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Film Review

The Thin Blue Line: Art or Trial in the Fact-Finding Process?

By Bennett L. Gershman†

Prosecutors in Dallas have said for years, “Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man.”¹

On November 28, 1976, about half-past midnight, on North Hampton Road in Dallas, Texas, Police Officer Robert Wood was shot to death at point blank range by the driver of a Mercury Comet. The killer sped away leaving no clues. After a month-long investigation, the police arrested Randall Dale Adams and charged him with the murder. Adams, who had no prior record, was tried, found guilty, and sentenced to death.²

Twelve years later, Adams’ case is the subject of an extraordinary film, *The Thin Blue Line*.³ Blending monologues, restagings, old movie clips, visual artifacts, newspaper accounts, maps, drawings, photographs, and police reports, the documentary meticulously dissects what is known about the case and the identity of the killer. In much the same manner that the

† Professor of Law, Pace University School of Law. I would like to thank my colleagues, Professors Donald L. Doernberg, Lissa Griffin, M. Stuart Madden, and Barbara Salken for their helpful comments on an earlier draft of this Article. I am also grateful to my secretary, Ms. Judith Caporale, for her assistance.

I would like to dedicate this Article to my late colleague and friend, Dean Philip B. Blank.

1. Transcript, *The Thin Blue Line* (Third Floor Productions, Inc. 1988), at 40 [hereinafter Transcript] (defense attorney Melvyn Bruder).

2. State v. Adams, F-77-1286-I (Crim. Dist. Ct. No. 2 Dallas County), *aff’d*, 577 S.W.2d 717 (Tex. Crim. App. 1979), *rev’d sub nom.* Adams v. Texas, 448 U.S. 38 (1980), *on remand* 624 S.W.2d 568 (Tex. Crim. App. 1981).

3. Miramax Films (1988).

Kennedy assassination still consumes us, the film projects a quality of urgency that rivets our attention. A haunting, pulsating score accentuates the tension. We are drawn inexorably into a psychological twilight zone of lies, deceptions, contradictions, and mistakes. The result is a portrayal, more vivid than any judicial decision or fictional account, of the vulnerability of the adversarial process of criminal justice, and the ease with which an innocent man could be put to death.

The film's central visual motif — which recurs again and again with nightmarish intensity — shows Officer Wood approaching the side of the car he had stopped, apparently for failing to illuminate its headlights. The window rolls down, and five gunshots explode into Wood's body and head. Who did it? Why? Each time we view this macabre tableau we search the gray shadows and blurred outlines for clues. In each revisitation, however, the scene changes, reinvented and transformed in the myriad ways that we, as well as police investigators and witnesses, might imagine it could have occurred.

Through this kaleidoscope we are relentlessly exposed to the formidable task facing trial juries, especially the jury which decided Randall Adams' fate, of resolving the falsehoods, inconsistencies, and ambiguities inherent in discovering the truth about a historical event. Ironically, however, we probably assimilate more relevant data in less than two hours than was imparted through the legal process to the *Adams* jury. Further, through this cinematic art form, we very likely are better equipped than the *Adams* jury to resolve the factual issues. It is a profoundly depressing experience. Indeed, the film's account of police myopia, judicial arrogance, witness corruption, and prosecutorial misconduct, has provided the impetus, as well as leads to actual evidence, for Adams' recent vindication.⁴

4. Apparently, Errol Morris, the director of the film, was given access to the prosecutor's files in the case that disclosed exculpatory information never revealed to Adams' attorneys. Moreover, his interviews with witnesses produced statements that contradicted their trial testimony. See Singer, *Predilections*, THE NEW YORKER, Feb. 6, 1989, at 63; Applebaum, "Blue Line" Aftermath: New Trial for Convict, N. Y. Times, Dec. 8, 1988, at C19, col. 5. As this Article was being completed, a Texas judge, following an evidentiary hearing on Adams' application for a writ of habeas corpus, granted the application and recommended a new trial. *Ex Parte Randall Dale Adams*, No. W-77-1286-I(B) (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989). On March 21, 1989, Adams was released from jail and will not be retried. See *infra* note

Part I of this Commentary objectively analyzes the film, focusing on its monologues, dramatizations, and exhibits. The film's organizational structure roughly parallels the stages of the criminal justice process, from the investigation and arrest of Adams to his trial, conviction, sentence, and post-conviction litigation. The prologue and epilogue unify the story. Part II attempts to explain the bizarre judicial result, focusing on the prosecutor's dominant role in the criminal justice process. It concludes, as does the film, that one of the fundamental features of our legal system — the intrinsic ability of the adversary process to discover the truth⁵ — cannot function when weighed down by prosecutorial misconduct. Part III analyzes the film's epistemological conclusion that although ultimate truth is unknowable, the artist's version of the truth can be superior to the official version arrived at by law. Part IV offers a brief conclusion and brings the case up-to-date.

I. Documentary Dramatization of a Murder Case

The film's prologue immediately introduces the overriding conflict between Adams' version of the events and that of the prosecution's chief witness, David Harris. Although legally resolved by the jury, it remains a mystery. It is immediately apparent that either Adams or Harris killed Officer Wood. The viewer's task, and the jury's as well, is straightforward: any information which inculpates Harris necessarily exculpates Adams, and vice versa.

Adams — the camera depicts a somber, expressionless man in white prison attire — relates, almost in a monotone, how he and his brother left Ohio in October, 1976, looking for work out

160 and accompanying text.

5. See generally J. FRANK, *COURTS ON TRIAL* (1950); FRANKEL, *PARTISAN JUSTICE* (1978); Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); See also *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth"). But see Flannery, *The Prosecutor's Case Against Liberal Discovery*, 33 F.R.D. 74 (1963) (trial not a search for truth).

For an interesting discussion of various theories of the American adversary system, see Goodpaster, *On The Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987).

West. They arrived in Dallas on Thursday, November 25th, where Adams immediately found employment. "Everything clicked. It's as if I was meant to be here."⁶ By contrast, David Harris — the camera reveals a cordial, personable young man in bright red attire — was a sixteen-year-old misfit with a long juvenile record. Harris stated, "I took a pistol from my dad and a shotgun — took a neighbor's car. I think I had broken into their house or something and got the keys to it. . . . Ended up coming to Dallas."⁷

The camera shifts back and forth between Adams and Harris. Adams explains that his car ran out of gas on his way home from work and "a person . . . pulled over . . . and asked me if I needed any help."⁸ Harris then describes how he picked up Adams and drove him home. Their stories seem to mesh. They agree that they spent the evening together drinking beer, smoking marijuana, and going to the movies. What else did they do together? When did they part? Why did they even meet? There is an existential quality which Adams himself expresses: "Why did I meet this kid? I don't know. Why did I run out of gas at that time? I don't know. But it happened."⁹ The harrowing dramatization of the killing — along with the flashing red light atop the police car — suddenly interrupts this dialogue, conveying the stark realization that at least one other person knew the killer's identity — Officer Wood.

The film, in the mode of a detective thriller, now moves to the investigative phase. We learn that the police immediately focused their attention on the recollections of Police Officer Teresa Turko, who was Wood's partner that night. Exactly what Turko saw has always been a baffling question, vividly depicted in the film. Turko, who is not interviewed in the film, was indisputably present when Wood was shot, and we see her in one simulated variation of the motif emptying her service revolver at the car as it sped away. However, although she consistently maintained that there was only one occupant in the car, she

6. Transcript, *supra* note 1, at 1.

7. *Id.*

8. *Id.*

9. *Id.* at 2.

could identify neither the car nor the killer.¹⁰ Turko was even hypnotized, but this failed to produce any leads.¹¹ A chocolate milkshake she had been drinking, flying surreally in slow motion from her hand into the roadway (she and Wood had just left a fast-food restaurant) suggests, as depicted in another dramatization of the motif, that she was seated inside her patrol car and rushed out only after she heard the gunfire.

Monologues by Dallas homicide investigators record their frustration:

It was getting awfully close to Christmas.

We still hadn't cleared it . . . [.] We'd never really gone that long in Dallas without clearing the murder of a police officer. We'd had several killed but we'd always cleared them pretty quick. And this case had gone a month, or nearly a month, and we still hadn't cleared it. However, we finally got the break that cleared it. . . [.]

It came out of Vidor, Texas.¹²

The film shifts to Vidor — a Texas road map helps locate the town — and the film returns to David Harris.

Several of Harris' neighbors, enthusiastic participants, recall

10. Officer Turko gave several contradictory reports to the police after the killing. She stated that she did not know the hair style of the driver, did not know whether the driver was black or white, male or female, and could not see into the car because "the window was too dirty to see through." *Ex parte* Randall Dale Adams, No. W-77-1286-I(B) at 6 (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989). Several of these reports were never disclosed to Adams' attorneys, despite a court order. Turko's refreshed and rehearsed trial testimony, at variance with her earlier accounts, became crucial in convicting Adams. The prosecution's suppression of these reports was one of the grounds upon which the district court granted the writ. *See id.* at 5-7.

11. *Id.* at 7. The prosecution did not notify Adams' defense attorneys of Turko's hypnosis. It is not clear whether the hypnosis had any effect on Turko's testimony, wherein she claimed for the first time that the driver had "bushy hair." Hypnosis did not trigger her recollection that the driver had bushy hair. In fact, she never told anyone that the driver had bushy hair until after she met with Assistant District Attorney Douglas Mulder to prepare her trial testimony. *Id.*

The issue of hypnotically-refreshed testimony recently has become a prominent evidentiary issue in criminal litigation. *See Rock v. Arkansas*, 483 U.S. 44 (1987). The Texas Court of Criminal Appeals has held that hypnotically-enhanced testimony may be introduced at trial only after a determination by the trial court, outside the jury's presence, that the proponent established its trustworthiness by clear and convincing evidence. *Zani v. State*, 758 S.W.2d 233, 243 (Tex. Crim. App. 1988).

12. Transcript, *supra* note 1, at 8.

that shortly after the murder, Harris bragged to them about killing Wood. After a news broadcast about the case, for example, Harris "started swearing up and down. He said, 'I swear to God . . . I shot that fucking pig. . . . I'm the one that killed him.'" ¹³ Harris even displayed to one of his neighbors the .22 caliber pistol he used, saying, "It's the one I shot him with, right here." ¹⁴ Harris explained to his friends that after Wood pulled him over and came up to the window, Harris "rolled down the window and just pulled the gun up and — Pow! — shot him." ¹⁵ Harris "swore up and down" to others that he murdered the officer, "trying to get anybody and everybody to listen to him. . . ." ¹⁶ We watch these interviews incredulously. Did Harris really say those things? More importantly, was he telling the truth?

Unconstrained by trial processes, the film attempts to travel into the mind of David Harris, to unravel its secrets. One method in this elusive quest, of course, is to record Harris himself. To be sure, Harris testified at Adams' trial and was cross-examined, ¹⁷ but one of the principal issues in the recent litigation was the trial judge's limitation of the cross-examination. ¹⁸ Indeed, Harris' revelations in this film, as we later learn, differ drastically from his trial testimony. Early in the film, for instance, we discover that immediately after the killing, Harris returned to Vidor and went on a crime spree.

Got back there, robbed an O'Bannion's 7-Eleven with a .22 rifle. Committed some other burglaries and what have you. All this time I was on probation — juvenile probation. Eventually I turned myself in for this stuff in Vidor. I think I made a confes-

13. *Id.* at 9 (statement of Hootie Nelson).

14. *Id.* at 10.

15. *Id.* at 9 (statement of Dennis Johnson).

16. *Id.* (statement of Floyd Jackson).

17. The importance of cross-examination to the fair and effective functioning of the adversary process is well known. According to Wigmore, cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. WIGMORE, EVIDENCE § 1367 (Chadbourn rev. ed. 1976). See also *Alford v. United States*, 282 U.S. 687, 692 (1931) (cross-examination is "one of the safeguards essential to a fair trial"); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested").

18. *Ex parte Randall Dale Adams*, No. W-77-1286-I(B) at 3-4 (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989).

sion or something. I can't even remember exactly. So I'm told I did.¹⁹

The trial judge refused to allow the jury to hear about these crimes.²⁰

We also hear from several of Harris' acquaintances. One neighbor provides chilling insights into Harris' character:

I seen David up in the bushes [soon after the Wood murder]. "Say, David, what are you doing in the bushes?" And . . . "Oh, man you ain't seen me." I said, "Why not? What's the deal?" He said, "Man, you just ain't seen me. You ain't seen me. Forget about seeing me, you know." Said, "Man, I've been having a real good time. Been robbing these houses and held up a couple of stores. . . [.] Got me a pistol."

That completely just alienated him from the whole neighborhood.

He didn't have a conscience. You know, if I do something bad, you know, it kind of gets to me, I feel, you know, "Shucks, I shouldn't have done that. I feel bad about it." Didn't bother *him*.

Didn't bother him at all.²¹

We further find out — a shattering discovery — that Harris is presently on death-row in Texas for a subsequent murder unrelated to the Wood killing, but strikingly similar in the manner in which the victim was killed. A newspaper headline and photographs of the victim accentuate the reality of that event. Police tell us that Harris broke into a home where Mark Mays and his girlfriend were alone. Harris forced Mays into the

19. Transcript, *supra* note 1, at 19 (statement of David Harris).

20. *Adams v. State*, 577 S.W.2d 717, 720-21 (Tex. Crim. App. 1979). The Texas Court of Criminal Appeals ruled that Adams' defense counsel had not properly preserved the issue by failing to notify the trial court that he believed such proof was admissible to demonstrate bias and motive on the part of Harris. The transcript of the trial proceedings, however, reveals just the opposite, namely, that counsel repeatedly advised the court that proof of Harris' pending charges of two burglaries and an aggravated robbery was admissible to show bias and motive. *Ex parte Randall Dale Adams*, No. 70,787 at 3-4 (Tex. Crim. App. Mar. 1, 1989). After an evidentiary hearing on a federal writ of habeas corpus, a magistrate found that the trial judge's ruling excluding proof of these crimes, and the affirmance by the Texas Court of Criminal Appeals, were erroneous. The magistrate concluded that "the finding by the Court of Criminal Appeals to the effect that counsel did not state that he wanted to demonstrate bias and motive on the part of Harris is not supported by the record." *Adams v. Lynaugh*, Civ. No. CA 3-85-2448-G at 6 (N.D. Tex. filed May 13, 1988).

21. Transcript, *supra* note 1, at 20 (emphasis in original).

bathroom at gunpoint and abducted the woman. When Mays chased after them, Harris shot him to death. A police officer describes the killing: "[W]hether it be two, three, or how many shots, I don't know — [Harris] . . . fired at point blank or near point-blank range."²²

Sam Kittrell, a young police officer in Vidor who had several encounters with Harris, is an important participant in the film. Kittrell interweaves at various points to describe Harris' ongoing criminal behavior and to provide eerie clues to Harris' personality. Kittrell recalls that a Mercury Comet had been stolen, and Harris was seen abandoning the car and running away. Kittrell at the time was hearing "little bits of information . . . that David had been involved in a shooting in Dallas of a police officer."²³

I asked him about . . . if he'd been to Dallas and he denied having been to Dallas. I asked him if he'd been involved in any type of shooting or knew anything about a shooting and he denied that to the end, which is fairly consistent with David. Even if he had of had some involvement, his first way that he always treats you he would deny. Then if he felt as though you really knew that he had done it, then he would be truthful about it.²⁴

Harris told Kittrell where he could locate the murder weapon, directing him to a swampy area behind Harris' residence. Kittrell retrieved the gun which had been placed underwater inside a sock sprayed with boot oil to prevent rust.

Harris, whose gun was used to kill Wood, and who stole the murder car, becomes a suspect and faces a wide assortment of other serious criminal charges. He accuses Adams.²⁵ Police de-

22. *Id.* at 45.

23. *Id.* at 8.

24. *Id.* at 9.

25. The district court found:

6. At the time of the interrogation, Harris was on juvenile probation for auto theft and burglary. In early December 1976, he had been arrested and confessed to three additional burglaries and an aggravated robbery.

7. During interrogation about the Wood murder, Harris inquired as to what would happen to his pending charges if he had not killed Officer Wood but "knew who did." He was advised that the resolution of those charges would depend on the nature and extent of his cooperation in making a case against the perpetrator.

8. After receiving this information, Harris accused applicant of committing the murder.

Ex parte Randall Dale Adams, No. W-77-1286-I(B) at 1-2 (Crim. Dist. Ct. No. 2 Dallas

scriptions of their questioning of Harris are grimly humorous, almost parody. Harris, according to the police, "came clean" when he realized "they are going to send me to the penitentiary for the rest of my life" ²⁶ He told the police that he had been "just bragging about this. I didn't do it, but I . . . know who did do it." ²⁷ "[O]f course," recalled a detective, "he came clean then. He tried to hide no facts. He just seemed like a friendly kid. We didn't want to make him mad." ²⁸ "It wasn't very long until I realized that what he knew was the facts of the case and it matched perfectly with what we knew. And it had to be right." ²⁹

Harris wryly recounts the version he gave the police:

The story that I told, uh, was: we were . . . it was like twelve something, so it was the next day, uh, early in the morning.

We were stopped and, uh, when we were stopped, the officer came up to the car and asked to see the driver's license or whatever, and he [Adams] just started shooting.

I don't know why, but it's always seemed like time just stopped or something, you know. I mean, it didn't seem like any time passed, you know.

It just seemed like, like it was . . . Boom! Time stopped or something. I don't know what it is, you know, uh. It's like a flash. ³⁰

The film returns to Adams. The police arrested Adams on the evening of December 21st. Etched from a distance, through the window of an interrogation room in Dallas police headquarters, is the profile of a young Randall Adams. The striking innocence of the scene, strangely resembling an Edward Hopper painting, contrasts sharply with the accumulating tension. Adams recalls that a detective tried to force him to sign a confession: "I told him I couldn't. . . . [He] threw a pistol on the table. Asked me . . . to pick it up. I told him 'No'. . . . He threatened me. . . . He pulled his service revolver on me." ³¹

County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989).

26. Transcript, *supra* note 1, at 10.

27. *Id.*

28. *Id.* at 10-11 (statement of Marshall Touchton).

29. *Id.* at 11 (statement of Gus Rose).

30. *Id.*

31. *Id.* at 2-3.

Statements by police personnel evoke laughter from some of the audience: "I had what I call a casual, friendly conversation with him to start with, to try to size him up . . . [a]nd I found almost immediately that he didn't have very much conscience [H]e was the kind that didn't have a lot of remorse for what he had done."³² "He showed no expression whatsoever."³³ "He, of course, almost overacted his innocence: he protested he hadn't done anything, couldn't imagine why we were bringing him in. He didn't fight or he didn't resist. He just protested his innocence."³⁴

ADAMS:

"I kept telling them the same thing, the same thing, the same thing. . . . [.] They didn't want to believe me."³⁵

Adams told the police that after riding around with Harris they went to a drive-in movie, arriving around seven o'clock. Fused with Adams' recollections are actual film clips from that double feature, *The Student Body* and *Swinging Cheerleaders*. The time these two films were shown and when the theater closed became crucial issues at trial. A popcorn machine becomes a tell-tale marker, used to dramatize Harris' trial testimony of when they left the movies: "Went to buy popcorn . . . a few minutes before midnight."³⁶

ADAMS:

We watched half of the one show, we started watching the first part of the second show.

32. *Id.* at 3 (statement of Gus Rose).

33. *Id.* (statement of Jackie Johnson).

34. *Id.* at 3 (statement of Gus Rose).

35. *Id.*

36. *Id.* at 42. This time sequence became crucial to corroborate Harris' testimony. The defense called the theatre managers, who testified that "'The Student Body' ran from 7:00 p.m. until 8:25 p.m., 'The Swinging Cheerleaders' ran from 8:40 p.m. until 10:14 p.m., and 'The Student Body' ran again from 10:24 p.m. until 11:49 p.m. (Trial R. III-614-15, 627)." *Ex parte* Randall Dale Adams, No. W-77-1286-I(B) at 16 (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989). The prosecutor knew from his investigator's written report that "'The Student Body' ended at 11:45 p.m. and there were no other showings that night." *Id.* at 17. Nevertheless, the prosecutor not only suppressed this report about the movie times from the defense, but actually vigorously cross-examined the managers in an effort to suggest that they may have shown "Swinging Cheerleaders" a second time and that the theater may have remained open for another hour. *Id.* at 16-17.

. . .
I didn't really care for the second feature, which was an R-rated, cheerleader type thing. . . .

. . .
I told him I wanted to leave.
. . . [H]e's acting kind of strange because he wanted to watch the end of the movie. Anyway, we left and we drove back towards Dallas, and we drove to the motel.

. . . I told him that since he was looking for a job, and there hadn't been anybody there at work, that if he wanted to stop back Monday morning . . . he can ride out and follow me to work, and he can talk to the boss. And he would probably get a job.

. . . I told him what time I went to work. And I left.

. . .
So I made me a sandwich and sat there and watched the end of The Carol Burnett Show. And when it went off, the news came on, and I watched fifteen, twenty minutes of the news. And that was it. I turned the TV off and went to sleep.³⁷

As Adams talks, the camera scans a page from the local TV listings for that date, showing that the Carol Burnett Show was on until 10 p.m., after which the evening news came on.

The film shifts back to the interrogation of Adams. We see close up an old typewriter, a clock on the wall, a document entitled "Voluntary Statement," and an ashtray gradually filling with cigarette butts. The police take a typewritten statement from Adams. "I read through it, and when it was basically what I liked, yes, I signed it."³⁸

Police officers state that:

[A]fter he made his right turn on Inwood Road . . . this is where our statement ends. He says he does not remember anything after that.

He didn't remember anything about a shooting. He didn't remember anything about a police officer stopping him or anything. . . . [T]hat part of his mind just conveniently went blank.

. . . And that's just a convenient memory lapse, is all that is.³⁹

A newspaper reports that Adams "confessed."

Adams is now charged with capital murder and the case is

37. Transcript, *supra* note 1, at 13-15.

38. *Id.* at 15.

39. *Id.*

scheduled for trial. Douglas Mulder will prosecute. The camera slowly scans a list of Mulder's victories, including the names of several defendants he sent to the electric chair. According to Edith James, one of Adams' attorneys:

Douglas Mulder had a perfect win record. I believe he resigned from the D.A.'s office without any defeats

That's why he's legendary.

Everything, as I recall, that Mulder ever said was about what a great guy Mulder was, how wonderful it was that he was getting all these convictions.⁴⁰

Judge Donald Metcalfe will preside. The camera closely peers into his face as he speaks: "I grew up in a family where I was taught a great respect for law enforcement. My father was an F.B.I. man probably at the worst possible time to be in the F.B.I. It was from 1932 to 1935 in Chicago."⁴¹

Metcalfe is portrayed as a crime buff with evident sympathy toward law enforcement. We watch a clip from an old movie depicting John Dillinger's death, as Metcalfe recounts how his father was at the Biograph Theater the night that Dillinger was apprehended. Metcalfe describes the public's fascination with Dillinger — "people were dipping their handkerchiefs in [Dillinger's] blood to get souvenirs" — and the "trivia" surrounding his capture — the "Woman in Red" that fingered Dillinger "was really the Lady in Orange."⁴²

Adams describes the testimony of Harris and Turko. Harris "was two hours late"⁴³ in his account of the events that day. Adams stated: "Everything that we did coincide with, he was two hours late. . . . The police officer was killed at twelve thirty, which is about two and a half hours after he last saw me."⁴⁴ Referring to Harris, Adams states:

His testimony is: as we were getting off the freeway on Inwood Avenue, that we're pulled over, he gets scared and he slumps down in the seat of the car. That as the officer walks up and shines his flashlight and I roll down my window, I pull the pistol

40. *Id.* at 18.

41. *Id.* at 21.

42. *Id.* at 22.

43. *Id.*

44. *Id.* at 23.

out and blow this man away.

His testimony is: that when I finally do drive to the motel, I get out. I tell him, "Don't worry about it. Forget this ever happened."

Now, that's crazy. That's crazy.⁴⁵

Turko, according to Adams, gave an inconsistent account. She told the police in her original statement, made fifteen minutes after the killing, that the killer wore "a fur-lined collar."⁴⁶

. . . In court: it might have been bushy hair. The kid [Harris] testified that I had a Levi jacket on . . . He testified at pre-trial that he had a fur-lined parka.

She's telling you who killed the man. One person in the car with the fur-lined collar.

Very convenient that the driver happened to have bushy hair. All she's got to do is look at a picture they took of me. But that is not her original statement. It's a hell of a big difference from "a fur-lined collar" to "bushy hair."⁴⁷

Adams testified in his own behalf. His lawyers were "very optimistic" about the result. Returning to the courtroom after a recess, however, they saw three people standing in front of the bench taking the oath to be sworn as witnesses.⁴⁸ A courtroom artist's sketch depicts the scene. These three last-minute witnesses were Emily Miller, her husband R.L. Miller, and Michael Randell.⁴⁹ The most forceful witness was Emily Miller.

Mrs. Miller got on the stand that last afternoon. And she said, "that's the man — I saw that man! I saw Randall Adams' face just right after. . . ." She said, "I saw the gun sticking out of the car when he shot that police officer, and that's the man," and she waved her finger right toward Randall Adams. She's the one that got him convicted.⁵⁰

The camera carefully surveys Emily Miller — dyed blond

45. *Id.* at 22-23.

46. *Id.* at 24.

47. *Id.* at 24-25 (statement of Randall Adams).

48. *Id.* at 25.

49. These "rebuttal" witnesses were not included on the prosecutor's list of witnesses. Defense counsel did not learn of their existence until they testified. *Ex parte* Randall Dale Adams, No. W-77-1286-I(B) at 21 (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989).

50. Transcript, *supra* note 1, at 25 (statement of Adams' attorney, Edith James).

hair, heavily made up, much older than she looked in newspaper photographs taken during the trial. Her free-flowing monologue has a stunning impact, contrasting sharply with the cramped question and answer style of testimony. As she talks, the film intermingles several clips from an old *Boston Blackie* movie:

EMILY MILLER:

Yeah, when I was a kid I used to want to be a detective all the time because I used to watch all the detective shows on TV.

When I was a kid they used to show these movies with Boston Blackie and he always had a woman with him. And I wanted to be the wife of a detective or be a detective, so I always watched detective stories.

I'm always looking because I never know what might come up. Or how I could help. I like to help in situations like that. I really do.

It's always happening to me, everywhere I go, you know, lots of times there's killings or anything, even around my house. Wherever. And I'm always looking or getting involved, you know, find out who did it, or what's going on.

I listen to people. And I'm always trying to decide who's lying or who killed who before the police do. See if I can beat them. Yeah.⁵¹

The camera deftly alternates between Emily Miller and her husband R.L. Miller as they describe what they claim they saw that night.

EMILY MILLER:

See, I was working at a gas station.⁵² My husband and I both. And then we weren't getting along well at all. So we was arguing back and forth. And this was why we didn't want to go home because we would rather talk it out in the car than go home with the kids and fight, you know? Had to listen to them, too. So we were really arguing, and we decided to go get something to eat.

So about that time, a police came out of a restaurant on the right hand side of the road and he went to pull the man over.

R.L. MILLER:

She turned around. I seen she was looking hard. She looked. And I didn't think she seen the guy, but she did. Because I said,

51. *Id.* at 26.

52. In fact, as we later learn, Emily Miller was fired from her job two weeks earlier for stealing from her boss.

"What you looking at?" Because I knew something went wrong. I said, "What you looking at?"

And she said, "You just shut up and drive."

EMILY MILLER:

And I kept telling my husband, "Slow down, slow down so I can see." And he said, "No." He said, "Come on." He said, "We're getting out of here. You're too nosy. You don't even know what's going on."

R.L. MILLER:

I had no idea somebody was going to get killed or shot. So I just drove on.

EMILY MILLER:

He was one of these kind that . . . he didn't like getting involved in nothing. He wanted to go on. He told me to shut up and turn around, don't look. I turned around and looked anyway.

R.L. MILLER:

So we heard something like backfire, or firecrackers, or something. And so we drove over the bridge, and I got to thinking, I said, "Emily, there're no firecrackers this time of the year."

I was thinking to myself, "that couldn't be somebody shooting," you know.

EMILY MILLER:

It was real dark, and it was cold. It was hard to see in that car. But, see, his window was down. The driver's window was down. And this is how I got such a good look.

R.L. MILLER:

I really didn't see anything inside. It was kind of . . . shadows on the window and stuff. But when he rolled down the window was what made his face stand out so. . . . The car was dark blue.

He had a beard, mustache, kind of dishwater-blond hair. But like I say, when he was in court, he sure looked a lot different. All I could tell was by this and this, you know, it was him.

I knew that there was some shots over there. I mean, you know, but I didn't want to be involved in it, because West Dallas is a high-crime neighborhood. One of the biggest.

EMILY MILLER:

He was more scared of it than I was. But see, when you have black people like that, they don't like getting involved in nothing. That's just common.

Like hearin', you know . . . ? Nobody wants to see nothing or hear nothing. And they'll stay completely in the background. That's why they were having such a hard time over there finding anybody that would come forward — because it was in a totally black neighborhood.

R.L. MILLER:

She just believed if she seen somebody doing something wrong, she'd sure tell it. She told on me a couple of times. She said that I was hauling drugs out of El Paso. Called the Sheriff down there, going to make me open my trunk. So I ended up opening it, but there wasn't nothing in it. Yeah, and . . . [.] Oh, man! Eeeooooowww. Yeah, if she found out you done something, she sure turn you in.⁵³

With this lengthy dialogue as a backdrop, the film reveals information about the Millers that was not disclosed to defense counsel during the trial. The Millers apparently were engaged in a violent weekend-long argument and were arrested for disorderly and violent behavior, at which point they decided to become prosecution witnesses.⁵⁴ Emily Miller admits that she

53. *Id.* at 26-28.

54. *See Ex parte Randall Dale Adams*, No. W-77-1286-I(B) at 8. On December 3, 1976, Emily Miller gave a statement to the police in which she described the driver as "either a Mexican or a very light skinned black man." *Id.* at 9. Adams is a white man. Prior to trial the court ordered the prosecutor to provide the defense with any information favorable to the defendant or inconsistent with the prosecution's theory of guilt. The prosecutor, according to the district court on Adams' application for a writ of habeas corpus, "knowingly suppressed Mrs. Miller's written statement." *Id.* "During deliberations, the jury sent out a note asking for Mrs. Miller's initial description of the driver to the police. The trial court refused this request. (Trial R. V. — 1313-15)." Application for writ of Habeas Corpus *Ex parte Randall Dale Adams*, No. W-77-1286-I(B) at 7-11. The prosecutor subsequently testified at a federal evidentiary hearing that he should have disclosed the statement to the defense but "forgot" to do so. *See Adams v. Lynaugh*, Civ. No. CA 3-85-2448-G at 8 (N.D. Tex. filed May 13, 1988).

The Texas Court of Criminal Appeals had initially ruled on this issue on the direct appeal. The court determined that defense counsel did not request Emily Miller's statement until three days after she testified. "This was not a timely request, and appellant may not complain of the failure of the prosecutor to disclose the statement earlier." *Adams v. State*, 577 S.W.2d 717, 723 (Tex. Crim. App. 1979).

The Texas Court of Criminal Appeals apparently misread the record. A federal magistrate, after an evidentiary hearing, held

that finding is clearly not supported by the record. . . . It is, thus, manifest from the state record that defense counsel made the proper motion for production of Miller's statement and that such motion was granted by the trial court. The contrary finding by the Court of Criminal Appeals is not supported by the record and is not entitled to be presumed correct by this Court.

Adams, Civ. No. CA. 3-85-2448-G at 8.

The district judge, ruling on Adams' application for a writ of habeas corpus, made these additional findings:

16. On Monday, May 2, 1977, defense counsel reiterated his request that the State produce any prior written statements made by Mrs. Miller.

17. Mr. Mulder then provided Mrs. Miller's written statement.

viewed a line-up in which Adams was present. She identified someone other than Adams — “I didn’t pick him out right then, because I picked out this bushy-haired man”⁵⁵ — after

18. Applicant sought to reopen the testimony to recall Mrs. Miller for further cross-examination.

19. Mr. Mulder advised the court that Mrs. Miller had already left for Bellville, Illinois, and that he had went to her apartment that morning and determined that she had moved out (Trial R. V-1147, 1150-51).

20. In the alternative, applicant offered Mrs. Miller’s written statement for impeachment so the jury would have the benefit of her initial description (Trial R. V-1148, 1157-58).

21. Mr. Mulder opposed the offer, contending that although it was not unfair to the State, it was unfair to Mrs. Miller to admit her written statement without giving her a chance to explain (Trial R. V-1160).

22. The court excluded the statement, observing that if Mrs. Miller was still in Dallas, the court “absolutely” would allow applicant to recall her (Trial R. V-1166).

23. In fact, Mrs. Miller was in Dallas at the Alamo Plaza Motel on Monday, May 2, 1977.

24. The Dallas County District Attorney’s Office had been paying the Millers’ hotel bill at the Adolphus Hotel through Friday, April 29, 1977.

25. When Mrs. Miller completed her testimony, she told Mr. Mulder that she would be at the Alamo Plaza Motel if he needed her any further (Fed. R. I-125).

26. Mr. Mulder’s statement to the court that Mrs. Miller was en route to Bellville, Illinois, was incorrect.

27. The State’s knowledge that Mrs. Miller was at the Alamo Plaza Motel was corroborated, to some extent, by the presence of her motel phone bill in the State’s file, with notations made on that bill by Mr. Mulder. Mr. Mulder was unable to explain at the evidentiary hearing why he had Mrs. Miller’s bill from the Alamo Plaza Motel in his file and why he had made notations regarding the number of phone calls made from her room.

28. During deliberations, the jury sent out notes asking for Mrs. Miller’s initial description of the driver to the police and inquiring whether Mrs. Miller had identified applicant in a police lineup.

29. The jury was extremely concerned about Mrs. Miller’s identification testimony, but expressed no such concern with the less compelling testimony of Robert Miller and Michael Randell.

30. This issue was properly preserved for review when the court granted, prior to trial, applicant’s *Gaskin* and *Brady* motions.

31. No appellate court has ever fully considered the merits of this issue.

32. Suppression of this statement was harmful to applicant, as it could have been used to impeach Mrs. Miller’s harmful testimony identifying him as the driver.

33. The State’s suppression of this statement undermines the court’s confidence in the jury verdict.

34. The court recommends that habeas corpus relief be granted.

Ex parte Randall Dale Adams, No. W-77-1286-I(B) at 10-11.

The Texas Court of Criminal Appeals specifically affirmed these findings. *Ex parte Randall Dale Adams*, No. 70,787 at 9-12 (Tex. Crim. App. Mar. 1, 1989).

55. Transcript, *supra* note 1, at 44.

which a police officer told her that Adams was the murder suspect.⁵⁶ R.L. Miller viewed the same line-up and did not pick out Adams because "he didn't get that good a look at him."⁵⁷ The film discloses a very large reward offered in the Wood case — neatly portrayed by newspaper clippings — and suggests that this reward inspired the Millers to point out Adams. We learn also that Emily Miller's daughter was about to stand trial on armed robbery charges carrying a maximum penalty of life imprisonment, but that one week after Emily Miller testified in the Adams case, the robbery charges against her daughter were dropped.⁵⁸

56. The district court found that "the State knowingly used perjured testimony . . . in eliciting [Emily Miller's] testimony that she had identified [Adams] in a police lineup." *Ex parte Randall Dale Adams*, No. W-77-1286-I(B) at 12-13.

This finding was based upon the following:

1. At trial, Emily Miller testified outside the presence of a jury that in December 1976, she identified applicant in a police lineup (Trial R. IV-1080-81).
2. In response to questions from the court, she testified that the police did not suggest which person in the lineup she should identify and that she identified applicant on her own (Trial R. IV-1088-89).
3. The trial court found that her trial identification was not tainted by an unduly suggestive lineup (Trial R. IV-1097).
4. During deliberations, the jury sent out notes inquiring whether Mrs. Miller had identified applicant in a police lineup (Trial R. V-1320-21).
5. In fact, Mrs. Miller identified someone other than applicant in the police lineup.
6. Mrs. Miller asked the officer conducting the lineup whether she had identified the "right man."
7. The officer told Mrs. Miller that she had identified the "wrong man."
8. Mrs. Miller asked the officer which person was the "right man."
9. The officer pointed out applicant, by place in the lineup, as the murder suspect.

...

12. The State suppressed evidence that Mrs. Miller failed to identify applicant in a police lineup, after which an officer improperly advised her that applicant was the murder suspect.

Ex parte Randall Dale Adams, No. W-77-1286-I(B) at 11-12.

The Texas Court of Criminal Appeals specifically affirmed these findings. *Ex parte Randall Dale Adams*, No. 70,787 at 11-12.

57. *Ex parte Randall Dale Adams*, No. 70,787 at 12. The prosecutor also suppressed information contained in his files that R.L. Miller failed to pick Adams out of a line-up. *Id.*

58. The dismissal of the robbery charges was initiated by Mulder, who advised his co-prosecutor at the *Adams* trial to "check out" the robbery case against Miller's daughter. The case was dismissed the following day. The attorney representing Miller's daughter was not even aware of the dismissal. The existence of the pending charges against Miller's daughter was never disclosed to the defense, even though the existence of such charges motivated the Millers to testify for the prosecution. *Ex parte Randall Dale*

The film portrays the Millers as self-motivated, irresponsible, and corrupt witnesses, whose last-minute testimony was given too late to permit the defense attorneys to investigate their stories. Elba Carr, a fellow employee of the Millers at Fas Gas, reinforces these impressions. Emily Miller, according to Carr, “had never told the truth in her life.”⁵⁹

[R.L. Miller] came to work the day after. He got to telling me about the policeman that had gotten shot the night before. And I hadn't heard anything about it. And I thought 'it was another one of these stories . . . And he brings in these newspapers, and he says: he didn't see a damn thing. He couldn't see nothing, it was too dark.

Wheels started rolling in his head about money, you know.

And that's when he got the idea . . . Let me put it in his words: for enough money, he would testify to what they wanted him to say. He would say anything that they wanted him to say. Or he would see anything that they wanted [him] to see.

Those were his words.

I was shocked that he did go ahead and get up and tell that he saw the actual shooting and . . . you know, recognized the boy. Identified him.⁶⁰

Carr tried to alert the defense to these facts but was too late.⁶¹

The third last-minute witness was Michael Randell. He tells us that he has “develop[ed] something like total recall.”⁶² There were two individuals in the car, according to Randell, and the driver had long blond hair and a moustache. His recollection contradicts his claim to “total recall.”

The officer, he walked up to the vehicle. He had walked up. His car was . . . let me see . . . I don't know if it was behind or in front, but I know he had him pulled over, and he was up to the car. I think he was up to the car. Let me think. Yeah, he was up to the car. He had to have been up to the car. He was up to the car.

I didn't see no bullet. I didn't see no gunfire. Because I went

Adams, No. W-77-1286-I(B) at 13-15.

59. Transcript, *supra* note 1, at 29.

60. *Id.* at 29-30 (statement of Elba Carr).

61. The film reproduces close up the contemporaneous telephone messages from Ms. Carr to the defense attorneys reporting that the Millers were “telling lies.”

62. Transcript, *supra* note 1, at 30.

on.⁶³

Randell testified that on the night of the offense he had been playing basketball at a nearby local court until midnight, and that he was alone in his car. These statements, Randell admits, were untrue. In fact, the local basketball court closed at 5 p.m., and Randell had been cheating on his wife with a woman named Debbie at the "Plush Pub" in Fort Worth.⁶⁴ Debbie was with him in the car at the time.⁶⁵ Randell is much more candid on camera than he was in his sworn testimony at the trial.

I didn't tell them about that. I couldn't tell them. My wife'd kill me. My wife would've tore my head off if she'd knowed I was out that night with another woman. . . . I was trying to get her home.

The driver's side was down because the lady was a little sick. You see, she needed some air, because she was pretty drunk.⁶⁶

Closing arguments by the defense and prosecution conclude the trial. Mulder's summation, Judge Metcalfe recalls, was highly emotional:

I always try very hard — every judge I know of does — to not show emotion on the bench. The reason: if you do show emotion, the jury might take it that you're favoring one side or another. So you try to remain passive, emotionless, objective.

I do have to admit that in the Adams case — and I've never really said this before — Doug Mulder's final argument was one I'd never heard before: about the "thin blue line" of police that separates the public from anarchy. And I have to concede that my eyes kind of welled up when I heard that. It did get to me emotionally, but I don't think I showed it.⁶⁷

We are slapped with the newspaper headline: "Adams Guilty."

The film shifts to the punishment phase of the trial. In Texas, the jury decides whether a defendant convicted of capital

63. *Id.* at 31 (statement of Michael Randell).

64. *Ex parte* Randall Dale Adams, No. W-77-1286-I(B) at 15 (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989).

65. Randell testified at trial that he formerly played professional basketball with the Denver Rockets, that on the night of the offense he had been playing basketball at a nearby local court until midnight, and that he was alone in his car. This testimony, according to the district judge, was perjurious. *Id.* at 15-16.

66. Transcript, *supra* note 1, at 42.

67. *Id.* at 31.

murder should be executed. The jury's decision depends on whether it finds that the defendant presents a future danger to society.⁶⁸ To help the jury answer this question, the prosecutor routinely elicits psychiatric testimony about the defendant's potential dangerousness. One of the most controversial of these psychiatric witnesses is Dr. James P. Grigson, known as "Dr. Doom" or "Dr. Death."⁶⁹

ADAMS:

It was April 15th, tax day. I think I was filling out my taxes at the time. Afraid I might be late. A guard walks up to the door and tells me there's someone out here who wants to talk to you. I asked him who it was. He said, he didn't know, but the court ordered me to talk to him. I said, "Oh, all right."

68. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1989). The statute provides: (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following . . . issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. . . .

69. Dr. Grigson's testimony in capital murder trials has attracted considerable attention. He has been labeled "Dr. Death." *West Fifty Seventh Street* (CBS television broadcast, Oct. 15, 1988); Cope, *Predicting Future Violence*, TRIAL 82 (Feb. 1982) ("He's the killer shrink") (quoting Henry Schwartzchild, Director of the Capital Punishment Project of the American Civil Liberties Union); Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 287 (1982) ("Dr. Grigson apparently has yet to meet a defendant he does not think dangerous"); *The New Yorker*, Sept. 5, 1988 at 76. He also has been referred to as "Dr. Doom." Pike, "Doctor of Doom" Testimony Rejected: Death Sentence Vacated in Texas," NAT'L L.J. June 1, 1981, at 5, col. 2; Tybor, *Dallas Doctor of Doom*, NAT'L L.J., Nov. 24, 1980, at 1, col. 2. He has been called the "hanging psychiatrist." J. WINSKADE AND J. ROSS, *THE INSANITY PLEA* 167 (1983). Dr. Grigson's testimony also has been the subject of three Supreme Court decisions: *Satterwhite v. Texas*, 108 S. Ct. 1792 (1988); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Estelle v. Smith*, 451 U.S. 454 (1981). See Davis, *Texas Capital Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert*, 69 J. CR. L. & CRIM. 300 (1978).

And here come this real tall, ostrich-looking dude. [A photograph depicts a smiling Grigson sprawled out on a sofa].

He introduced himself as Dr. Grigson. He pulled a pad out of his coat pocket that had a line drawn across it. On this pad, on the upper half he had six images. I will say a box, a square, a circle with a diamond in it. I don't know — you know, it's been awhile. He slides this piece of paper across to me and he hands me a pencil. He says, "I'm going to get a cup of coffee. Please copy what's on this piece of paper."

Well, I'm looking at this man, I said, "What? You want it copied just the same way you did? Or you want me to change it around? What do you want me to do?" He said, "[J]ust do whatever you think you want to do," and he left. So on the bottom half of this piece of paper I made my boxes and x's and zeros with diamonds in them exactly like his. [A photograph of a Bender-Gestalt test flashes on the screen].

He asked me, "What's the meaning of a rolling stone gathers no moss?" I'm looking at this man and I'm saying, "Are you kidding, is this a joke? What are you doing?" He said, "No, I really want to know your answer to that question." I said, "Well, a rolling stone gathers no moss, to me it would represent a person that doesn't stand still long enough. It's kind of hard for people to cling to him, he keeps moving on. It's hard for people to get close to him."

He shook his head. He said, "What about, a bird in the hand is worth two in the bush?" I said, "If you have a hold of something why give it up for the chance of getting something that might be a little better? It doesn't make sense. You have got something pretty good why let go of it? If you can get the other one, get it if you can, but don't let go of what you got to try to get something else.["]

He asked about my family. He asked about my background, and he left. Total time we had talked: maybe fifteen, twenty minutes.⁷⁰

We are hit with another newspaper headline: "No remorse . . . no guilt."

Adams recalls Grigson's characterizations:

He called me Charlie Manson. He called me Adolf Hitler. He said I'm the type of personality that can work all day and creep all night.

70. Transcript, *supra* note 1, at 32-33.

. . . Even though he talked to me for fifteen minutes. I have no prior . . . arrest[s]. . . .
He's crazy. He's crazy.⁷¹

Judge Metcalfe remarks:

You can understand why a man might steal if he needs money to . . . put food on the table. I can understand why a seventeen year old boy who doesn't have a car would steal one to ride around in. I can understand why the heroin addict needs heroin. But it's very hard to understand why anybody has to kill a police officer. It just doesn't have to be.⁷²

A newspaper headline seals the result: "Adams Given Death."

Adams reflects on his death sentence as the film scans a stark black and white photograph of an electric chair:

They're very serious. They're talking about how they're going to execute you. Plain and simple. We're going to end it right here. You get numb. You get numb. You get . . . [i]t's like a bad dream. You want to wake up but you can't do it.

Fifteen times, twenty times a day I hear this same story about what happens when a man is electrocuted. His eyeballs pop out. His fingernails pop out. His toenails pop out. He bleeds out of every orifice he's got.⁷³

Harris, in turn, reflects on Adams' fate: "I didn't have any idea of what happened to him. After I testified, I was gone.

I never really concerned myself with it, you [k]now. Maybe I didn't want to know. I didn't have any interest in knowing, otherwise I might have tried to find out."⁷⁴

The post-trial proceedings are quickly condensed. Adams lost his appeal in the Texas Court of Criminal Appeals.⁷⁵ One week before his execution, the United States Supreme Court granted him a stay, and a year later vacated his death sentence.⁷⁶

71. *Id.* at 34.

72. *Id.*

73. *Id.* at 35.

74. *Id.* at 36.

75. *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979).

76. *Adams v. Texas*, 448 U.S. 38, 50-51 (1980). The Supreme Court held that the Texas statute in effect at Adams' trial relating to the qualifications of persons to serve on capital juries violated the sixth and fourteenth amendments as construed in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The Court in *Adams* found that under the

Judge Metcalfe's view of the appellate process suggests either naivete or arrogance:

Our highest state appellate court — the Court of Criminal Appeals in Austin — affirmed the case 9-0. And then it was reversed by the United States Supreme Court, 8-1.

When the Appellate Court reverses a case, they are never saying the trial judge was right or wrong. They are saying they disagree with the judge. You can't, for instance, in the Adams appeals say the appellate courts were saying I was right or I was wrong.

After all if in Austin, in our state appeals court, I was 9-0 correct and in Washington I was 1-8 incorrect. If you tally all those votes I come out 10-8.⁷⁷

Adams sought a new trial but his request was suspiciously rejected. The prosecutor's office, according to Adams' lawyer, vowed a retrial of Randall Dale Adams because there was no room . . . for a cop-killer going free, or getting off with anything less than the death penalty. . . .

. . . For reasons that were never really made public, [the prosecutor] requested the governor to commute Mr. Adams' death penalty to life and that eliminated the possibility of a retrial based on the reversal.⁷⁸

Texas statute, a prospective juror automatically was excluded from service if that juror was unwilling to swear that the mandatory penalty of death or life imprisonment would not affect his or her deliberations on any factual issue. Such inquiry resulting in exclusion from service was much broader than *Witherspoon* permitted. *Adams*, 448 U.S. at 50-51. The appropriate standard is not whether the juror might in any way be affected by the imposition of the death penalty, but rather, whether the juror would be unable to follow the judge's instructions or obey his or her oath as juror. *Witherspoon*, 391 U.S. at 522.

77. Transcript, *supra* note 1, at 38-39.

78. *Id.* at 39. See *Adams v. State*, 624 S.W.2d 568 (Tex. Crim. App. 1981) wherein the court, by a vote of 6-3, denied Adams' application for a new trial following the Supreme Court's decision setting aside his death sentence. The majority's brief opinion held that the Supreme Court decision had no direct effect on the as yet unaltered judgment of guilt against Adams found in the trial court. *Id.* at 569. Moreover, the majority concluded, since the Governor commuted the death penalty, there was no judgment remaining upon which the state court could act. *Id.* Three judges vigorously dissented, urging that the Governor's action constituted a usurpation by the executive branch of the judiciary's constitutional power. *Id.* at 569-70 (Clinton, J., dissenting). The dissenters pointed out that on the date the Governor commuted the death sentence, in view of the Supreme Court's decision, there was no valid judgment in existence assessing the punishment at death, and therefore nothing for the Governor to commute. *Id.* at 570. The dissent implied that the commutation was a sham to prevent Adams from obtaining a new

The film ends by focusing once more on David Harris. Although Sam Kittrell could not recall any specific factor in Harris' background that would suggest violent or pathological behavior, he mentions, almost in passing, that David "had one brother that drowned, numerous years ago."⁷⁹ We are suddenly hit with the realization that this event is a clue to unraveling the mystery. As Harris speaks, we see family album photographs of Harris, his father and mother, and his younger brother. The effect is poignant, suggesting the seeds of Harris' criminal personality.

I was three years old — I had a four year old brother and he drowned, in 1963, right after President Kennedy was assassinated, I believe — sometime right after that during the summer. We was living in Beaumont on Harrison Street and, my dad was working on his truck out in the yard and mom was in the house doing her housework or fixing dinner or something.

Me and my brother, we had one of these blow up pools and we were playing in that. My dad was supposed to be watching us or keeping eyes on us or something. My brother wandered off, down the street, and these people had a swimming pool in their backyard, and they were elderly people, and they never used the pool. I guess it had a bunch of leaves and stuff in it. And he, evidently, fell in there and drowned.

I guess that was a great loss for me. I used to sit up in my room at night and talk to him and he wasn't even there. So I guess that might have been some kind of a traumatic experience for me, you [k]now, at that time — not really understanding what it was but having that loss.

I guess my dad always kind of felt responsible because, he was supposed to have been there watching us. And I don't know, maybe he couldn't get rid of the responsibility or the guilt or something.

I don't know what it was. But I was there and I guess maybe I reminded him of that. All the time growing up it was hard for me to get any acceptance from him with anything I did. It was never good enough. And when my brother, my younger brother,

trial. *Id.* at 569-70. The Executive Order stated that the Governor's commutation was at the request of the Texas Board of Pardons and Paroles. *Id.* at 570. But as the dissent noted, Adams never requested a commutation of his sentence or a pardon. Adams wanted a new trial. *Id.* at 570 n.6.

79. Transcript, *supra* note 1, at 47.

was born it was kind of like he was daddy's favorite. Or something. I don't know. He realizes it now — how he treated me then and I know he regrets it. And he thinks maybe that that's what caused everything, but, I can't let him take that blame because everybody's life is going to take some kind of path regardless of what happens.

I think maybe a lot of the things I did when I was younger was an attempt to get back at him or something for the way he treated me. But I came to realize I wasn't doing nothing but hurting myself.⁸⁰

The film concludes with "the last interview" of David Harris, on December 5, 1986. We do not see Harris. We see a tape recorder in motion upon which is superimposed a transcript of that last interview:

ERROL MORRIS:

Would you say that Adams is a pretty unlucky fellow?

DAVID HARRIS:

Definitely. If it wasn't for bad luck, he wouldn't have had none.

ERROL MORRIS:

What was the bad luck?

DAVID HARRIS:

Could have been any number of things. Depends on how you want to look at it. It's like I told you a while ago about the guy who didn't have no place to stay. If he had a place to stay, he'd never have nowhere to go, right?

ERROL MORRIS:

You mean if he would have stayed there at the motel that night this would never have happened?

DAVID HARRIS:

Good possibility. Good possibility. Heard of the proverbial scapegoat? There's probably been thousands of innocent people convicted and there will probably be thousands more. Why? Who knows.

ERROL MORRIS:

Is he innocent?

DAVID HARRIS:

Did you ask him?

ERROL MORRIS:

80. *Id.* at 48-49 (statement of David Harris).

Well, he's always said he's been innocent.

DAVID HARRIS:

There you go. Didn't believe him, huh? Criminals always lie.

ERROL MORRIS:

Well, what do you think about whether or not he's innocent?

DAVID HARRIS:

I'm sure he is.

ERROL MORRIS:

How can you be sure?

DAVID HARRIS:

Because I'm the one that knows.

ERROL MORRIS:

Were you surprised that the police blamed him?

DAVID HARRIS:

They didn't blame him. I did. A scared sixteen year old kid. He sure would like to get out of it if he can.

ERROL MORRIS:

Do you think they believed you?

DAVID HARRIS:

No doubt. Must have. They didn't have nothing else until I give them something, so . . . I guess they get something, they run with it, you know.

ERROL MORRIS:

Were you surprised they believed you?

DAVID HARRIS:

I might have been. I don't know. I was hoping they'd believe me. After all was said and done it was kind of unbelievable. But there it is. I've always thought if you could say why there's a reason that Randall Adams is in jail, it might be because the fact that he didn't have no place for somebody to stay that helped him that night . . . landed him where he's at . . .

That might be the reason. That might be the only, total reason why he's where he's at today.⁸¹

A close up of the red flashing police car light signals the film's end.⁸²

81. *Id.* at 49-50.

82. After *The Thin Blue Line* was produced, Harris made further and even more incriminating admissions. The district court found:

10. Harris admitted to Steve Dunleavy of the FOX Television Network, David Pasztor of the Dallas Times Herald and David Jackson of the Dallas Morning News that he was alone in the car at the time of the Wood murder, that he was holding the murder weapon in his right hand, that he stuck the gun outside the

II. The Prosecutor's Control Over the Adversarial System and the "Search for Truth"

By providing a devastating account of an almost certain miscarriage of justice, *The Thin Blue Line* offers an enormously compelling critique of the utility and fairness of the adversary trial process. The problem is not unfamiliar. Many of the concerns about the legal fact-finding system have been raised in other contexts,⁸³ but never in such a clear and direct way. To be sure, some limitations upon accurate fact-finding derive from constitutional and evidentiary rules.⁸⁴ But the greatest threat to reliable fact-finding emanates from the prosecutor's unique and decisive role in the adversary system, and his ability to control the adjudication process. Indeed, the most serious malfunctions of the fact-finding process in *Adams* were attributable to the prosecutor's willful suppression of evidence.

The prosecutor is commonly regarded as the most dominant figure in the criminal justice system.⁸⁵ The prosecutor decides

driver's window as Officer Wood approached, that his finger was on the trigger, that the gun discharged five times, that Officer Wood fell to the ground and that Harris drove away.

11. Harris sent a confidential letter to his mother in September 1988 acknowledging that he, rather than applicant, was responsible for the Wood murder and explaining reasons that he had not accepted responsibility when interrogated by the police in 1976.

12. David Harris judicially confessed at the habeas corpus hearing that he, rather than applicant, killed Officer Wood.

13. The only time that Harris has denied killing Officer Wood was when the police confronted him with his admissions to friends and his possession of the murder weapon, at which time he shifted the blame to applicant and later repeated that version at trial.

Ex parte Randall Dale Adams, No. W-77-1286-I(B) at 2 (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989).

83. See *supra* note 5.

84. The exclusionary rules of the fourth and fifth amendments often keep out reliable proof. *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment); *Jackson v. Denno*, 378 U.S. 368 (1964) (fifth amendment). Rules of privilege also deny proof to the fact-finder. *Griffin v. California*, 380 U.S. 609 (1965) (privilege against self-incrimination); *Trammel v. United States*, 445 U.S. 40 (1980) (spousal privilege).

85. See Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981) (prosecutor holds the power to invoke or deny punishment); *Young v. United States ex rel. Vuitton et fils S.A.*, 107 S. Ct. 2124, 2141 (1987) ("Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual.") See also B. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4.1 (1985).

whether or not to bring criminal charges, who to charge, what charges to bring, and whether a defendant will stand trial, plead guilty, or be granted immunity from prosecution. In jurisdictions that authorize capital punishment, the prosecutor literally decides who shall live and who shall die.⁸⁶ Why did the prosecutor proceed against Randall Adams at all? And with such vigor? Why did the prosecutor not proceed against David Harris, who more probably committed the murder?

The prosecutor knew from the outset that the killer more closely resembled Harris than Adams,⁸⁷ that the car had been stolen by Harris,⁸⁸ that the murder weapon had been stolen by Harris, and that Harris was on juvenile probation when Wood stopped the car.⁸⁹ If he were caught with a stolen car or a weapon, Harris would have been returned to prison as a probation violator. Harris went into hiding after the killing, thereafter returning to Vidor and committing additional violent crimes. Harris bragged to friends immediately after the killing that he had murdered Wood.⁹⁰ The theater manager contradicted Harris' account of the time when Harris left the movies that night.⁹¹ The three last-minute identification witnesses either failed to identify Adams in a line-up, gave inaccurate descriptions to the police, lied about their backgrounds, or had motives to fabricate their stories.⁹² By contrast, the prosecutor knew that

86. Moreover, in exercising this vast power, the prosecutor is independent from the judiciary, and his discretion is virtually unlimited. The prosecutor can neither be compelled to prosecute, *see* *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, *Cox v. Hauberg*, 381 U.S. 935 (1965); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973), nor can he be enjoined from prosecuting, *United States v. Thompson*, 251 U.S. 407, 411-13 (1920). Although some prosecutorial discretion is necessary, the exercise of such discretion can be "lawless," H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 290 (1963); "tyrannical," *see* *Henderson v. United States*, 349 F.2d 712, 714 (D.C. Cir. 1965) (Bazelon, C. J., dissenting), and "dangerous," Jackson, *The Federal Prosecutor*, 31 J. CR. L. & CRIM. 3, 5 (1940).

87. Turko's initial description, although vague, stated that the driver wore a "dark coat with a large collar" and had "collar length hair." Exhibit A-1, *Ex parte* Randall Dale Adams, No. W-77-1286-I(B) (Crim. Dist. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989). She did not say until the trial that the driver had "bushy hair." *Ex parte* Randall Dale Adams, No. W-77-1286-I(B) at 6.

88. Transcript, *supra* note 1, at 35.

89. *Id.* at 19.

90. *See supra* notes 13-15 and accompanying text.

91. *See supra* note 36.

92. *See supra* notes 54-56.

Adams had no criminal record, had been honorably discharged from the Army, had always held a steady job, had gone to work every day at his job in Dallas even after Wood was killed, had no history to even remotely suggest he would commit such a crime, and had no reason to kill the policeman.⁹³

Yet, Adams was an easy target. Harris provided eyewitness testimony,⁹⁴ the Millers and Randell supplied corroboration,⁹⁵ and Adams himself made a statement which, although ambiguous, could have suggested that he knew more than he was saying.⁹⁶ Admittedly, even an ethical prosecutor faces considerable pressure to proceed aggressively against a suspect such as Adams. Once a case acquires this kind of momentum, it becomes difficult — perhaps even institutionally impossible — for any prosecutor to analyze that case objectively and decide to forego or defer prosecution.⁹⁷ Such institutional pressures are even more compelling in an unsolved murder of a police officer, and raise complex ethical and legal questions. Thus, although a prosecutor is obligated to ensure generally that justice is served, and to protect a defendant's right to a fair trial, he is also encouraged to win.⁹⁸ The pressures that impel a prosecutor to prosecute aggressively and make winning so attractive can result in conduct that violates a defendant's rights.

The effectiveness and fairness of the adversary system presuppose that prosecutors behave fairly. The prosecutor is re-

93. Exhibit F, Application for Writ of Habeas Corpus, *Ex parte Randall Dale Adams*, No. W-77-1286-I(B) (interoffice memorandum from Investigator Jeff Shaw to Assistant District Attorney Douglas Mulder). See also Transcript, *supra* note 1, at 34.

94. See *supra* notes 26-30 and accompanying text.

95. See *supra* notes 50-66 and accompanying text.

96. See *supra* notes 38-40 and accompanying text.

97. See Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 552 (1987). "At a crucial point in every investigation, therefore, the information gathering shifts from an impartial inquiry as to who did it to the building of a case against a specific person. What results is a natural tendency to acquire all the evidence that inculcates the person selected as guilty while all other evidence is ignored." *Id.*

98. *Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutor's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. 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."). See AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 3-1.1(c) (2d ed. 1986) [hereinafter STANDARDS FOR CRIMINAL JUSTICE] ("The duty of the prosecutor is to seek justice, not merely to convict.").

quired, among other things, to reveal information that tends to exculpate a defendant,⁹⁹ not to offer any evidence that the prosecutor believes is fraudulent,¹⁰⁰ to refrain from advocacy that distorts the evidence,¹⁰¹ and to refrain from improper argument that encourages the jury to decide a case on matters unrelated to the evidence.¹⁰² In this case, these legal and ethical constraints on the prosecutor's behavior were ignored.

Emily Miller, her husband, and Michael Randell were called by the prosecutor at the end of the trial as "rebuttal witnesses," preventing the defense from having any chance to investigate and contradict their stories. The strategy worked. Probably the most powerful testimony at the trial came from Emily Miller, waving her finger at Randall Adams and shouting, "that's the man — I saw that man!"¹⁰³ The prejudicial impact of such testimony on a jury is incalculable.¹⁰⁴ The jury during deliberations focused heavily on Miller's identification, wanting to know whether she gave a description to the police, and whether she picked Adams out of a line-up.¹⁰⁵

Too late for use at trial, the defense subsequently learned that both Millers had reputations as liars, would do anything for money, and were under arrest for other crimes at the time they offered cooperation to the prosecutor. The jury was given the false impression, apparently with the prosecutor's knowledge,

99. *Brady v. Maryland*, 373 U.S. 83, 86 (1963). See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 98, at § 3-3.11(a) ("It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused").

100. *Miller v. Pate*, 386 U.S. 1, 7 (1967). See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 98, at § 3-5.6 ("It is unprofessional conduct for a prosecutor knowingly to offer false evidence. . .").

101. *Frazier v. Cupp*, 394 U.S. 731, 736 (1969). See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 98, at §§ 3-5.6, 3-5.7 (unprofessional conduct for prosecutor to offer inadmissible evidence, ask legally objectionable questions, discredit a witness the prosecutor knows is telling the truth, or ask questions that imply facts prosecutor knows are false).

102. *Viereck v. United States*, 318 U.S. 236, 247-48 (1943). See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 98, at § 3.5-8 (prosecutor should not use arguments calculated to inflame or mislead jury).

103. Transcript, *supra* note 1, at 25.

104. F. LOFTUS, *EYEWITNESS TESTIMONY* 19 (1979). "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" *Id.*

105. See *supra* notes 53-54.

that the Millers were gainfully employed and at work at the time they made their critical observations. Also unknown to the defense, but known to the prosecutor, was the Millers' interest in reward money for information about the killing, as well as the pendency of serious criminal charges against Emily Miller's daughter, charges which the prosecutor dismissed in the same courtroom one week after the Millers testified against Adams.¹⁰⁶ The context in which their claimed observations were made — in the space of a few seconds late at night on a dark street while driving in the opposite direction — by itself raises considerable doubt about the accuracy of the Millers' identifications.¹⁰⁷ The impeaching information, had it been known to the defense, would have destroyed their credibility.

Moreover, the prosecutor plainly knew that the Millers were untrustworthy and impeachable witnesses, but did not reveal any of this information to the defense. The prosecutor, for example, withheld a statement Emily Miller gave to the police shortly after the killing, in which she described the killer as a "Mexican or light skinned black man."¹⁰⁸ When the defense learned about this statement for the first time on Monday morning following the Millers' Friday afternoon testimony, it sought to recall Mrs. Miller. The prosecutor objected, arguing that Miller had left Dallas and that the prosecutor did not know her present whereabouts.¹⁰⁹ The prosecutor's files, however, contained receipts for numerous telephone calls made by the Millers that Monday from a different hotel in Dallas.¹¹⁰ The

106. See *supra* note 58 and accompanying text.

107. Courts and commentators have long recognized the treacherous nature of eyewitness proof, and the potential breakdown in the adversary process resulting from mistaken identifications. See *United States v. Wade*, 388 U.S. 218 (1967) "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Id.* at 228. Eyewitness identification is felt to be "inherently suspect" and "notoriously unreliable." *Watkins v. Sowders*, 449 U.S. 341, 350 (1981) (Brennan, J., dissenting).

A recent study of wrongful convictions concludes that the eyewitness misidentification is the single most important factor leading to conviction. See Huff, Rattner & Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQUENCY 518, 524 (1986).

108. See *supra* note 54.

109. *Adams v. State*, 577 S.W.2d 717, 722-23 (Tex. Crim. App. 1979). See also *supra* note 53.

110. See *supra* note 53.

prosecutor similarly knew, but did not disclose to the defense, that neither Emily nor R. L. Miller was able to identify Adams from a line-up, and identified him only after a police investigator pointed Adams out.¹¹¹ In view of the devastating impact of the Millers' in-court identifications, the prosecutor's suppression of this information and his tacit vouching for the accuracy of their testimony is astonishing, particularly when the defendant's life hung on the acceptance of that testimony.

Distortion of proof is unethical and constitutes misconduct.¹¹² Yet, the prosecutor skewed his presentation of the proof to confuse the jury's perception of the facts. Although the prosecutor knew, for example, that the drive-in movie closed well before midnight, which contradicted a crucial piece of Harris' testimony, the prosecutor cross-examined the theater manager in a deliberate effort to convey to the jury the false impression that the theater may have remained open past midnight.¹¹³ The prosecutor knew that Michael Randell gave false and misleading testimony about his background, where he was coming from, and who he was with.¹¹⁴ The prosecutor knew that Turko had been hypnotized, and had made statements shortly after the shooting directly contradicting her trial testimony.¹¹⁵ None of this information, clearly relevant to discredit the trustworthiness of these witnesses' accounts, was disclosed to the defense. Presupposing highly skilled defense counsel able to test the accuracy and truthfulness of the prosecution's proof — a basic postulate for the adversary system's success¹¹⁶ — the process necessarily malfunctions when the prosecutor is able to distort the information that enters the process, and screen out information that is detrimental to his case.

111. See *supra* note 54.

112. See *supra* note 100.

113. See *supra* note 36.

114. See *supra* note 66 and accompanying text.

115. See *supra* notes 10-11 and accompanying text.

116. See Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 228 (1964) ("The plea for the adversary system is that it elicits a reasonable approximation of the truth. The reasoning is that with each side on its mettle to present its own case and to challenge its opponents, the relevant unprivileged evidence in the main emerges in the ensuing clash."); Jonakait, *supra* note 97, at 566 ("When the prosecutor presents distorted or incomplete evidence and the defense is unaware of the deficient presentation, the adversary system is not fully functioning.").

The prosecutor also withheld important evidence about David Harris' credibility. Prosecutors commonly bargain with accomplices and informants to convict other criminals. Although these arrangements can be criticized on legal, policy, and ethical grounds,¹¹⁷ the focus here is not on whether such practice in the abstract is good or bad. The focus, rather, is on the ability of the adversary system effectively to cope with this type of proof, especially when a prosecutor conceals crucial information about the details of the arrangement. Harris indisputably received total and complete immunity for his testimony against Adams. Harris, however, denied at trial that any deal had been made with the prosecutor. Harris now acknowledges that the prosecutor told him to deny that any deal was made if he were asked.¹¹⁸ He admits that there was an understanding with the prosecutor that if he testified consistently with what the prosecutor wanted him to say, he would receive complete immunity for the many charges he faced, which carried sentences of up to life imprison-

117. *Washington v. Texas*, 388 U.S. 14, 22 (1967) (noting proclivity of accomplices to lie in favor of prosecution). See Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800 (1987). See also *Use of Jailhouse Informers Reviewed in Los Angeles*, N.Y. Times, Jan. 3, 1989, at A14, col 1.

118. The district court found:

1. At trial, David Harris testified outside the presence of the jury that he had no deals, agreements, promises, or offers of leniency in exchange for his testimony (Trial R. IV-1114-16) nor would he get any help on the offenses committed in Vidor either before or after the Wood murder (Trial R. IV-1119).

2. The burglary and aggravated robbery charges were not prosecuted and Harris' juvenile probation was not revoked after he testified against applicant. In fact, after applicant's trial, Harris never again had to report to his probation officer.

3. On the basis of conversations with the Dallas authorities, officer Sam Kittrell of the Vidor Police Department had the understanding, prior to applicant's trial, that Harris' charges would be dismissed after he testified against applicant.

4. Harris' family retained a lawyer, Rodney Price, to determine whether Harris needed representation on the Vidor charges. After speaking to the authorities, Price advised the family prior to applicant's trial that Harris did not need counsel because the charges would not be prosecuted.

5. The charges were dismissed in consideration for Harris' testimony against applicant.

6. The court cannot conclude definitively that the State made a deal with Harris in exchange for his testimony against applicant. However, it does appear that Harris lied when he testified at trial that he would not get any help on the Vidor charges.

7. The court cannot conclude definitively that the prosecutor had actual knowledge that Harris' charges would be dismissed at the time Harris testified.

Ex parte Randall Dale Adams, No. W-77-1286-I(B) at 4-5 (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70,787 (Tex. Crim. App. Mar. 1, 1989).

ment.¹¹⁹ As every prosecutor and defense lawyer knows, accurate testimony about this type of immunity bargain is crucial to a fact-finder's evaluation of a witness' credibility.¹²⁰ A witness who points the finger at someone else to protect his own life or freedom is arguably less believable for that reason. The *Adams* jury never knew that Harris would go free in return for his testimony, and would have been imprisoned, perhaps for the rest of his life, if he did not testify against Adams in accordance with the deal.

Compounding his misconduct, the prosecutor also resisted defense efforts to elicit proof that Harris committed several additional violent felonies after he returned to Vidor, which carried a penalty of life imprisonment. The prosecutor argued that such proof was irrelevant.¹²¹ Judge Metcalfe concurred, and excluded this proof. The Texas Court of Criminal Appeals upheld Metcalfe's ruling. Nevertheless, a federal magistrate and a district judge subsequently ruled that the prosecutor, Metcalfe, and the Texas appeals court were wrong in keeping out that proof.¹²² Indeed, in a landmark case that was specifically cited to Judge Metcalfe, the Supreme Court explicitly endorsed the admissibility of such proof.¹²³ Had the jury known the extent of Harris' crimes and the extent of his self-interest in giving his testimony, the jury might very well have discounted his testimony entirely.

Finally, the prosecutor's manipulation of "expert" testimony produced the death sentence. Although the jury nominally made the decision to execute Adams, the prosecutor and his psychiatric witnesses, particularly Dr. Grigson, actually were responsible.¹²⁴ As Justice Blackmun wrote in one of several cases reaching the Supreme Court involving the testimony of the "ubiquitous"¹²⁵ Dr. Grigson: "In a capital case, the specious tes-

119. Transcript, *supra* note 1, at 43. See also *Ex parte Randall Dale Adams*, No. W-77-1286-I(B) at 4-5.

120. See *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) ("[t]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination").

121. Transcript, *supra* note 1, at 21.

122. *Adams v. Lynaugh*, Civ. No. CA 3-85-2448-G at 6 (N.D. Tex. filed May 13, 1988); *Ex parte Randall Dale Adams*, No. W-77-1286-I(B), at 4.

123. *Davis v. Alaska*, 415 U.S. at 309.

124. See *supra* notes 69-70 and accompanying text.

125. *Satterwhite v. Texas*, 108 S. Ct. 1792, 1803 (1988) (Blackmun, J., concurring).

timony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself."¹²⁶

Dr. Grigson examined Adams for about fifteen minutes.¹²⁷ Dr. Grigson testified that Adams had the profile and characteristics of a sociopath and would commit criminal acts of violence in the future that would constitute a continuing threat to society.¹²⁸ Although such predictions are notoriously unreliable in general,¹²⁹ they appear grotesque when they concern a person such as Randall Adams who never before in his life had engaged in antisocial or violent behavior. This is particularly the case when such testimony emanates from a witness — popularly known as “Dr. Death” or “Dr. Doom” — who in virtually every case testifies that the defendant is potentially dangerous and should be executed.¹³⁰ Concerning witnesses like Grigson, Justice Blackmun observed that these self-proclaimed experts at predicting future dangerousness create “an aura of scientific infallibility,”¹³¹ making it difficult for the adversary process to “cut through the facade of superior knowledge”¹³² and thereby demonstrate the fraudulent nature of such testimony.

See also supra note 68.

126. *Barefoot v. Estelle*, 463 U.S. 880, 916 (1988) (Blackmun, J., dissenting).

127. Transcript, *supra* note 1, at 32-33.

128. *Adams v. State*, 577 S.W.2d 717, 731 (Tex. Crim. App. 1979).

129. The American Psychiatric Association has characterized predictions of long-term future violence as “fundamentally very low reliability.” Brief Amicus Curiae for the American Psychiatric Association at 12, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080). Other authorities, based on overwhelming evidence, have reached the same conclusion. *See Barefoot*, 463 U.S. at 920-21 and n.2. *See also* *People v. Murtishaw*, 29 Cal. 3d 733, 767, 631 P.2d 446, 466, 175 Cal. Rptr. 738, 758 (1981) (such predictions are “unreliable,” “frequently erroneous,” and “extremely prejudicial”).

130. *See* Tybor, *supra* note 69, at 8. Cope, *Predicting Future Violence*, *supra* note 69, at 82. “Grigson has testified about defendants’ potential for violence in 119 capital cases, at times deeming defendants severe sociopaths certain to strike again. Only nine of those defendants have been spared the sentence of death.” *Id.* (footnote omitted). *See also* J. WINSLADE & J. ROSS, *supra* note 69 at 167 (Grigson has testified in virtually every case that a capital defendant had been a sociopath).

131. *Barefoot*, 463 U.S. at 926 (Blackmun, J., dissenting) (quoting Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980)).

132. *Id.* at 932.

III. The Truth: The Artist's Version or the Law's Version?

Art and law both claim to discover the truth. Law provides an adversary trial process to accurately determine the facts. Art also aspires to truth-finding, but is not hemmed in by evidentiary rules and legal processes. Film, as a form of art, is freer and more open to exploration and exposition. Law is objective, and its language is spoken and written. Film is subjective, and its language is visual, aural, and even tactile. Is either method inherently superior? Is law's method seriously flawed? *The Thin Blue Line* attempts to answer these questions. As an epistemological adventure story, the film forces us to examine our views about the legal system's ability to uncover the truth.

Through free-flowing monologues of the principal players in the case, the film critiques the basic precepts of law governing our system's fact-finding process. Thus, under our legal system, the police acquire evidence in a principled and nonarbitrary manner; defense counsel is a skilled and forceful advocate; the judge is neutral and detached; and the prosecutor serves justice. Presumably all relevant nonprivileged information is available to the fact-finder, such information is capable of testing through cross-examination, and fundamental principles such as the presumption of innocence and the requirement of proof beyond a reasonable doubt guide the result. The film suggests, however, that things are not what the public assumes they are. In the *Adams* case these precepts were turned upside down, producing a flawed result.

The first tenet of reliable fact finding is an efficient investigation in which all relevant evidence is acquired and no relevant proof is ignored.¹³³ The homicide detectives violated this precept. They are portrayed as aggressive, overzealous, and simple-minded. They become frustrated at failing to solve a cop-killing. Rather than continuing to carefully investigate leads — and there were several, most of which pointed to David Harris — the police became desperate enough to settle for an innocent man. Their selection of Randall Adams, at which time the adversary system began to crumble, is portrayed as brain-

133. Y. KAMISAR, W. LA FAVE, J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 184-207 (6th ed. 1986).

less. The police believed Harris simply because he was a "nice kid." They disbelieved Adams because he "protested his innocence" and "didn't have a lot of remorse for what he had done."¹³⁴ The film even suggests that the police chose Adams because Adams could be given the death penalty while Harris, as a juvenile, could not.¹³⁵

Another essential ingredient for reliable fact finding is an able defense lawyer.¹³⁶ The film's critique of Adams' attorneys reflects two popular views of the defense lawyer. Under one view, the lawyer is seen as a righteous, if necessarily ineffectual, champion of the poor and the powerless, representing the forces of good in the form of some socially just cause. This lawyer stands resolutely against the forces of evil, characterized by powerful government, a venal prosecutor, or an oppressive society. A film such as *To Kill a Mockingbird*¹³⁷ captures this view. Under another and by no means mutually exclusive view, the lawyer is seen as a fighter, whose arena is the courtroom. Clarence Darrow and Perry Mason come to mind, as do films such as *Inherit the Wind*¹³⁸ and *Compulsion*.¹³⁹ Adams' lawyers fall into the first category only. They are portrayed as honorable and decent people, but naive, unaggressive, and easily manipulated. Edith James says: "I admit, I'm sort of a gullible person."¹⁴⁰ Dennis White says: "Since his trial I have . . . given up my practice of criminal law. . . . I just feel like I'll let other people handle these problems"¹⁴¹ Accurate fact finding, the film suggests, requires at a minimum a defense attorney who is not only decent and compassionate, as Adams' lawyers clearly were, but also capable of fighting, and maybe of dirty fighting, if necessary. Adams' lawyers plainly were no match for Dallas County's aggressive prosecutor.¹⁴²

134. See *supra* notes 32-33 and accompanying text.

135. The Texas Penal Code states: "No person may, in any case, be punished by death for an offense committed while he was younger than 17 years." TEX. PENAL CODE ANN. § 8.07(d) (Vernon 1989).

136. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

137. Universal 1963.

138. United Artists 1960.

139. Metro-Goldwyn-Mayer 1959.

140. Transcript, *supra* note 1, at 17.

141. *Id.* at 40.

142. One of the grounds upon which the district court granted Adams' writ of

Trustworthy results also require a disinterested judge who can fairly and impartially run the show.¹⁴³ Here, the judge was biased and arrogant, unwilling and incapable of protecting Adams' rights. The judge's sympathy for law enforcement is obvious. To this man, judging a cop-killing case left little room for objectivity, and considerable opportunity for emotion. The judge characterized Adams as "only a drifter"¹⁴⁴ and cried when the prosecutor referred to "the thin blue line of police that separates the public from anarchy."¹⁴⁵ The film poses the questions: Is this the norm for judges? Did the judge do anything judicial here?

The popular myth about the prosecutor is that he is "Mr. District Attorney," a "Champion of the People," a virtuous protector, and even a "Minister of Justice."¹⁴⁶ He or she has the job of ensuring that justice is served and the defendant dealt with fairly. We close our eyes to the possibility of a lawless official who, entirely unnoticed, can subordinate the rights of citizens to achieving personal victories.¹⁴⁷

The film suggests that the relationship between the prosecutor and justice is not what it seems. Allusions to the "Halls of Justice" and the "Scales of Justice" become ironic metaphors for the prosecutor's efforts to pervert the truth. Harris recalls the prosecutor warning him to deny that an immunity deal had been made.¹⁴⁸ Harris notes that Justice "has got that blindfold on. We don't see what goes on behind the closed doors."¹⁴⁹ The prosecutor "was deceiving the jury, see. He wanted to deceive Justice."¹⁵⁰ Michael Randell later says: "That's why they call it the Hall of Justice — the scales are not balanced. The scales are in

habeas corpus was the ineffectiveness of his counsel. The court found: "Counsel's conduct so undermined the proper function of the adversary process that the trial cannot be relied on as having produced a just and reliable result." *Ex Parte Randall Dale Adams*, No. W-77-1286-I(B) at 6 (Crim. Dist. Ct. No. 2 Dallas County), *aff'd*, No. 70-787 (Tex. Crim. App. Mar. 1, 1989).

143. *In re Murchison*, 349 U.S. 133, 137 (1955); *Quercia v. United States*, 289 U.S. 466, 470 (1933).

144. Transcript, *supra* note 1, at 21.

145. *Id.* at 31.

146. Mayer, 'Hogan's Office' Is a Kind Of Ministry of Justice, N.Y. Times, July 23, 1967, § 6 (Magazine), at 7.

147. See *supra* notes 84-101 and accompanying text.

148. See *supra* note 25 and accompanying text.

149. Transcript, *supra* note 1, at 42.

150. *Id.*

the hall and they go up and down. . . . So if the D.A. wants you to hang 15 or 20 years, you hung.”¹⁵¹ The film scans a list of defendants whom the prosecutor sent to the electric chair. There is an air of unreality to their guilt or their death. We are reminded of the prosecutor’s boast: “Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man.”¹⁵² The film makes this boast horribly real when we recognize that a “great” prosecutor brought Adams within one week of being executed. As a critique of capital punishment and of the prosecutor’s power of life and death, the film is brutal.

In addition to the integrity of the players, the system relies heavily on rules of evidence supposedly geared to enhancing the accuracy of verdicts. For example, the ability to show a witness’ interest or bias is essential to legal fact finding.¹⁵³ For Harris, his interest was his freedom; for the Millers it was reward money and the dropping of criminal charges against their daughter; for Michael Randell it was covering up an embarrassing liaison. While we see the effect this has on our view of the truth, so clearly discrediting these witnesses’ testimony, we learn that none of this information was known to the jury. Cross-examination, the law’s greatest truth-enhancing device, was entirely worthless. If all this information remained hidden, the film asks, did the legal system do its job?

Evidentiary rules also try to exclude unreliable proof, such as the Millers’ eyewitness identification of Adams.¹⁵⁴ The Millers testified that they picked Adams out of a line-up, but in the film they admit that they did not. Their inconsistent statements raise further doubts about the accuracy of their testimony. Most damning of all, however, are the filmed monologues of the Millers — a fascinating psychological portrait of vanity and venality. How could a jury ever accept their testimony? The film suggests another question: How often does such proof support an erroneous verdict?

Elaborating its thesis that things are not always what they appear to be, that blue may be red, or that a judge may not be

151. *Id.* at 43.

152. *Id.* at 40.

153. *See supra* notes 116-122 and accompanying text.

154. *See supra* notes 103-111 and accompanying text.

judicial, the film examines the “expert” psychiatric witness, whose contribution to the fact-finding process is popularly viewed as sacrosanct. The film’s critique of Dr. Grigson turns this view upside down.¹⁵⁵ Grigson is presented to a jury as an expert on “future dangerousness.” His testimony has resulted in scores of defendants being sentenced to the electric chair. To impressionable juries he is oracular and infallible. Grigson asks Adams: “What is the meaning of a rolling stone gathers no moss?”¹⁵⁶ Adams’ answer seems normal, certainly in the mainstream, something we would say. But Grigson says Adams should die. Would Grigson diagnose us as sociopaths? Adams had no prior record, and no history of violence. Would Grigson be able to send us to the electric chair? Is Grigson crazy? This is the law, the film tells us. Upside down and inside out.

In the shadow of the electric chair, death chillingly pervades the film, depriving us of the safety of our assumptions that the law is capable of offering certainty and moral resolution.¹⁵⁷ In fact, the law speaks not in certainties but in probabilities that frequently end in morally and factually ambiguous results. The film incites us to demand certainty when the result is death.

On a philosophical level, the film is a pictorial essay about knowledge and truth. The film tells us truth is unknowable and that what we “know” is merely our own version of the truth. The point comes through when the title *The Thin Blue Line* slowly changes from blue to red; it is vividly reinforced in the *Roshomon*-like restagings of the murder, reminding us that we cannot know what happened. The blurred outlines and changing reality are constant reminders that there is no absolute truth. Yet, by fusing together the cerebral and the sensual, the film gives us a feeling about truth and falsehood that we have never experienced before, certainly not from a novel, another film, or an actual trial. The film suggests that it can do a better job of ascertaining the truth by turning on the camera and the tape recorder, and by reordering reality so that time and space move

155. See *supra* notes 124-132 and accompanying text.

156. See *supra* note 70 and accompanying text.

157. This popular need for certainty may be one of the reasons the public finds plea bargaining so morally offensive — it offers no morally acceptable resolution. In the same way, the ambiguous resolutions of several recent highly publicized trials intensify popular dissatisfaction with the law’s inability to resolve disputes.

in different ways than those on which we have learned to rely. The free-flowing monologue reveals more than the law's customary question and answer style of interrogation, although it is ironic that at the film's climax — the near-confession of David Harris — the question and answer style is needed.

The film's own version of the truth is not perfect. Spatial and temporal barriers are nonexistent. Cigarettes slowly accumulate in an ashtray to convey the passage of time when Adams is being interrogated. Wood's flashlight flies through the air in slow motion to accentuate his violent death. The free-flowing monologues are selectively edited, with more effective statements retained and even juxtaposed with visual images bearing no relation to the content of the statement. A good example is Harris' statement "I just took off"¹⁵⁸ set against the restaging of the death car accelerating away from the scene. From its context, Harris' statement more logically referred to his "taking off" from home. Banner headlines, used as chapter headings, are meant to convey "objective" truth. The musical score is so pulsating and intense that it is impossible to believe that the film would be effective without it.

In the end, although the film provides a version of the truth superior to the official version, things are again not what they seem. This is the final irony in a film filled with ironies. The film "solves" the case. It satisfies the popular desire for certainty and moral rightness. But while we are relieved that Adams has been exonerated, we do not really know if he has been. We are sure he is innocent, but will the law let him go? The film, as art, gives its version of the truth. But the official version remains intact. The film has convinced us that we know the better "truth" but that it may make no difference.

IV. Conclusion

In documenting a Texas capital murder case, *The Thin Blue Line* places the audience in the jury box and by providing additional data, raises searing questions not only about the justice of the verdict, but also about the ability of the adversary system to work when a prosecutor distorts and suppresses cru-

158. Transcript, *supra* note 1, at 44.

cial facts. Having shown the fact-finding process as untrustworthy, easily manipulated, and inadequate, the film presents the artist's view of the truth, and becomes a visual meditation on truth itself.

As this article was being completed, a district judge in Texas recommended a new trial for Adams.¹⁵⁹ That decision was unanimously affirmed by the Texas Court of Criminal Appeals.¹⁶⁰ On March 21, 1989, after being incarcerated for twelve-and-one-half years, Adams was released from jail. Two days later, the Dallas District Attorney's Office announced that it would not retry Adams because "it lacked sufficient credible evidence against him."¹⁶¹

159. On December 30, 1988, after an evidentiary hearing, District Judge Baraka granted Adams' application for a writ of habeas corpus and recommended that Adams receive a new trial. On January 5, 1989, pursuant to article 11.07 of the Texas Code of Criminal Procedure, the clerk of the district court certified the findings of fact and conclusions of law to the Texas Court of Criminal Appeals, which by law must review those findings and conclusions. The Texas Court of Criminal Appeals affirmed Judge Baraka's decision. *Ex parte* Randall Dale Adams, No. 70,787 (Tex. Crim. App. Mar. 1, 1989).

160. *Id.*

161. Belkin, *Dallas Will Not Retry Man in Killing of Policeman*, N. Y. Times, Mar. 24, 1989, at A11, col. 1 (quoting Dallas District Attorney John Vance).