood, he failed to meet minimal standards of prosecutorial competency.

#### A. PRESENTATION OF UNRELIABLE AND DECEPTIVE TESTIMONY

According to American Bar Association (ABA) Model Rule 3.8(a), “The prosecutor in a criminal case shall refrain from prosecuting a charge the

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16. DAVIS, *supra* note 3, at 19-42.

17. *See id.* at 19-60.

18. *Id.*

19. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1983) [hereinafter MODEL CODE] (“The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.2(C) (Am. Bar Ass’n 3d ed. 1992) (“The duty of the prosecutor is to seek justice, not merely to convict.”); *see also* MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (2010) [hereinafter MODEL RULES] (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

20. *See, e.g.*, MODEL RULES R. 3.8.

prosecutor knows is not supported by probable cause.” Probable cause is a very low standard, and most prosecutors will refrain from charging an individual unless they know that they can prove guilt beyond a reasonable doubt, since they know they must meet that much higher standard at trial.<sup>21</sup> Some prosecutors take the view that they should charge whenever they believe they can secure a conviction, deferring most of the responsibility to the jury.<sup>22</sup> However, prosecutors have a duty to serve as “ministers of justice,” and should therefore assume more of a “gatekeeping” role at the charging stage.<sup>23</sup> The gatekeeping function involves sometimes declining to prosecute, even when a prosecutor believes she can secure a conviction, because jurors make mistakes. According to Professors Bruce Green and Ellen Yaroshevsky, the charging decision calls for some gatekeeping to avoid prosecuting innocent individuals, but there is no agreement on how much.<sup>24</sup> It is clear that Forrest Allgood totally abdicated his gatekeeping responsibility in the Brooks and Brewer cases.

Moreover, once a prosecutor has decided to move forward with a prosecution, he must assure that the evidence he presents in court is credible. As a practical matter, no prosecutor would want to present evidence that would be impeached by the defense attorney. Such impeachment would cause the jury to question the believability of the witness, and thus weaken the government’s case. More importantly, if there are issues that would cause a jury to question a witness’s credibility, the prosecutor should question that witness’s credibility as well and decline to present his testimony in support of a criminal conviction.

When a prosecutor presents evidence in the trial of a criminal case, he vouches for the credibility of that evidence. For example, when a prosecutor presents a witness’s testimony, he is assuring the jury that the witness is telling the truth. In closing arguments, the prosecutor directly addresses the jury and gives his word that the witness is being truthful.

It is hard to believe that Allgood was unaware that the evidence presented by Doctors Hayne and West was at a minimum, questionable. There is no doubt that he was aware that Dr. West had been discredited when he presented his testimony in the Brewer case. Whether or not he broke ethical rules, his decision to rely on this junk science to seek the death penalty is deplorable.

Dr. Steven Hayne performed the autopsies in both the Brooks and Brewer cases. It is difficult to discern how he was qualified as an expert witness. He

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21. But some prosecutors engage in the phenomenon of “overcharging” to give themselves an advantage either during plea bargaining or at trial. See DAVIS, *supra* note 3, at 31.

22. See Lars Nelson, *Preserving the Public Trust: Prosecutors’ Professional Responsibility to Advocate for the Electronic Recording of Custodial Interrogations*, 44 WILLAMETTE L. REV. 1, 17-18 (2007).

23. Bruce A. Green & Ellen Yaroshevsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 497 (2009) (citing Bruce A. Green, *Prosecutorial Ethics As Usual*, 2003 U. ILL. L. REV. 1573, 1588 (2003)).

24. See Green, *supra* note 20; see also MODEL RULES R. 3.8 cmt., *supra* note 17 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

served as the interim state medical examiner in 1987 and 1988 but stepped down because he was not qualified to fill the position.<sup>25</sup> Mississippi law requires state medical examiners to be certified in forensic pathology by the American Board of Pathology. Dr. Hayne has admitted that he failed the board exam after walking out in the middle of the exam. According to Dr. Hayne, the questions were “absurd.”<sup>26</sup> Despite the fact that he failed the exam, he has repeatedly testified under oath that he is “board certified.”<sup>27</sup> He claims membership in several organizations listed on his resume that are either not reputable or not well known. For example, he lists the American Academy of Forensic Examiners, which may be an alternate name for the American College of Forensic Examiners—an organization that accepts any member willing to pay a fee.<sup>28</sup> Dr. Hayne has admitted that the Academy “certified” him without requiring him to take an exam.<sup>29</sup>

Although Mississippi law requires that a board-certified state medical examiner oversee death investigations, the office remained unfilled between 1995 and 2011, purportedly due to lack of funding.<sup>30</sup> During that time period, individual prosecutors would “shop around” for the pathologist of their choice, creating an obvious bias problem and a very lucrative business for pathologists who produced the desired result for prosecutors. And Dr. Hayne always delivered. In 2007, Hayne charged \$550 per autopsy and \$195 per hour for trial preparation and testimony.<sup>31</sup> Since he was performing 1,500 to 1,800 autopsies a year—well over the profession’s cap of 325 per year—he was making millions of dollars each year.

According to the National Association of Medical Examiners, medical examiners have an ethical obligation to perform impartial investigations.<sup>32</sup> They do not work for the prosecutor’s office and should reach their conclusions about the cause of death independent of any outside influence, including that of the prosecutor’s. Apparently prosecutors in the state of Mississippi and the medical examiners they hired did not ascribe to this ethic:

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25. Radley Balko, *CSI: Mississippi*, REASON.COM (Nov. 2007), <http://reason.com/archives/2007/10/08/csi-mississippi/singlepage>.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* He charged \$1,500 or more for civil cases, and \$375 per hour for trial preparation and testimony.

32. See NATIONAL ASSOCIATION OF MEDICAL EXAMINERS MODEL POST-MORTEM EXAMINATIONS ACT § 3 (1954) (“It is basic to any properly organized medico-legal investigative system that the head of the Office be a person of the highest mental and moral caliber, with the best obtainable professional training in medicine and pathology, devoting full time to his duties and dedicated to the discreet and *wholly impartial acquisition of post-mortem evidence.*”) (emphasis added).

In 1994, for example, John T. Kitchens, the district attorney for Rankin and Madison counties, wrote a letter to the state commissioner of public safety complaining that the state medical examiner at the time, Emily Ward, had “unnecessarily rendered aid to the defense of criminal defendants.” Kitchens warned that “public officials surrounding the criminal justice system must remain mindful of who they work for”; that prosecutors shouldn’t have to “bear the extra burden of wondering for which side the State Medical examiner [sic] is then employed”; and that the state examiner should never confer with defense counsel without the consent of the district attorney involved in the case.<sup>33</sup>

Forrest Allgood clearly had a cozy business relationship with Dr. Hayne. Dr. Lloyd White served as the Mississippi medical examiner from 1989 to 1993. Just before leaving office he wrote a letter to the editor of the *Jackson Advocate*, accusing Dr. Hayne of unethical behavior and accusing Forrest Allgood of conspiring with Dr. Hayne to produce a result favorable to the prosecution in a particular case.<sup>34</sup> Dr. White wrote that he had performed an autopsy on a woman who was found dead in a bathtub. While waiting on the results of toxicology and other tests and prior to determining the cause of death, he received a phone call from Dr. Hayne. Dr. Hayne informed him that Forrest Allgood had requested that the body be moved to Dr. Hayne’s office for a second examination. White stated that the body was moved “surreptitiously, without my knowledge or permission.”<sup>35</sup> Dr. Hayne told Dr. White that he concluded that the woman was strangled and that it would be in Dr. White’s best interest to agree with him. Dr. White stated that Allgood had a suspect that he wanted to charge and that he was afraid that Dr. White’s autopsy would not help his case.<sup>36</sup>

Dr. Hayne frequently worked with Dr. Michael West, who claimed to be a forensic odontologist. Forensic odontology is a very imprecise field, especially when used in criminal cases.<sup>37</sup> It involves comparing a suspect’s teeth to marks on a victim’s body. The error rate in bite mark identification is very high; studies have found error rates as high as 63.5 percent and 91 percent.<sup>38</sup> There are virtually no rules, accreditation processes, or standards in the field, and there have been numerous exonerations in cases where individuals were convicted

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33. See Balko, *supra* note 25.

34. *Id.*

35. *Id.*

36. *Id.*

37. See COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 173-176 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>, pp. 173-176.

38. *Cases Where DNA Revealed that Bite Mark Analysis Led to Wrongful Arrests and Convictions*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Cases\\_Where\\_DNA\\_Revealed\\_that\\_Bite\\_Mark\\_Analysis\\_Led\\_to\\_Wrongful\\_Arrests\\_and\\_Convictions.php](http://www.innocenceproject.org/Content/Cases_Where_DNA_Revealed_that_Bite_Mark_Analysis_Led_to_Wrongful_Arrests_and_Convictions.php) (citation omitted).

based on bite mark evidence.<sup>39</sup>

Dr. West took the already suspect practice of forensic odontology to a new low, frequently making fantastical claims, many of which were eventually proven to be incorrect. With no training or scientific study, he invented his own method which he called "The West Phenomenon." He would use ultraviolet light and photography to locate and enhance wound markings that could otherwise not be seen with the naked eye. Dr. West made a spectacle of his exam, wearing big yellow goggles during the procedure and reaching unsupported conclusions that could not be verified by other forensic experts because, conveniently, his method could not be photographed.<sup>40</sup>

Dr. West was referred to the Ethics Committee of the American Association of Forensic Scientists (AAFS) about a week after Brooks's conviction.<sup>41</sup> A year later, a complaint was filed with the American Board of Forensic Odontology (ABFO). Both complaints alleged that Dr. West was making unsubstantiated claims under oath. There was a hearing in 1994, and the AAFS unanimously recommended that Dr. West be expelled. The ABFO found that Dr. West had misrepresented evidence and recommended that he be suspended for a year.<sup>42</sup> Mississippi courts began to follow suit, dismissing and reversing cases in which Dr. West (and Dr. Hayne) had testified.<sup>43</sup>

Even if Allgood claims that he was unaware of Dr. Hayne's and Dr. West's lack of credibility and fraudulent behavior at the time of the Brooks trial, he certainly was aware of Dr. West's suspension when he prosecuted Kenny Brewer for Christine Jackson's murder. He should have known about Dr. Hayne's failure to pass the board exam before the Brooks trial. Yet he retained Doctors West and Hayne and sponsored their testimony at trial. Allgood even questioned Dr. West about his professional "difficulties" on the witness stand during the Brewer trial, and he admitted under oath that he resigned from the American Board of Forensic Sciences and the International Association of Identification just before

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39. Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 *FORDHAM L. REV.* 2893, 2933 (2009); Flynn McRoberts & Steve Mills, *From the Start, A Faulty Science*, CHI. TRIB. (Oct. 19, 2004), <http://www.truthinjustice.org/bitemarks.htm>; see INNOCENCE PROJECT, *supra* note 35.

40. In one case, Dr. West employed the West Phenomenon to identify bite marks on a bologna sandwich as those of the defendant, who was subsequently convicted. The conviction was vacated upon West's statement that he threw away the sandwich after studying it because, in his belief, no one else could replicate his analysis, and therefore the sandwich would be of no further use. Radley Balko, *Indeed, and Without a Doubt*, REASON.COM, (Aug. 7, 2007), <http://reason.com/archives/2007/08/02/indeed-and-without-a-doubt>.

41. Carrington, *supra* note 15, at 109.

42. *Id.* at 120 (citing AM. BD. OF FORENSIC ODONTOLOGY ETHICS COMM., REPORT OF 1993-1994, COMPLAINT 93-B (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)).

43. *Id.* at 120-21 (citing *State v. Maxwell*, No. 5139 (Miss. Cir. Ct. dismissed Apr. 24, 1992); Defense Motion #55, Motion for New Trial for Newly Discovered Evidence, (Dec. 14, 1994), *State v. Keko*, No. 92-3292 (25th Jud. Dist. Ct. of La., Div. A, 1996), court refused to recognize West's and Hayne's claims).

these organizations would have taken action to expel him.<sup>44</sup> Brewer's lawyers objected to the admission of Dr. West's testimony but the court ruled that it was admissible.<sup>45</sup>

Allgood's decision to present the testimony of Doctors West and Hayne in the Brooks and Brewer cases is troubling on many levels. Though it is unclear how much Allgood knew about Dr. Hayne and Dr. West before the Brooks case, he had an obligation to at least verify their credentials. Allgood certainly knew about the number of autopsies Dr. Hayne was performing and thus should have been aware that Dr. Hayne was violating standards of the profession. Allgood also knew or should have known that Mississippi law requires medical examiners to be certified by the American Board of Pathology and that Dr. Hayne had no such certification. Finally, at a minimum, Allgood knew or should have known that Dr. Hayne failed the board exam.

Similarly, there was ample support for Dr. West's lack of credibility. By the time of the Brewer trial, Dr. West had been suspended by the ABFO after complaints alleging that he was making unsubstantiated claims under oath. The ethics committee of the ABFO concluded that Dr. West made material misrepresentations of evidence and data, that he failed to act in an impartial manner, and that he "present[ed] opinions regarding physical evidence outside the field of forensic odontology."<sup>46</sup> The AAFS recommended that he be expelled after finding that Dr. West "engaged in a pattern of activities in disregard for generally accepted professional standards" and that he misrepresented data.<sup>47</sup> Dr. West was also asked to resign from the International Association of Identification.<sup>48</sup> Allgood knew about all of these findings, yet he offered Dr. West's testimony nonetheless.

Allgood's presentation of five-year-old Ashley Smith's testimony in the Brooks case was equally troubling. Ashley testified at trial that Brooks was the person who came into their bedroom and took Courtney. Allgood argued to the jury that Ashley had "consistently from start to finish [said] this is the guy that took my sister."<sup>49</sup> This statement was, at best, an exaggeration, and at worst, a lie. When members of Courtney's family found her missing on the morning of September 15, 1990, there was a massive search for her body that lasted until the sun went down. At no time during that day did Ashley mention anything about Brooks being the perpetrator. After Deputy Sheriff Cecil Russell found her body in the pond the following morning, his office rounded up twelve suspects, and

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44. Transcript of Record at 689-94, *Brewer v. State*, No. 94-162-CR1 (C.C.S.D. Miss. 1995) [hereinafter *Brewer Tr.*].

45. *Id.* at 121.

46. *Id.* at 700-01.

47. *Id.* at 702-03.

48. *Id.* at 699.

49. See Carrington, *supra* note 15, at 75.

Levon Brooks was not among them. Surely if Ashley had identified Brooks by this point he would have been arrested and no other suspects would have been detained. Ashley did not identify Brooks until Deputy Sheriff Robert William interviewed her days after Courtney's body was discovered,<sup>50</sup> and the identification was far from solid. William interviewed Ashley twice. During the first interview, she told him that several people came into the house and that one of them was named "Trayvon." She went on to say that Trayvon attended Riley College with her mother and that he had a son named Travis.<sup>51</sup> A few days later, William interviewed Ashley again, and showed her a photo array that included Brooks's photo. Ashley picked him out and referred to him by his nickname "Tie Tee." Levon Brooks was then arrested and charged with the murder of Courtney Smith.

Levon Brooks had never been called "Trayvon," he never attended Riley College, and he certainly did not have a son named Travis. This five-year-old child picked the photograph of the person she knew and called him by his nickname "Tie Tee," not "Trayvon." In addition, Levon Brooks had a solid alibi. He was working all night in a popular local club during the evening that Courtney was abducted.<sup>52</sup> Numerous witnesses saw him there, and several testified at trial.

Allgood could not have secured the convictions of Brooks and Brewer without the testimony of Doctors Hayne and West. Their testimony was the only evidence that linked Kenny Brewer to the murder of Christine Jackson. The testimony of Ashley Smith in the Brooks case was very unreliable, and Allgood's characterization of her identification was extremely misleading. It was unconscionable for Allgood to seek the convictions of these men and ask that they be executed based on the testimony of witnesses whose credibility was questionable, at best.

## B. EXTREME TUNNEL VISION

Tunnel vision is the phenomenon in the criminal justice system that leads "actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt.'"<sup>53</sup> The phenomenon plays a role in many cases of wrongful conviction.<sup>54</sup> The law enforcement officers and Allgood certainly had tunnel vision in the Brooks case, but Allgood's behavior in the prosecution of Kenny Brewer can only be described as "extreme tunnel vision."

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50. See Carrington, *supra* note 12, at 76; see also Transcript of Record at 637-39, State v. Brooks, Noxubee Cir. Cause No. 5937 (C.C.S.D. Miss. 1992) [hereinafter Brooks Tr.].

51. Brooks Tr., *supra* note 48 at 637-39.

52. *Id.* at 72.

53. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. REV. 291, 292 (2006) (internal quotations omitted) (citation omitted); see also Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 How. L. J. 475 (2006).

54. *Id.*



The response of the deputy sheriff's office to Peter Neufeld and Vanessa Potkin when asked about the similarities of the two crimes is astonishing.<sup>55</sup> It is difficult to fathom how the officers would not consider the possibility that the same person committed both crimes. Dr. Hayne and Dr. West, who purported to be forensic experts, likewise should have at least considered that possibility. It would be quite a coincidence if another individual committed a "copy cat" crime so similar—another three-year-old, taken from her bed in the middle of the night, sexually assaulted, bitten all over her body, murdered, and dumped in a body of water. Yet not one person hesitated in moving forward with the conviction and execution of Kenny Brewer.

Though there were many systemic failures, Allgood bears the greatest responsibility for this injustice. He had the moral and ethical duty to halt the prosecution of Kenny Brewer once these facts became clear to him,<sup>56</sup> and they must have been clear to him from the beginning. After all, he was the prosecutor in both cases. What could have caused Allgood to fail in his moral and ethical duties as a prosecutor? Did he think about the similarities and shrug his shoulders? Did he really believe that two different men could have done these crimes, especially with the peculiarity of what he believed to be bite marks all over the victims' bodies? Did he simply not care?

The "extreme tunnel vision" was at its peak when Allgood insisted on continuing the prosecution of Kenny Brewer even after DNA evidence proved conclusively that he had not raped Christine Jackson. His new theory, that Brewer murdered her but did not rape her, defied logic. According to Peter Neufeld, Allgood was the first prosecutor he had ever known to continue a prosecution even after DNA exonerated the defendant.<sup>57</sup> Allgood's inexplicable intransigence resulted in Kenny Brewer spending another five years in prison after DNA proved his innocence.

Allgood was asked why he didn't run the DNA profile against the state's database, and he indicated that there was no such database.<sup>58</sup> In fact, there *was* a state DNA database, and John M. Allen, the assistant director of the state crime laboratory, indicated that it had been in existence for years.<sup>59</sup> It is unclear whether Allgood's behavior can be explained by intentional or reckless misconduct or just sheer ignorance. In either case, it is deplorable that one of the most powerful criminal justice officials in the state of Mississippi engaged in this kind of behavior.

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55. See *supra* pp. 92-93.

56. In 2008, the American Bar Association amended the Model Rules of Professional Responsibility, making it an ethical requirement for prosecutors to take action under certain circumstances, to investigate and/or remedy wrongful convictions. See *infra* pp.16-17.

57. Shaila Dewan, *Despite DNA Test, A Case Is Retried*, N.Y. TIMES (Sept. 6, 2007) available at <http://www.nytimes.com/2007/09/06/us/06dna.html?pagewanted=print>.

58. *Id.*

59. *Id.*

In 2008, the ABA amended Rule 3.8 of the Model Rules of Professional Responsibility ("Special Responsibilities of a Prosecutor"), requiring prosecutors to take action if they become aware of credible evidence of a wrongful conviction:

- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - (1) promptly disclose that evidence to an appropriate court or authority, and
  - (2) if the conviction was obtained in the prosecutor's jurisdiction,
    - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
    - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit."
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.<sup>60</sup>

These rules set forth the bare minimum responsibilities of the prosecutor when he becomes aware of evidence of a wrongful conviction. The amendments had not yet been adopted at the time of the Brooks and Brewer cases, and the Mississippi bar has yet to adopt them or amend its rules to create any responsibility for prosecutors to correct wrongful convictions.<sup>61</sup> However, prosecutors have a responsibility to do more than meet the bare minimum ethical standards. According to the United States Supreme Court (referring to the duties of a federal prosecutor), "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."<sup>62</sup> The Court also makes it clear that a prosecutor's interest in a criminal case is not to seek a conviction, but to assure "that justice shall be done."<sup>63</sup> Allgood's behavior fell far short of this responsibility.

Perhaps most shocking is Allgood's arrogance and refusal to accept any responsibility for the injustices in these cases. His flippant remarks in the film about how he did his best and that "the system worked" are indications that he saw no need to change his practices. There is significant evidence that he continued to recklessly prosecute murder cases on the flimsiest of evidence,<sup>64</sup>

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60. MODEL RULES R. 3.8 (2011).

61. See generally, MISS. RULES OF PROF'L CONDUCT.

62. Berger, *supra* note 1, at 87.

63. *Id.*

64. See Part IV *infra*.

even after his behavior in the Brooks and Brewer cases was exposed.<sup>65</sup>

#### IV. ALLGOOD'S MISCONDUCT CONTINUES

Although the film is only about the Brooks and Brewer cases, they were by no means the only cases in which Allgood prosecuted innocent people. There was the case of Sabrina Butler, an eighteen-year-old mentally retarded woman who Allgood prosecuted for the murder of her infant son. She was convicted in 1990, but the Mississippi Supreme Court reversed her conviction in 1992, holding, in part, that Allgood committed misconduct by arguing to the jury that her failure to take the stand was an indication of her guilt.<sup>66</sup> Prosecutors with a minimal level of competence are aware that it is improper to comment on the defendant's failure to testify.<sup>67</sup> When Butler was re-tried in 1995, she was acquitted after the medical examiner in the first trial admitted to making key mistakes and other experts testified that the child most likely died of Sudden Infant Death Syndrome or kidney disease.<sup>68</sup>

Then there was the case of Tyler Edmonds. Tyler Edmonds was a thirteen-year-old boy when Forrest Allgood brought capital murder charges against him for the 2003 murder of his half-sister's husband. Amazingly, Allgood again retained the then discredited Dr. Steven Hayne, who testified that two people had held the murder weapon based on examination of the bullet wounds in the victim's body. Mr. Edmonds was convicted and sentenced to life in prison. The Mississippi Supreme Court reversed Mr. Edmonds's conviction, holding that the trial court erred in admitting Dr. Hayne's testimony. According to the court:

There was no showing that Dr. Hayne's testimony was based, not on opinion or speculation, but rather on scientific methods and procedures . . . The State made no proffer of any scientific testing performed to support Dr. Hayne's two-shooter theory. Therefore, the testimony pertaining to the two-shooter theory should not have been admitted under our standards.<sup>69</sup>

In 2008, Edmonds was retried and acquitted.<sup>70</sup>

Perhaps the most shocking of Allgood's current prosecutions is the case of

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65. See, e.g., Radley Balko, *Bad Boys*, REASON.COM (July 2011), <http://reason.com/archives/2011/06/27/bad-boys/singlepage> (discussing Allgood's attempts to have biological evidence destroyed after Brewer's conviction, the Mississippi Supreme Court's order for a new trial due to faulty evidence, and Allgood's opposition to comparing crime scene DNA against the state's DNA database).

66. *Butler v. State*, 608 So. 2d 314, 318-19 (Miss. 1992).

67. U.S. Const. amend V. ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."); *Griffin v. California*, 380 U.S. 609, 615 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.").

68. Balko, *supra* note 62.

69. *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007).

70. See Balko, *supra* note 62.

Rennie Gibbs. Ms. Gibbs became pregnant when she was fifteen years old. She lost the baby in her thirty-sixth week of pregnancy when the baby was still-born. When Forrest Allgood discovered that she had a cocaine habit during her pregnancy, he charged her with the "depraved heart murder" of the child, an offense that carries a mandatory sentence of life in prison.<sup>71</sup> Ms. Gibbs's lawyer Robert McDuff filed a motion to dismiss, arguing that the allegations did not constitute murder under Mississippi law. According to Mr. McDuff, "If it's not a crime for a mother to intentionally end her pregnancy, how can it be a crime for her to do it unintentionally, whether by taking drugs or smoking or whatever it is."<sup>72</sup> The trial judge denied the motion, and the Mississippi Supreme Court granted an interlocutory appeal but then reversed its decision. According to the court, the appeal was improvidently granted and the issue can be raised, if necessary, on direct appeal from any conviction.<sup>73</sup> Ms. Gibbs's case is currently pending trial.

As recently as December 2011, the Mississippi Supreme Court reversed a murder conviction based on Allgood's misconduct. During the murder trial of Brian Holliman, Allgood made an impermissible "golden rule" argument during his closing argument. Specifically, he asked the jurors to put themselves in the shoes of the victim, an argument that the court specifically forbade in *Wells v. State*.<sup>74</sup> The Court admonished Allgood in the *Holliman* opinion:

The transgression of this long-stated rule by counsel is of particular concern. Accordingly, this Court feels it appropriate to restate its admonition to counsel set forth in *Stringer v. State*, 627 So. 2d 326, 330 (Miss. 1993):

We take this opportunity to caution the bench and bar of a growing number of reversals caused by inefficient, ineffective or unprofessional conduct by counsel. Retrials of criminal proceedings are extremely costly to the taxpayers of this State. It is not beyond the authority of this Court to assess the entire costs of a new trial to the attorney whose conduct made the trial necessary in those cases where this occurs. Personal liability for this cost may well be imposed by this Court in the future and it will be done with an even hand, applied both to the private attorney and the attorney representing the State. This Court is increasingly unwilling to cast the burden of incompetence on innocent

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71. Ed Pilkington, *Outcry in America as Pregnant Women Who Lose Babies Face Murder Charges*, THE GUARDIAN, June 24, 2011, <http://www.guardian.co.uk/world/2011/jun/24/america-pregnant-women-murder-charges> (last visited Apr. 28, 2012).

72. HYPERVOCAL.COM, *Why Does This 15-Year-Old Girl Face Life in Prison for a Miscarriage?*, <http://hypervocal.com/news/2011/why-does-this-15-year-old-girl-face-life-in-prison-for-a-miscarriage/> (last visited Apr. 28, 2012).

73. *Gibbs v. State*, No. 2010-IA-00819-SCT (Miss. 2011), available at <http://statecasefiles.justia.com/documents/mississippi/supreme-court/2010-ia-00819-sct.pdf?ts=1323899775>.

74. *Wells v. State*, 698 So. 2d 497, 507 (Miss. 1997).

taxpayers and considers this notice to the bench and bar that in the future we may not do so.<sup>75</sup>

Forrest Allgood has been a prosecutor for thirty-four years and has been the elected District Attorney in his district since 1989. Allgood brags about his experience on his website:

The District Attorney is the public official who represents the State in all felony criminal prosecutions. His office is a law firm; but it is a very specialized one. Criminal law is hyper-technical. One error can get a case dismissed; and there are lots of ways to make an error.<sup>76</sup>

Forrest Allgood should certainly know about making errors, but not surprisingly, none of his wrongful convictions or reversals are mentioned on his website. Despite his incompetence and misconduct, he has been consistently re-elected, most recently in 2011.

## V. CONCLUSION

*Mississippi Innocence* is an extraordinary film that offers a window into what passes as justice in the state of Mississippi. Although Brooks and Brewer were finally exonerated, they lost over a decade of their lives. Allgood was wrong—the system did not work. The criminal justice “system” did not save their lives. If Kenny Brewer had not written to the Innocence Project, and if they had not taken his case, he would likely have been executed, and Levon Brooks would have spent the rest of his life in a Mississippi prison. That is not the way the “system” is supposed to work. In fact, there is nothing “systematic” about the outcome of their cases, and it leads one to believe that there are most certainly other innocent people imprisoned in the state of Mississippi. The Attorney General admitted as much.

The film focuses on the despicable acts of Dr. Steven Hayne and Dr. Michael West. Although they have not been held accountable for their key roles in the wrongful convictions of Levon Brooks and Kenny Brewer, they are no longer performing autopsies in the state of Mississippi, and the position of state medical examiner was finally filled with a qualified doctor.

However, Forrest Allgood is still the District Attorney for District 16. He continues to engage in misconduct and abuse his power and discretion in the prosecution of murder cases. His reign of terror speaks volumes about the ineffectiveness of the electoral system as a mechanism of accountability for

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75. Holliman v. State, No. 2010-KA-00397-SCT (Miss. 2011), available at <http://courts.ms.gov/Images/Opinions/CO74243.pdf>.

76. RE-ELECT FORREST ALLGOOD, <http://www.forrestallgood.com/experience.html> (last visited Feb. 23, 2012).

prosecutors.<sup>77</sup> Allgood's opponent for the District Attorney position in 2011 apparently had nothing to say about Allgood's transgressions. In a profile of the candidates in *The Columbus Dispatch*, Allgood's challenger Steve Wallace noted:

Mr. Allgood has been in office 20 years and in that time we've seen the crime rate go up. We've seen Justice Court judges stopped from doing preliminary hearings and more things taken to the grand jury than ever.<sup>78</sup>

Wallace went on to promise to advocate for increased funding for upgraded computers and other equipment, but there was no mention of Allgood's wrongful convictions or other misconduct. Unless and until someone challenges Allgood in the next election, exposes his misconduct and incompetence, and offers an alternative to the voters, he will undoubtedly continue with his unique and frightening brand of prosecution.

The Mississippi bar should amend its Rules of Professional Conduct to include sections (g) and (h) of Rule 3.8 of the ABA Model Rules. Currently the Mississippi Rules impose minimal ethical standards for prosecutors:

**RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.<sup>79</sup>

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77. DAVIS, *supra* note 3, at 163-77.

78. Jason Browne, *Election Profiles: District 16 District Attorney*, THE DISPATCH, July 16, 2011, <http://www.cdispatch.com/news/article.asp?aid=12129>.

79. MISSISSIPPI RULES OF PROF'L CONDUCT R. 3.18 (1987), available at [http://courts.ms.gov/rules/msrulesofcourt/rules\\_of\\_professional\\_conduct.pdf](http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf).

Although the comment to this rule refers to the prosecutor's duty as a "minister of justice," it provides neither guidance nor examples for prosecutors attempting to fulfill this duty.<sup>80</sup>

In addition to amending its Rules of Professional Responsibility, the Mississippi bar should advocate for the establishment of a specialized unit to investigate and remedy wrongful convictions. Texas prosecutor Craig Watkins took the lead in establishing such a unit in his district. Mr. Watkins was elected as the District Attorney for Dallas County in 2007 and was re-elected in 2010. In 2007, he established a "Conviction Integrity Unit" in his office to investigate legitimate post-conviction claims of innocence.<sup>81</sup> There have been twenty-two exonerations in Dallas County since 2001, and most of them took place during Watkins's tenure.<sup>82</sup> Watkins has garnered a national reputation for his efforts. Scholars have called for the establishment of similar units in prosecution offices across the country.<sup>83</sup>

*Mississippi Innocence* is a great film that could serve as a catalyst for reform of the criminal justice system in the state of Mississippi. The film reveals egregious examples of misconduct and unethical behavior on the part of criminal justice officials and demonstrates how easily the criminal justice system can fail. It also raises the frightening prospect that these cases are undoubtedly not the only wrongful convictions in the state of Mississippi and the even more unsettling possibility that innocent men and women may have been executed. The Mississippi Innocence Project, established in 2007, is working to help free the wrongfully convicted and to identify and rectify the systemic problems in the state's criminal justice system. The state bar should support their efforts and take a leadership role in rectifying Mississippi's broken criminal justice system.

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80. MISSISSIPPI RULES OF PROF'L CONDUCT R. 3.18.

81. Dallas County District Attorney's Office—Conviction Integrity Unit, [http://dallasda.co/webdev/?page\\_id=73](http://dallasda.co/webdev/?page_id=73) (last visited Apr. 28, 2012).

82. AP Interview: Texas DA seeks death penalty review, SEATTLE PI, February 23, 2012, <http://www.seattlepi.com/news/article/AP-Interview-Texas-DA-seeks-death-penalty-review-3356768.php>.

83. See, e.g., Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 66 (2009).