

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

# VOICE

FOR THE DEFENSE

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## RECENT TEXAS EXONERATION: MALLORY NICHOLSON

### GARY A. UDASHEN

On June 2, 2022, Mallory Vernon Nicholson was officially declared “actually innocent” of two convictions for aggravated sexual abuse and one for burglary based on a 1982 case from Dallas County. Mr. Nicholson’s exoneration followed an exhaustive investigation of his case by the Innocence Project, in collaboration with the Dallas County District Attorney’s Office’s Conviction Integrity Unit.

#### Background of Case

On June 12, 1987, a nine-year old boy and his seven-year-old cousin were playing outside when they were approached by a black male who offered them five dollars to help him enter a nearby apartment. Once inside the apartment, the black male took a television, clock radio, articles of clothing, and meat from the refrigerator and put the items in a plastic bag. He made several trips outside the apartment carrying these items.

After removing all the items, the black male returned to the apartment and sexually assaulted both boys. The boys later escaped and reported the assault to their aunt, who called the police.

Dallas police patrol officers responded and took the boys to Parkland Hospital for sexual assault exams, where they reported that their assailant was a 14-year-old neighbor who went by the nickname of “CoCo.” The initial police reports listed “CoCo” as the suspect. Many years later, “CoCo” was, in fact, confirmed to be a real person who the District Attorney’s Office determined was killed in 1989.

During the investigation, police investigators were with one of the boys and his mother going to the crime scene. On the way, while riding in the patrol car, the boy reportedly saw a man later identified as Mallory Nicholson sitting on a porch talking to a friend. The boy said that Mr. Nicholson was the perpetrator. Mr. Nicholson was 35 years old at the time.

The police placed Mr. Nicholson’s photo in a six-photo lineup and presented this to the other young victim. The other victim did not identify Mr. Nicholson as the perpetrator. After the photo lineup, the second boy’s mother called the detective and said the boy had recognized Mr. Nicholson as the perpetrator, but was afraid to identify him. Mr.

Nicholson was arrested, tried and convicted based on this “eyewitness” testimony, despite there being no other evidence to connect him to the crime.

At trial, Mr. Nicholson presented evidence that he was at his wife’s funeral in Waxahachie at the time of the offense. Nevertheless, the jury convicted him, and he was sentenced to 55 years in prison. Significantly, the defense presented no evidence concerning the victims’ initial statements that the person who committed these offenses was a 14-year-old young man named “CoCo.”

### Suppression of Exculpatory Evidence

Beginning in 2019, the Innocence Project and the Dallas County District Attorney’s Office’s Conviction Integrity Unit began their investigation into the case. This led to the discovery of the following suppressed exculpatory evidence:

1. Five police reports that identified 14-year-old “CoCo” as the person who assaulted the two boys were not revealed to the defense.
2. The Parkland Hospital records where the assailant was identified as a 14-year-old young man named “CoCo” was not revealed to the defense.
3. Evidence that one of the victims said the assailant had “very short hair” was also not revealed to the defense. Mr. Nicholson had an Afro, both at the time of trial and at the time he was identified as the perpetrator of the offense.

This information was part of the trial prosecutor’s file. Although defense counsel was deceased at the time of this reinvestigation, nothing in the record indicated that this information was provided to defense counsel at trial. Moreover, the fact that defense counsel pursued a defense of misidentification, yet no evidence was presented concerning “CoCo,” was found to be strong proof that defense counsel was not informed that the victims had initially identified “CoCo” as their assailant.

Ultimately, the Dallas County District Attorney’s Office entered into agreed findings with Mr. Nicholson’s attorneys that Mr. Nicholson’s due process rights had been violated based on the State’s suppression of exculpatory evidence. The trial court judge signed the agreed findings and recommended that these convictions be vacated. On November 10, 2021, the Court of Criminal Appeals granted Mr. Nicholson habeas relief and the three convictions were vacated.

On May 26, 2022, Dallas County District Attorney John Creuzot, CIU Chief Cynthia Garza, and CIU prosecutor Holly Dozier, filed the “State’s Motion to Dismiss Indictment,” on all three cases. In this motion, the District Attorney’s Office wrote: “Over a period of several years, the Dallas County District Attorney’s Office’s Conviction Integrity Unit (CIU) re-investigated this case, working collaboratively with the Innocence Project and the Innocence Project of Texas.

June 15-17, 2023



San Antonio, TX

ADVANCED CRIMINAL LAW COURSE

## State Bar of Texas Scholarship Opportunities

### The Requirements:

- Request an application at 2023 Criminal Justice Section Scholarship Application tab on the Criminal Justice Section website.
- Applicants who have practiced 5 years or less will be given preference.
- Applicants may apply for both seminars, but only one scholarship per applicant will be awarded, regardless of the number of seminars applied to.
- The SBOT Advanced Criminal Law scholarship may be used to attend the “boot camp” offered as part of the Advanced Criminal Law seminar.
- Applicants must be a member of the Criminal Justice Section of the SBOT, or, in the alternative, may join when they apply for the scholarship.

Deadline for applications is Friday, April 7, 2023, and recipients will be notified by April 15, 2023. Questions? Email Dwight McDonald at [Dwight.Mcdonald@ttu.edu](mailto:Dwight.Mcdonald@ttu.edu).

This re-investigation yielded new evidence indicating that Mallory Nicholson is actually innocent in this case.

Most notably, Nicholson did not meet the original description of the assailant provided to the police and medical personnel on the evening of the offense. Specifically, the original description of the assailant was a 14-year-old, black male who went by the nickname "CoCo." By stark contrast, Nicholson was 35 years old at the time of trial.

The CIU discovered that CoCo was a juvenile, J.M., who was a known burglar to Dallas police officers who worked in the area. J.M. lived in the apartments directly across the street from the offense location at that time. According to the facts of the offense at issue, the assailant reportedly took items from the apartment, including raw and cooked meat, clothing, a television set, and a clock radio. In order to transport the items out of the apartment, the assailant took multiple trips in and out of the apartment, taking different items during each trip. The close proximity of the offense location to J.M.'s apartment across the street would have been very convenient for taking multiple trips in and out of the apartment transporting the stolen items.

... Additionally, patrol officers who listed J.M. as the original suspect were not called to testify at Nicholson's trial and no evidence was presented to show that J.M. was suspected prior to Nicholson's arrest. To this end, during the re-investigation, the lead detective acknowledged that, given that eyewitness identification was believed to be the gold standard at the time, it is unlikely she followed up on CoCo as a suspect. Similarly, the lead trial prosecutor acknowledged that since this case hinged on eyewitness identification, it is likely that information related to CoCo was ignored or not recognized as Brady evidence because the children identified Nicholson as the perpetrator of the offenses."

On June 2, 2022, a hearing was held in Dallas County's Criminal District Court No. 7 where the State presented its motions to dismiss the indictments.

Mr. Nicholson appeared in court with his attorneys, Adnan Sultan from the national Innocence Project and Gary A. Udashen from the Innocence Project of Texas. The trial court signed the orders dismissing the indictments and declared Mr. Nicholson to be actually innocent.

### Lessons Learned

Mallory Nicholson was wrongfully convicted for the following reasons:

1. The prosecution suppressed exculpatory evidence. If the jury had heard that the two victims, initially and immediately, stated that the perpetrator of this offense was a 14-year-old young man they knew named "CoCo," Mr. Nicholson would not have been convicted. The suppressed exculpatory evidence was found in the prosecutor's trial file after this file was reviewed by the CIU and the Innocence Project attorneys.
2. The eyewitness testimony presented at trial of the two victims identifying the 35-year-old Nicholson as their assailant was clearly incorrect. Eyewitness testimony is notoriously unreliable as demonstrated by the numerous DNA exonerations where the initial conviction was based on eyewitness testimony. In fact, mistaken eyewitness identification contributed to approximately 69% of the more than 375 wrongful convictions in the United States overturned by post-conviction DNA evidence. The passage of 40 years makes a precise determination of the events that led to this faulty eyewitness testimony difficult. However, as District Attorney Creuzot stated at Mr. Nicholson's exoneration hearing, it is impossible to reconcile the statements of the victims that their attacker was 14-year-old "CoCo" with a later claim that 35-year-old Mallory Nicholson was their attacker.
3. Tunnel vision and a poor investigation by the police and prosecutors also played a significant role in this case. Despite the fact that the victims gave the police the name of their actual attacker, the police chose to ignore that and pursue a case against Mr. Nicholson. The prosecutors also ignored the fact that their own files included the identity of the true perpetrator and instead kept their focus where the police had directed it: on Mallory Nicholson.
4. Mr. Nicholson was tried before an all-white jury (which was standard practice in Dallas County

in 1982). The jury rejected the testimony from his five alibi witnesses, all of whom were black. Studies have shown that all-white juries convict black defendants at higher rates than white defendants and have been shown to disregard the testimony of truthful black defense witnesses. Moreover, an inordinately high percentage of wrongful convictions and ultimate exonerations are of black men. In fact, seven of the last nine exonerations in Texas are of wrongfully convicted black men.

As found by the District Attorney and the court, Mallory Nicholson was an innocent man who spent over 20 years in prison, and another 20 years on parole and registered as a sex offender. Although justice for Mallory Nicholson was slow and late, nevertheless, it finally was achieved.

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This story of Mallory Nicholson's exoneration is the first of what will be a recurring feature in the Voice. Mike Ware, Executive Director of the Innocence Project of Texas, Allison Clayton, IPTX Deputy Executive Director, and Gary Udashen, IPTX board member and former board president,

will write periodic articles concerning particularly noteworthy exonerations from around the State of Texas. For purposes of these stories, the term "actual innocence" will follow the use of that term in the Texas statute providing compensation for the wrongfully imprisoned. (§103.001, Civil Practice & Remedies Code). Under that statute, wrongfully imprisoned persons are entitled to receive state compensation if they have received a pardon based on innocence, they have been granted writ relief by the Court of Criminal Appeals based on actual innocence, or they have been granted writ relief by the Court of Criminal Appeals on some other basis and the State's Attorney dismisses the charge on the basis that no credible evidence exists that inculcates the defendant and that the State's Attorney believes the defendant to be actually innocent.



**Gary Udashen** is a senior attorney with Udashen/Anton in Dallas. He is board certified in criminal law and criminal appellate law. Udashen is also a board member of the Innocence Project of Texas and served for nine years as board president.



## TCDLA STAFF SPOTLIGHT

# Rick Wardroup

Curriculum Director / Staff Attorney

### *Celebrating 12 Years with TCDLA!*

**Native State:** Colorado

**Zodiac Sign:** Aquarius

**Favorite Color:** Blue

**Pets:** 1 Dog, Lola | 1 Cat, Jack

**Hobbies:** Cycling & Reading

**Fun Fact:** He once intended to be a doctor and has a degree in chemistry.

**Rick Wardroup** was born in Denver, Colorado in the dark ages. He attended undergraduate and law school at Texas Tech University and never moved away from Lubbock. He became involved in capital litigation in 1983 and has worked on cases at the trial level, on direct appeal, state habeas and federal habeas. Rick's jobs at TCDLA allow him to organize trainings and teach in several areas which are close to his heart, capital litigation, forensics, development of Public Defenders and lawyer wellness. He is involved in the recovery community in Lubbock and with the Texas Lawyers Assistance Program. He has been happily married to his third-and-final-wife, Karla for over 23 years. He is a proud father of two daughters and a son.