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## New lessons from an old mystery

By Tom McNamee

In 1874 a novelist named Wilkie Collins, famous in his day, wrote a whopper of a mystery story, *The Dead Alive*. It was all about how two brothers on a farm were convicted of murdering a hired hand and almost hanged, saved only when the supposed dead man walked back into town — he's alive!

The story was a page-turner, with a little love story thrown in, but readers of the day might have been forgiven for thinking it was a bit of a stretch. Well really, come on: The defense lawyer is a joke, so-called expert witnesses mistake animal bones for human ones, a townsman's cockeyed dream about the murder fuels public suspicions and — can you believe this? — the accused man confesses to a crime he did not commit.

But it was, in fact, just these improbable twists and turns that made *The Dead Alive* a particularly fascinating read in 1874 because, as Collins wrote in an afternote, he based the novel on a real-life murder case in which all those things really happened. "It may not be amiss to add, for the benefit of incredulous readers, that all the 'improbable events' in the story are matters of fact, taken from the printed narrative," Collins wrote.

From the vantage point of 2006, however, Collins' novel and the real-life case that was his model are freighted with a more insistent significance. Collins, understandably in his day, presumed that such a gross miscarriage of justice had to be a fluke — that's what made his story more of a hoot than harrowing. But in the last couple of decades, the expose of scores of wrongful convictions in capital cases has revealed this was no fluke at all. Bad lawyers, junk science, overzealous prosecutors, witnesses with huge reasons to lie, the sway of uninformed public opinion, and false confessions — this stuff, we can say with certainty today, happens more than anybody would have imagined.

In an equally fascinating new book, *Willkie Collins' The Dead Alive: The Novel, the Case, and Wrongful Convictions* (Northwestern University Press, 200 pages, \$24.95), Rob Warden dissects the novel and the true-life story, spelling out the many ways in which the systemic flaws that produced this first known miscarriage of justice continue to distort our system of justice today. Warden is executive director of the Center on Wrongful Convictions at Northwestern University, and all proceeds from this book will go to the center.

"I thought this would be an unusual way, if the book happened to catch on, to get the attention of people who might not otherwise focus on the problem of wrongful convictions," he explained in an interview.

Warden's book consists of Collins' novel in its entirety, followed by Warden's own "The Story Behind the Novel." This is followed by brief summaries of 11 other "dead alive" cases in which defendants were wrongfully convicted of murders that never happened. And if the reader

still harbors doubts that this is a profoundly real problem, Warden includes a list of 234 defendants who were wrongfully sentenced to death.

Collins' model for his novel was the true story of two brothers, Jesse and Stephen Boorn, who were sentenced to death in Vermont in 1819 for the murder of their brother-in-law, Russell Colvin. The brothers were exonerated only after Colvin showed up alive and well in New Jersey. While the investigation and trial were replete with errors, Warden singles out three particularly dangerous flaws in the system that remain common today: false confessions, jailhouse snitches and junk science.

Why do innocent people confess to crimes they did not commit?

“Even 25 years ago, we might not have believed it,” Warden said. “We knew there were crazy people, people who for some strange reason might confess to a crime he or she did not commit, and we understood torture, but we didn't understand the psychological factors that would make it possible.”

In the case of Stephen Boorn, Warden writes, two interrogators succeeded in filling the accused man with fear — his only hope of escaping the noose was to confess. So Stephen wrote a confession in which he portrayed his brother-in-law's death as manslaughter, a crime for which he might be let off with a whipping.

As for jailhouse snitches, they came in two varieties in the case of the Boorn brothers. A town drunk eager to score points with the cops named Stephen Boorn as the killer. And Stephen's own brother, Jesse, probably hoping to save his own neck, claimed that Stephen had confided to him about the murder.

“In capital murder cases, snitches are the No. 1 factor, being present in 45 percent of wrongful convictions identified since 1976,” Warden said. “When I define snitch, by the way, I don't mean just anybody who's in jail, but anybody who has an incentive to testify a certain way.”

And then there was the junk science. In the Boorn brothers' case, four local physicians examined bones found at the suspected site of the murder (you know, the murder that never happened) and pronounced them human. It was later established that the bones were in fact animal, but this potentially exonerating evidence was never introduced at the trial.

In his book Warden can only speculate as to why the Boorns' lawyers failed to present this evidence. Perhaps, given the sentiment in town, the physicians were reluctant to testify on behalf of the brothers, Warden writes, and the defense lawyers, out of professional courtesy, decided not to force the doctors to take the stand.

This seems hard to believe — professional courtesy trumping the best possible — but Warden says it is not uncommon. There are times, for example, when a defendant might fare better in a bench trial rather than before a jury, but his lawyer will push for a jury trial. Why? Because the case is a real “heater” and the lawyer knows that the judge wants a jury — not the judge — to decide the verdict.

So, the lawyer figures, why anger the judge? Long after his client goes to Death Row, he and the judge still have to do business.