

Miscarriage of Justice: Examining Factors That Lead to Wrongful Convictions

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RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES

Samuel R. Gross, Senior Editor, srgross@umich.edu
Maurice Possley, Senior Researcher
Klara Stephens, Research Fellow

National Registry of Exonerations

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NATIONAL REGISTRY OF EXONERATIONS
NEWKIRK CENTER FOR SCIENCE AND SOCIETY
UNIVERSITY OF CALIFORNIA IRVINE
IRVINE, CALIFORNIA 92697

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Executive Summary

African Americans are only 13% of the American population but a majority of innocent defendants wrongfully convicted of crimes and later exonerated. They constitute 47% of the 1,900 exonerations listed in the National Registry of Exonerations (as of October 2016), and the great majority of more than 1,800 additional innocent defendants who were framed and convicted of crimes in 15 large-scale police scandals and later cleared in “group exonerations.” p. 1

We see this racial disparity for all major crime categories, but we examine it in this report in the context of the three types of crime that produce the largest numbers of exonerations in the Registry: murder, sexual assault, and drug crimes. p. 1

I. Murder

- Judging from exonerations, innocent black people are about seven times more likely to be convicted of murder than innocent white people. A major cause of the high number of black murder exonerations is the high homicide rate in the black community—a tragedy that kills many African Americans and sends many others to prison. Innocent defendants who are falsely convicted and exonerated do not contribute to this high homicide rate. They—like the families of victims who are killed—are deeply harmed by murders committed by others. p. 4
- African-American prisoners who are convicted of murder are about 50% more likely to be innocent than other convicted murderers. Part of that disparity is tied to the race of the victim. African Americans imprisoned for murder are more likely to be innocent if they were convicted of killing white victims. Only about 15% of murders by African Americans have white victims, but 31% of innocent African-American murder exonerees were convicted of killing white people. pp. 4-6
- The convictions that led to murder exonerations with black defendants were 22% more likely to include misconduct by police officers than those with white defendants. In addition, on average black murder exonerees spent three years longer in prison before release than white murder exonerees, and those sentenced to death spent four years longer. pp. 6-9
- Many of the convictions of African-American murder exonerees were affected by a wide range of types of racial discrimination, from unconscious bias and institutional discrimination to explicit racism. pp. 9-11
- Most wrongful convictions are never discovered. We have no direct measure of the number of all convictions of innocent murder defendants, but our best estimate suggests that they outnumber those we know about many times over. Judging from exonerations, half of those innocent murder defendants are African Americans. pp. 11-12

II. Sexual Assault

- Judging from exonerations, a black prisoner serving time for sexual assault is three-and-a-half times more likely to be innocent than a white sexual assault convict. The major cause for this huge racial disparity appears to be the high danger of mistaken eyewitness identification by white victims in violent crimes with black assailants. pp. 12-13
- Assaults on white women by African-American men are a small minority of all sexual assaults in the United States, but they constitute half of sexual assaults with eyewitness misidentifications that led to exoneration. (The unreliability of cross-racial eyewitness identification also appears to have contributed to racial disparities in false convictions for other crimes, but to a lesser extent.) p. 13
- Eyewitness misidentifications do not completely explain the racial disparity in sexual assault exonerations. Some misidentifications themselves are in part the products of racial bias, and other convictions that led to sexual assault exonerations were marred by implicit biases, racially tainted official misconduct and, in some cases, explicit racism. pp. 13-15
- African-American sexual assault exonerees received much longer prison sentences than white sexual assault exonerees, and they spent on average almost four-and-a-half years longer in prison before exoneration. It appears that innocent black sexual assault defendants receive harsher sentences than whites if they are convicted, and then face greater resistance to exoneration even in cases in which they are ultimately released. pp. 15-16

III. Drug Crimes

- The best national evidence on drug use shows that African Americans and whites use illegal drugs at about the same rate. Nonetheless, African Americans are about five times as likely to go to prison for drug possession as whites—and judging from exonerations, innocent black people are about 12 times more likely to be convicted of drug crimes than innocent white people. pp.16-17
- In general, very few ordinary, low-level drug convictions result in exoneration, regardless of innocence, because the stakes are too low. In Harris County, Texas, however, there have been 133 exonerations in ordinary drug possession cases in the last few years. These are cases in which defendants pled guilty, and were exonerated after routine lab tests showed they were not carrying illegal drugs. Sixty-two percent of the Harris County drug-crime guilty plea exonerees were African American in a county with 20% black residents. pp. 18-19
- The main reason for this racial disproportion in convictions of innocent drug defendants is that police enforce drug laws more vigorously against African Americans than against members of the white majority, despite strong evidence that both groups use drugs pp. 20-21

at equivalent rates. African Americans are more frequently stopped, searched, arrested, and convicted—including in cases in which they are innocent. The extreme form of this practice is systematic racial profiling in drug-law enforcement.

- Since 1989, more than 1,800 defendants have been cleared in “group exonerations” that followed 15 large-scale police scandals in which officers systematically framed innocent defendants. The great majority were African-American defendants who were framed for drug crimes that never occurred. There are almost certainly many more such cases that remain hidden. pp. 21-25
- Why do police officers who conduct these outrageous programs of framing innocent drug defendants concentrate on African Americans? The simple answer: Because that’s what they do in *all* aspects of drug-law enforcement. Guilty or innocent, they always focus disproportionately on African Americans. Of the many costs that the War on Drugs inflicts on the black community, the practice of deliberately charging innocent defendants with fabricated crimes may be the most shameful. pp. 26-27

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RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES

I. Introduction

Race is central to every aspect of criminal justice in the United States. The conviction of innocent defendants is no exception.

As of October 15, 2016, the National Registry of Exonerations listed 1,900 defendants who were convicted of crimes and later exonerated because they were innocent; 47% of them were African Americans, three times their rate in the population.¹ About 1,900 additional innocent defendants who had been framed and convicted of crimes in 15 large-scale police scandals were cleared in “group exonerations;” the great majority of those defendants were also black. Judging from the cases we know, a substantial majority of innocent people who are convicted of crimes in the United States are African Americans.

What explains this stark racial disparity? We study that question by examining exonerations for murder, sexual assault and drug crimes, the three types of crime that produce the largest numbers of exonerations.² What we see—as so often in considering the role of race in America—is complex and disturbing, familiar but frequently ignored.

¹ All National Registry data reported in this paper are as of October 15, 2016, when the Registry listed 1,900 individual exonerations. Information about any individual exonerations we discuss may be found by searching for the exonerees by name on the [Registry web site](#).

² African Americans are over-represented among exonerations for other crimes as well. Table A displays the racial breakdown of exonerations in the Registry for all major crime categories.

TABLE A: EXONERATIONS BY RACE OF DEFENDANT AND TYPE OF CRIME (N=1,900)

	White	Black	Hispanic	Other	TOTAL
Murder (762)	36%	50%	12%	2%	100%
Sexual Assault (289)	34%	59%	6%	1%	100%
Child Sex Abuse (212)	64%	25%	9%	2%	101%
Robbery (100)	20%	62%	15%	3%	100%
Other Violent Crimes (200)	46%	36%	13%	5%	100%
Drug Crimes (221)	24%	55%	19%	2%	100%
Other Non-Violent Crimes (116)	59%	22%	15%	4%	100%
ALL CRIMES (1,900)	39%	47%	12%	2%	100%

As used in Table A, on the Registry, and throughout this report, the categories “White” and “Black” do not include individuals who identify themselves as Hispanic or Latino. We do not discuss false convictions and exonerations of Hispanic or Latino defendants (except in passing) because to do so we would need national criminal justice statistics on reported crimes, arrests, convictions and imprisonment, and the studies that are available use inconsistent standards for tabulating that ethnic category, suffer from high rates of missing data, or fail to address the issue entirely.

There is no one explanation for the heavy concentration of black defendants among those convicted of crimes they did not commit. The causes we have identified run from inevitable consequences of patterns in crime and punishment to deliberate acts of racism, with many stops in between. They differ sharply from one type of crime to another.

A major cause of the high number of black murder exonerations is the high murder rate in the black community—a tragedy that kills many African Americans and sends many others to prison. Exonerated defendants go to prison, but not because they deserve to; they, like those who are killed, are innocent victims of crimes committed by others. But homicide rates alone do not explain the high number of African Americans who were falsely convicted of murder or the length of time they spent in prison before release. Misconduct and discrimination also played major parts.

Most innocent African American defendants who were exonerated for sexual assault had been convicted of raping white women. The leading cause of these false convictions was mistaken eyewitness identifications—a notoriously error-prone process when white Americans are asked to identify black strangers. As with murder exonerations, however, the leading cause is far from the only one. We see clear evidence of racial bias, ranging from unconscious bias to explicit racism. And, as with murder if not more so, black sexual assault exonerees spent more time in prison than their white counterparts.

Prosecutions for drug offenses take a different path from murder and rape cases. A murder or rape investigation is initiated when a violent crime is reported to the police, usually by a victim, or when a dead body is found. Drug transactions and drug possession have no immediate victims. With rare exceptions, drug investigations are initiated by the police themselves, who go searching for crimes that are almost never reported. The police have essentially unlimited discretion to choose how and where to enforce drug laws, and against whom, which opens the door to pervasive discrimination. We see the effects in two settings. In routine drug possession cases, African Americans are more likely than whites to be convicted by mistake because—guilty or innocent—they are more likely to be stopped, searched and arrested. Some false drug convictions, however, are not mistakes. African Americans are also the main targets in a shocking series of scandals in which police officers systematically framed innocent defendants for drug crimes that never occurred.

II. Murder

1. Basic racial patterns in murders and exonerations

Half of all defendants exonerated for murder are African Americans (380/762), who make up only 13% of the population of the United States.³ For the population at large, that's seven times the rate for whites, who are 64% of the population⁴ but comprise only 36% of murder exonerations. Much of this racial disparity can be traced to a comparable disparity in murder convictions. African Americans are more than seven times more likely to be imprisoned for murder than white Americans,⁵ and more than six times as likely to be killed in a homicide.⁶ Murder in America is overwhelmingly intra-racial: 84% of white murder victims and 93% of black murder victims are killed by members of their own race.⁷

This high murder rate means that African Americans are far more likely than whites to be investigated, arrested and convicted of murder. Mostly, those who are investigated and convicted are guilty. But *innocent* African Americans also face a much higher risk of being suspected of murder, and of being convicted despite their innocence.

Innocent black murder suspects, especially those who are falsely convicted—like the families of those who are killed—are additional victims of murders committed by others. Those who have been exonerated spent on average more than 14 years in prison before they were released. Many more have not been exonerated at all; more often than not, they will die in prison.

2. Additional racial disparities in murder exonerations

Differences in homicide rates may explain most of the enormous racial disparity in exoneration rates for murder, but not all. Forty percent of defendants imprisoned for murder are African

³ Rastogi, Sonya, Tallese D. Johnson, Elizabeth M. Hoeffel, and Malcolm P. Drewery, Jr. [The Black Population: 2010. 2010 Census Briefs](#). (September 2011): p. 6, Table 3.

⁴ U.S. Census Bureau. [QuickFacts - United States](#). (July 2016).

⁵ Bureau of Justice Statistics, U.S. Dep't of Justice. [Prisoners in 2015](#). (December 2016): p.30, Appendix Table 5. The numbers of prisoners reported in this study by the United States Bureau of Justice Statistics are estimates of the prison population on a particular date, in this case December 31, 2015. So are most of the general statistics we discuss on arrest, conviction and imprisonment. The murder exonerations to which we compare these numbers are based on convictions that occurred over decades, from the 1960s through 2016—almost all since 1980—and the proportions of crimes and convictions by race have varied over that period. As a result, throughout this report, all rates and comparisons we discuss that depend on general criminal justice statistics are estimates or illustrations.

⁶ Bureau of Justice Statistics, U.S. Dep't of Justice. [Homicide Trends in the United States, 1980-2008](#). (November 2011): p. 3, Table 1. The rates of homicide victimization by race reported in this study are for all black and white victims, including those who identify as Hispanic or Latino.

⁷ Bureau of Justice Statistics, U.S. Dep't of Justice. [Homicide Trends in the United States, 1980-2008](#). November 2011); Sherman, Amy. [An updated look at statistics on black-on-black murders](#). PolitiFact Florida. (May 2015).

American⁸ but they account for 50% of murder exonerations, including 53% of those who were sentenced to death. Unless some unknown and improbable process gives innocent black convicts a big advantage in obtaining exonerations, that means that African American prisoners who were convicted of murder are about 50% more likely to be innocent than other convicted murderers.

(a) Race of victim

About 42% of murder victims in the United States are white.⁹ The proportion of murder exonerees of all races who were convicted of killing white victims is somewhat higher, 52% of the cases in which we know the race of the victim (350/670).¹⁰ The concentration of murder defendants who were convicted of killing white victims is considerably greater among exonerees who were sentenced to death, 74% (77/106).

Many studies in at least 15 states have shown that defendants who are charged with killing white victims, regardless of their own race, are more likely to be sentenced to death than those charged with killing black victims.¹¹ Since 1976, 76% of executions in the United States were for murders of white victims.¹² The disparities we see in our data suggest that innocent defendants who are charged with killing white victims are more likely to be sentenced to death, and sometimes no doubt executed, than those charged with killing black victims.

There are also sentencing disparities among murder exonerees who avoided death sentences. About half of non-capital murder exonerees were sentenced to life imprisonment, or to life without the possibility of parole¹³ (321/647), and the rest were sentenced to prison for terms shorter than life. Sixty percent of non-capital murder exonerees who were convicted of killing white victims

⁸ Bureau of Justice Statistics, U.S. Dep’t of Justice. [Prisoners in 2015](#). (December 2016): p.30, Appendix Table 5.

⁹ The only national statistics on the race of murder victims come from [the FBI’s Supplementary Homicide Reports](#). These data have three limitations: (i) They are incomplete. (ii) They combine murder and non-negligent manslaughter. (iii) They do not identify Hispanic or Latino victims, so their racial categories—“white” and “black”—are not limited, as ours are, to non-Hispanic white and black victims. The estimate in the text is the average percent of “white” victims reported by the FBI from 2001 through 2010, multiplied by 0.88 to correct for the 12% of “whites” who were identified as Hispanic or Latino in the 2010 census. U.S. Census Bureau. [QuickFacts - United States](#). (July 2016).

¹⁰ We classify a murder exoneration as a “white victim” case if it included at least one murder victim who was white. Ten cases in the Registry with multiple murder victims had both at least one white victim and at least one black victim each. They are coded as white victim cases.

¹¹ For reviews of the literature on this issue, see Grosso, Catherine M., Barbara O’Brien, Abijah Taylor, and George Woodworth. “Race Discrimination and the Death Penalty: An Empirical and Legal Overview.” *America’s Experiment with Capital Punishment* 525 (James R. Acker, Robert M. Bohm, & Charles S. Lanier, eds., 3d ed. 2014); O’Brien, Barbara, Catherine M. Grosso, George Woodworth, and Abijah Taylor. “Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009.” *94 N.C. L. Rev.* 1997 (2016).

¹² Death Penalty Information Center. [Race of Victims Since 1976](#). (February 2017).

¹³ This category also includes any sentence of 99 years in prison or longer.

were sentenced to life imprisonment (165/273), compared to 39% of those who were convicted of killing black victims (76/194).

In other words, judging from exonerations, the pattern of harsh sentencing for murder convictions with white victims and lighter sentencing for those with black victims is not restricted to death sentences. If they avoid the death penalty, innocent murder defendants in white-victim cases are also more likely to be sentenced to life in prison than those charged with killing black victims.

The race-of-victim disparity in murder exonerations also interacts with the race-of-defendant disparity. Only about 15% of murders by African Americans have white victims,¹⁴ but 31% of innocent African American murder exonerees were convicted of killing white people (106/341). This is a considerable disparity; it could explain most or all of the difference in murder exonerations by race beyond general homicide rates.

Part of the explanation for the high number of black murder exonerees who were convicted of killing white victims may be the perils of cross-racial eyewitness identification. We discuss that issue in more detail in the next section, on sexual assault exonerations, where it looms larger.¹⁵ Beyond that, it is no news that inter-racial violence by African Americans is punished more harshly than intra-racial violence. It would not be surprising to learn that it is also pursued with greater ferocity, and less accuracy.

(b) Misconduct and delay

Two racial differences in murder exonerations might help explain the disproportionate number of murder exonerations with black defendants.

Misconduct: Official misconduct is more common in murder convictions that lead to exonerations of black defendants than in those with white defendants.

Delay: Exonerations of black murder defendants take longer than exonerations of white murder defendants.

Misconduct. Seventy percent of the murder prosecutions that led to exoneration included official misconduct that we know about. We have identified many different types of misconduct. The most common is concealing exculpatory evidence—often called “Brady violations” after the

¹⁴ Federal Bureau of Investigation. [2014 – Crime in the United States](#). (2015). The estimate in the text is the proportion “White” victims for “Black or African American” offenders, multiplied by 0.88 to correct for the 12% of “whites” who were identified as Hispanic or Latino in the 2010 census. See *supra*, note 9.

¹⁵ Only 30% of murder exonerations of African Americans convicted of killing white victims included eyewitness misidentifications (32/106), compared to 83% of sexual assault exonerations of African American men who were convicted of sexual assaults on white women (83/100).

landmark 1963 Supreme Court case *Brady v. Maryland*¹⁶—which occurred in just over half the cases. The next most common type is witness tampering—everything from misleading a witness at a lineup, to threatening a witness, to suborning perjury—which occurred in 31% of murder exoneration cases; followed by perjury by a state official, which happened in 11% of the cases.

The rate of official misconduct is considerably higher among murder exonerations with black defendants than those with white defendants, 76% compared to 63%. The rate of misconduct is higher overall in capital cases, and the difference by race is greater: 87% of black exonerees who were sentenced to death were victims of official misconduct, compared to 67% of white death-row exonerees.

For the most part, these differences by race are due to misconduct by police officers. The rate of misconduct by prosecutors is about the same for all murder exonerations regardless of race, 44% for black defendants and 46% for whites. (There is a modest difference in prosecutorial misconduct among capital exonerations, 59% for black defendants compared 53% of whites.) On the other hand, there is a large difference in the rate of misconduct by police: 55% for black murder exonerees compared to 33% for whites (and 59% compared to 44% among death-sentenced exonerees).

The high rate of misconduct by police in murder cases with black defendants is reflected in the nature of the misconduct that occurs. Concealing exculpatory evidence, the most common type, is primarily a form of prosecutorial misconduct; there is relatively little difference in its frequency by race: 53% for black murder exonerees and 49% for whites. On the other hand, witness tampering is committed almost exclusively by police officers. It occurred in 21% of murder exonerations with white defendants but in 39% of those with black defendants, nearly twice as often.

We only know about misconduct that is reported in the documents we can obtain. Official misconduct in criminal cases is under-reported because, by its very nature, most misconduct is deliberately concealed—and much if not most remains hidden.¹⁷ That means that wrongful murder

¹⁶ *Brady v. Maryland*, 73 U.S. 83 (1963).

¹⁷ In some contexts, the fact that we can only report on misconduct that has been uncovered can lead to reporting biases. For example, the rate of observed misconduct in death penalty exonerations is twice the rate for sexual assault exonerations, 78% vs. 39%. That may be due to a higher rate of misconduct in capital murder investigations and prosecutions, at least among cases that end in exoneration; it may also be due, at least in part, to a higher rate of uncovering whatever misconduct occurred in post-conviction investigations in capital cases. Death sentences are re-examined more thoroughly than other crimes, and the trials that produce them are heavily litigated in successive reviews. As a result, we are more likely to know if misconduct was committed in capital cases. By contrast, many rape exonerations are based entirely on DNA tests that clear the innocent defendant but provide no information about any chicanery that may have led to the false conviction—which can create a false impression that no misconduct occurred. Because of the danger of biases such as this, we are generally cautious in making generalizations about patterns of misconduct from the data in the Registry. That danger does not apply here. We can think of no plausible reason why official misconduct leading to a murder conviction of an innocent person is more likely to come to light

convictions are also more likely to include *undiscovered misconduct* when the defendant is black: in exonerations for which some misconduct already is known, in those with no known misconduct, and among false murder convictions that have not resulted in exoneration.

Delay. Exonerations of innocent murder defendants take longer if the defendant is black, 14.2 years on average, than if he is white, 11.2 years. For death row exonerations in the Registry the average delays and the difference by race are larger, 16 years for black defendants and 12 years for whites.¹⁸ In other words, black murder exonerees average about three more years in prison than white murder exonerees—which means that, at any given time, a larger proportion of black murder defendants who will eventually be exonerated are still in prison

Part of the reason may be that authorities are more likely to resist exoneration in cases where there was official misconduct, which is more common when the exoneree is black. Murder exonerations with known misconduct do take longer than those without, 13.8 years to 10.1 years, on average. But differences by race persist even after controlling for official misconduct. Among murder exonerations with official misconduct, the average time to exoneration is 15 years for black exonerees and 12.5 years for white exonerees; among murder exonerations without misconduct, it's 11.4 years for black exonerees and 9.2 for whites.

It seems that innocent African Americans who are convicted of murder are at a disadvantage not only because their convictions were more likely to have been influenced by official misconduct, but also simply because of their race.

Consider this case:

In 1984, 19-year-old [Henry McCollum](#) and his 15-year-old half-brother [Leon Brown](#) were sentenced to death for the rape and murder of 11-year-old Sabrina Buie in Robeson County, North Carolina. McCollum and Brown were from New Jersey; they were visiting relatives in North Carolina. Both were intellectually disabled, and both falsely confessed under pressure from police. No physical evidence connected them to the crime.

In 2010, after decades of unsuccessful efforts to prove their innocence through the courts, the North Carolina Innocence Inquiry Commission agreed to investigate the

if the defendant is black than if he is white. The racial disparities we see seem to be caused by real differences in the rates of official misconduct in murder cases, mostly by police officers

¹⁸ The average length of the delays between conviction and exoneration for death sentences has been increasing over time. That may simply reflect a buildup of older cases on death rows across the country since 1972, when the Supreme Court vacated all existing death sentences in Furman v. Georgia, 408 U.S. 238 (1972), and the sharp decrease in the number of new death sentences in recent years, which dropped from a high of over 300 a year in the mid-1990s to a mere 30 in 2016. See Death Penalty Information Center. [Death Sentences in the United States](#). (February 2017). The six death-row exonerations in 2014 are a telling example. They averaged 35 years from conviction to exoneration—which, of course, could not have happened in 1990 or even 2000.

case. It determined that DNA from a cigarette butt found at the scene of the crime came from Roscoe Artis, a proven serial murderer and rapist who was himself sentenced to death for raping and killing an 18-year-old woman in the same county about a month after McCollum and Brown had confessed.

Artis had been a suspect in the Sabrina Buie rape-murder. In 1984, the police had asked the North Carolina State Bureau of Investigations to compare the fingerprints found on beer cans at the crime to those of Artis—but they hid that request from the defense. The authorities also concealed the fact that a witness who testified at trial that McCollum and Brown had admitted to the murder, had not only previously denied knowing anything about the case, but had taken a lie detector test that confirmed his denial.

McCollum and Brown were exonerated in 2014, after nearly 31 years in prison. They were pardoned by the Governor of North Carolina in 2015, and received \$750,000 each in compensation from the state. Even so, after their release the prosecutor who sent them to death row told The New York Times: “No question about it, absolutely they are guilty.”

Certainly there was misconduct that contributed to the conviction of McCollum and Brown, and that may have contributed to the decades of resistance to reopening the case. Did it also matter that the defendants were African Americans—as well as strangers to the community, and mentally handicapped? Did their race contribute to authorities’ unjustified and apparently unexamined confidence in their guilt even as evidence of innocence mounted? That would fit the data we see across cases.

McCollum and Brown are two of eight innocent death-row defendants who have been exonerated since the beginning of 2012 after spending between 30 and 39 years in prison. All eight are African Americans.

(c) Intentional and structural discrimination

In some cases, it’s easy to spot racism in the investigations or the prosecutions that led to the false convictions that we study:

In 1980, a Texas Ranger investigating the rape-murder of a high school student described what was coming to the two custodians who found the body, [Clarence Brandley](#) and a white colleague. He said “One of you is going to have to hang for this” and, turning to Brandley, added, “Since you’re the nigger, you’re elected.” Brandley was sentenced to death in 1981 and exonerated in 1990.

In 1987, in Monroeville, Alabama, police framed [Walter McMillian](#) for the murder of a white woman who worked as a clerk at a dry cleaner’s. McMillian, a 46-year old African-American man, had numerous alibi witnesses, all black: he was at a fish fry at the time of the killing. The only reason to suspect him was that he had a white girlfriend. McMillian was sentenced to death in 1988 and exonerated in 1993.

More often, discrimination is less overt:

In 2014, [Glenn Ford](#) was exonerated after 30 years on death row in Louisiana. He was released because over the decades after his conviction, his lawyers discovered several facts that undermined the state's case: trial testimony by the state's experts witnesses was false or misleading; police officers lied to the jury about what Ford said to them; hidden police reports included tips from informants that implicated two other suspects, but not Ford; and one of those two suspects admitted that he was the actual killer.

In 2015, A.M. "Marty" Stroud III, the former trial prosecutor who put Ford on death row in 1984, published a remarkable apology: "Glenn Ford was an innocent man. He was released from the hell hole he had endured for the last three decades."¹⁹

Stroud takes painful personal responsibility for the tragedy, but not because of deliberate misconduct. He was inattentive: "My fault was that I was too passive. I did not consider the rumors about the involvement of parties other than Mr. Ford to be credible.... Had I been more inquisitive, perhaps the evidence would have come to light years ago."

Stroud describes how he played by rules that gave him an unfair advantage over an innocent man: "I did not question the unfairness of Mr. Ford having appointed counsel who had never tried a criminal jury case much less a capital one." Even more troubling: "The jury was all white, Mr. Ford was African-American. Potential African-American jurors were struck with little thought about potential discrimination because at that time a claim of racial discrimination in the selection of jurors could not be successful...."²⁰

Stroud is unsparingly self-critical, but he does not describe himself as a racist: "In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning." He believed Ford was guilty and did not question that belief. The same is probably true of the police officers who concealed information about the real killers, the judge who presided over the selection of an all-white jury, and the jury itself, which sentenced Ford to death.

Police and prosecutors may habitually assume that any black murder suspect they deal with is a killer. That's false, of course, and it's a form of racial profiling. If they are white, they may mistrust

¹⁹ Stroud III, A.M. "Marty". [Lead Prosecutor Apologizes for Role in Sending Man to Death Row](#). *Shreveport Times*. (March 2015).

²⁰ Ford was convicted two years before the landmark case of *Batson v. Kentucky*, 476 U.S. 79 (1986), in which the Supreme Court for the first time created a procedure for challenging the use of peremptory challenges to create all white criminal trial juries.

claims of innocence by black defendants and alibi evidence from black witnesses because black people are unfamiliar and seem less trustworthy than those who are more similar to themselves.

All of us, judges and jurors as well as lawyers and police, are subject to unconscious racial biases—and all of us are prone to going along with accepted practices. Routine, institutional discrimination is more common than intentional racism, and probably harder to detect and correct. Perhaps that is one reason why Clarence Brandley, the target of explicit racism, was exonerated nine years after he was convicted, while Glenn Ford had to wait 30 years.

Would Glenn Ford have been convicted and sentenced to death if he had not been a black man charged with killing a white victim? There's no way to know. Hundreds of white defendants have also been falsely convicted of murder, and most of their cases included serious official misconduct. But we do know that innocent black murder defendants as a group are at a disadvantage because of their race, and that sometimes it costs them their freedom and most or all of their remaining years.

3. The net effect

We don't know the number of false criminal convictions, for murder or any other crime. Most by far remain hidden—false convictions far outnumber exonerations—and we have too little information to estimate that hidden figure.²¹ Except in one context: death sentences.

Death sentences have a far higher rate of exoneration than other crimes, and we have far more detailed data on them than any other category of criminal sentences. A study published in the Proceedings of the National Academy of Sciences made use of these unique characteristics to calculate “a conservative estimate of the proportion of false conviction among death sentences in the United States”—4.1%.²²

As the study is careful to point out, this estimate is for death sentences only. It cannot be applied to all crimes, or even to all murders. Still, it's a starting point; it suggests that the rate of miscarriages of justice for murders in general is somewhere in the general vicinity of the rate for capital murders.

Assume for a moment that the proportion of innocent defendants among all murder convictions is half the rate for death sentences, 2%. That would mean there would be about 3,400 innocent defendants among the estimated 171,700 inmates who are in American prisons for murder

²¹ Gross, Samuel R. [What We Think, What We Know, and What We Think We Know About False Convictions](#). forthcoming in *Ohio State J. of Crim Law*, Vol. 14, No. 2 (Spring 2017): pp. 12-16.

²² Gross, Samuel R., O'Brien, Barbara, Hu, Chen and Kennedy, Edward. [Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death](#). *Proceedings of the National Academy of Sciences*, Vol. 111, No. 20 (May 20, 2014); pp. 7230-7235.

convictions,²³ plus thousands more among the comparable number of defendants who were convicted of murder in the past 40 years but are not now in prison because they were released or have died, or both.

In short, it is likely that at least several thousand defendants have been falsely convicted of murder in the time period covered by the Registry, and—judging from the exonerations we have seen—about half of them were African Americans.

III. Sexual Assault

Fifty-nine percent of sexual assault exonerees are African Americans, four-and-a-half times their proportion in the population; thirty-four percent are white. Unlike murder, these numbers are way out of line with the racial composition of sexual assault convictions. As of the end of 2014, 22% of American prisoners convicted of sexual assault were black, 44% were white and 19% Hispanic.²⁴ Judging from known erroneous convictions, a prisoner serving time for sexual assault is three-and-a-half times as likely to be innocent if he is black than if he is white.

1. *Eyewitness misidentification*

Ninety-nine percent of the victims in sexual assault exonerations—like more than 90% of all sexual assault victims in the United States²⁵—are women. Strangers commit only about one-fifth of sexual assaults on women,²⁶ but they account for 71% of the false convictions that result in exoneration (204/289).

The leading cause of false sexual assault convictions is eyewitness misidentification of defendants who are strangers to the victims. In 79% of sexual assault exonerations (228/289), the identity of the man who committed the rape was the only issue at trial;²⁷ 86% of those cases were rapes by strangers (195/228), and 88% included mistaken eyewitness identifications (200/228).

There were eyewitness misidentifications in 69% of all sexual assault exonerations (200/289), including 86% of the cases in which the defendants were strangers to the victims (176/204). The

²³ Bureau of Justice Statistics, U.S. Dep’t of Justice. [Prisoners in 2015](#). (December 2016): p.30, Appendix Table 5.

²⁴ *Id.* (the remaining 15% were American Indians and Alaska Natives; Asians, Native Hawaiians, and other Pacific Islanders; and persons of two or more races).

²⁵ See, e.g., Bureau of Justice Statistics, U.S. Dep’t of Justice. [Special Report: National Crime Victimization Survey, Violence against Women: Estimates from the Redesigned Survey](#). (August 1995). This study and similar ones by the Bureau of Justice Statistics of the Department of Justice are based on a survey of the population and include data on sexual assaults that were not reported to the authorities as well as those that were.

²⁶ *Id.* p. 1.

²⁷ In the remaining 21% of sexual assault exonerations the assault never happened. Instead, the supposed victim lied about a consensual sexual encounter or fabricated an attack from scratch. In 86% of these “no-crime” exonerations, the complainant knew the innocent defendant; none involved eyewitness misidentification.

rate of eyewitness errors is much higher for innocent black defendants—79% (135/170)—than for whites, 51% (50/99).

In half of all sexual assault exonerations with eyewitness misidentifications, black men were convicted of raping white women,²⁸ a racial combination that appears in less than 11% of sexual assaults in the United States.²⁹ According to surveys of crime victims, about 70% of white sexual assault victims were attacked by white men and only about 13% by black men.³⁰ But 57% of white-victim sexual assault exonerees are black (101/177), and 37% are white—which suggests that black defendants convicted of raping white women are about eight times more likely to be innocent than white men convicted of raping women of their own race.

There are many possible explanations for this disturbing pattern, but the simplest is probably the most powerful: the perils of cross-racial identification. One of the oldest and most consistent findings of systematic studies of eyewitness identification is that white Americans are much more likely to mistake one black person for another than to mistakenly identify members of their own race.³¹

2. Other causes for the racial disparity in sexual assault exonerations

Eyewitness misidentifications do not occur in a vacuum. Some are the products of racial bias.

Marvin Anderson was suspected of rape in Virginia because the real rapist told his victim that he “had a white girl,” and Anderson was the only black man known to the local police who lived with a white woman. Anderson had no criminal record, so an officer showed his color employment identification photo to the victim together with half dozen black-and-white mug shots of other men, and asked her to

²⁸ To be precise, this ratio is the number of sexual assault exonerations with black defendants and white victims, divided by the number of all sexual assault exonerations for which the races of the defendants and the victims are known (77/150).

²⁹ Black offenders accounted for an average of approximately 11% of all rapes and sexual assaults of white victims from 1996 through 2008. Bureau of Justice Statistics, U.S. Dep’t of Justice. [Criminal Victimization in the United States, 1996–2008](#) (based on the National Criminal Victimization Survey; the statistic fluctuates because for each year it is usually extrapolated from a sample of ten or fewer survey responses).

³⁰ *Id.*

³¹ See Meissner, Christian A. and John C. Brigham. “Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review.” *7 Psychol. Pub. Pol'y & L.* 3 (2001). The problem of cross-racial identification is greater for black defendants than for white defendants for two reasons. First, a lower proportion of sexual assaults committed by white perpetrators are cross-racial. Most sexual assaults are committed against victims known to the attacker, who are likely to be of the same race; but if the crime is against a stranger, the victim is likely to be white regardless of the race of the attacker simply because whites are the great majority of the population. Second, white subjects show stronger “own race bias” than black subjects—they tend to be worse at identifying members of the other race—perhaps because as members of the majority group, many white Americans have little contact with African Americans, while almost all African Americans have regular contacts with whites. *Id.* at p.18.

pick the perpetrator. Naturally, she chose Anderson, who spent 15 years in prison before he was exonerated by DNA.

Black defendants also account for 40% of rape exonerations that do not include eyewitness mistakes. In some cases, the evidence that convicted the innocent defendant was produced by racially tainted investigations.

In 1983, [Stanley Wrice](#), an African American man, was convicted of participating in a vicious gang rape of a white woman in Chicago and sentenced to life in prison. The victim did not identify Wrice, but he had confessed and two witnesses testified that they saw him participate in the rape. Wrice was exonerated in 2013 after it was established that he had been tortured into confessing by two officers in a Chicago police unit that specialized in obtaining confessions by torture, mostly from black suspects. (Two years earlier, their commander, Lieutenant Jon Burge, was sent to federal prison for committing perjury in testimony about the unit.) By then, one of the two supposed eyewitnesses, also a black man, had recanted and stated under oath that he too had been tortured, to force him to testify against Wrice; the other witness had died.

In other cases, the critical players may have been defense attorneys, judges or jurors, rather than prosecutors or police officers.

In 1990, [Michael Phillips](#), an African American man, pled guilty in Dallas to the rape of a 16-year old white girl who misidentified him. Phillips later said he entered the plea because his lawyer (who never investigated his claim of innocence) told him he would get life in prison if he went to trial and that no jury would believe a black man over a white girl. He spent 12 years in prison, an unusually long term for a rape by a defendant with no prior record for violence or sexual misconduct. Phillips was exonerated in 2014 when the rape kit was finally tested for DNA.

In some cases, the presence of racism is unmistakable.

In 1991, [Marcus Lyons](#) had recently been released from prison after completing a sentence for rape. He tried to call attention to his case by putting on his Navy uniform, going to steps of the DuPage County, Illinois, courthouse, and nailing his foot to a cross made out of railroad ties. One of the officers who stopped him said “Come on nigger, your 15 minutes of fame are over.” Lyons was exonerated in 2007, by DNA testing of semen found on underpants worn by the victim. He would have been cleared in 1988 if blood-type testing had been done on those underpants, but they were concealed by the police.

In others, the impact of race is less explicit.

In 1984, [Ulysses Charles](#), a black immigrant from Trinidad who spoke with a strong Caribbean accent, was convicted of raping three women in Boston. All three victims misidentified Charles as the rapist, even though they had told police that the rapist had an American accent, and had failed to mention Charles’s dreadlocks

and gold front teeth. Before trial, tests on crime scene evidence found seminal fluid from the rapist and showed that the attacker had blood type O; Charles, as the police knew, had blood type B. That evidence was concealed, and at trial the prosecutor called a forensic analyst who testified falsely that the rapist had not ejaculated. Charles was exonerated by DNA testing in 2001, after 20 years in prison.

Would the extreme misconduct that sent Charles to prison have occurred if he had been white? Would the victims have been confident of their identifications, despite the fact that he did not resemble the man they had earlier described? Would the jurors? Maybe—but it seems unlikely.

Of all the problems that plague American criminal justice, few if any are as incendiary as the relationship between rape and race. From the Reconstruction through the first half of the twentieth century, claims that black men raped white women triggered countless lynchings, riots and even massacres of African Americans. Those horrors have stopped, but the fears and biases that fed them have not disappeared. It should be no surprise that racial bias and outright racism also play a role in wrongful convictions for sexual assault.

3. Sentencing and time in prison before exoneration

On average, African American sexual assault exonerees spent considerably longer in prison than white sexual assault exonerees, 13.3 years compared to 8.9 years. Much of this disparity is caused by a comparatively small number of exonerees who were imprisoned for decades. Twenty-five sexual assault exonerees spent 25 years in prison or longer; all but one were exonerated in the past nine years. Of those, 88% were black, including all five who were imprisoned for 30 to 35 years.

Black sexual assault exonerees also received harsher sentences than whites: 28% were sentenced to life imprisonment compared to 17% for white sexual assault exonerees, and the average *minimum* term for those who were not sentenced to life was 29 years for African Americans and 19 years for whites.

These are extremely severe sentences, by any measure, for white and black sexual assault exonerees alike. In 2000, for example, only 1.6% of all sexual assault defendants convicted in state courts were sentenced to life imprisonment, the average *maximum* term of incarceration was 7 years, and 16% received probation (as did *one* of 289 sexual assault exonerees, 0.3%).³² Part of the explanation is the process that produced these sentences. Eighty-eight percent of sexual assault convictions in state courts in 2000 were based on guilty pleas, almost all pursuant to plea bargains, but 96% of assault exonerees went to trial. From the look of it, they paid heavily for their day in court—especially the African Americans. Very likely, many innocent defendants who have not been exonerated decided not to take that risk.

³² Bureau of Justice Statistics, U.S. Dep’t of Justice. [Felony Sentences in State Courts](#). (2000).

Our data are limited. We have only sketchy information on racial patterns in sentencing for sexual assault convictions in general, none for those with innocent defendants who were not exonerated, and incomplete data on the details of the crimes and the process of obtaining exonerations even for the cases we know best, those that we list in the Registry.

We cannot say for sure why so many African American sexual assault exonerees received such extreme sentences, even by comparison to the draconian sentences meted out to white sexual assault defendants who were later exonerated. Differences in criminal history cannot explain the gap: Among sexual assault exonerees who had no prior criminal convictions, the only two who received life sentences were African Americans. The average term for the rest was 32 years for black exonerees and 19 years for white exonerees. Our best guess is that black sexual assault defendants who insisted on their innocence and refused to plead guilty were punished more harshly for doing so than innocent white defendants who followed the same course.

Sentence length has an obvious impact on the time an exonerated defendant may spend in prison: the longer the sentence, the longer the time the defendant might spend in prison before exoneration. But it does not entirely explain the racial difference in prison time before exoneration for sexual assault. Controlling for length of sentence, black sexual assault exonerees served about three years longer before release than whites.³³

As with sentence length, we know too little to say for sure why African American sexual assault exonerees spent more time in prison before release than white sexual assault exonerees. The simplest explanation, however, seems most plausible: they received longer sentences when convicted, and they faced greater resistance to exoneration, even in cases in which they were ultimately released.

IV. Drug Crimes

1. Individual drug-crime exonerations

Drug law enforcement bears little resemblance to the enforcement of laws against violent crime. Illegal drug use is the quintessential “victimless crime”—the only person who may be injured as a direct consequence is the one who breaks the law. As a result, drug crimes are rarely reported to the police, so we have no direct information on the frequency or characteristics of drug offenses. The only systematic data on illicit drug use in the United States come from anonymous annual surveys by the federal Department of Health and Human Services. The most recent survey to

³³ We computed the following ordinary least squares regression analysis with Years Lost before exoneration as the dependent variable, and Sentence in years, Race (1 if defendant is black; 0 otherwise), and the interaction of Sentence and Race as the independent variables:

$$\text{Years Lost} = 3.7376 + 0.2292 \text{ Sentence} + 3.5456 \text{ Race} - 0.1010 \text{ Sentence * Race.}$$

The coefficients for all three independent variables are highly statistically significant.

include data on race was in 2013. Like earlier ones, it found that about 10% of the population over 12 years of age had used illegal drugs in the previous year, and that this use was more or less evenly distributed across the largest racial groups: 8.8% for Hispanics, 9.5% for whites and 10.5% percent for African Americans.³⁴

Convictions for drug crimes are another matter entirely. Thirty-three percent of those serving prison terms for drug offenses are African Americans, two-and-a-half times their proportion in the population.³⁵

Most of these prisoners were convicted of drug trafficking. We don't have decent data on the number of drug sellers by race, or any other characteristic. There is some evidence that white adolescents are more likely to sell drugs than black adolescents, but it's hard to interpret.³⁶ The number of African American drug dealers on the street could conceivably be proportional to their number in prison, but it is highly unlikely since most users get drugs from members of their own race. In any event, 35% of those imprisoned for drug *possession* are also black, compared to 38% who are white, despite the fact that African Americans are 13% of the population and use drugs at about the same rate as whites.

Drug crime exonerations are even more racially concentrated: 55% (121/221) have black defendants and 24% (54/221) white defendants. Overall African Americans are about five times as likely to go to prison for drug possession as whites, and judging from exonerations, innocent black people are about 12 times more likely to be convicted of drug crimes than innocent white people. (If that were not true, it would mean that for some unknown reason innocent African Americans convicted of drug crimes are much more likely to be exonerated than innocent white drug convicts.)

Most drug defendants are convicted of misdemeanors, and even among those convicted of felonies, relatively few go to prison.³⁷ Few defendants with such comparatively light penalties are ever exonerated, for any crime, regardless of innocence.

³⁴ Substance Abuse and Mental Health Services Administration, U.S. Dep't of Health and Human Services. [Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings](#). The rate was considerably lower for Asian, 3.1%.

³⁵ Bureau of Justice Statistics, U.S. Dep't of Justice. [Prisoners in 2015](#). (December 2016): Appendix Tables 4. A 2009 study by Human Rights Watch found comparable racial ratios for drug crime arrests from 1983 through 2007. Human Rights Watch. [A Decade of Disparity: Drug Arrests and Race in the United States](#). (March 2009). A study by the Sentencing Project in 2009 found that from 1995 to 2005, African Americans comprised approximately 13% of drug users, but 36% of drug arrests and 46% of those convicted for drug offenses. Mauer, Marc. [The changing racial dynamics of the war on drugs](#). *The Sentencing Project* (2009).

³⁶ Rothwell, Jonathan. [How the War on Drugs Damages Black Social Mobility](#). *The Brookings Institute* (September 30, 2014).

³⁷ Bureau of Justice Statistics, U.S. Dep't of Justice. [Felony Sentences in State Courts](#). (2000).

Most of the effort that goes into addressing wrongful convictions is devoted to defendants with extreme sentences. As a result, the distribution of exonerations is heavily lopsided. At the top of the range, defendants who are sentenced to death are about six times as likely to be exonerated as those convicted of murder and not sentenced to death, and hundreds of times more likely than defendants convicted of robbery.³⁸

And so on down the line. Non-violent crimes comprise more than 80% of felony convictions³⁹ but fewer than 20% of exonerations; there are, for example, about three times as many felony convictions for theft as for robbery but one-eighth the number of exonerations. Misdemeanor convictions outnumber felonies by at least four to one,⁴⁰ but account for less than *four percent* of exonerations (70/1900). Clearly, only a tiny fraction of innocent defendants who are convicted of misdemeanors or non-violent felonies are ever exonerated.

Most innocent defendants with relatively light sentences probably never try to clear their names. They serve their time and do what they can to put the past behind them. If they do seek justice, they are unlikely to find help. The Center on Wrongful Convictions at Northwestern University School of Law, for example, tells prisoners who ask for assistance that unless they have at least 10 years *remaining* on their sentences, the Center will not be able to help them because it's overloaded with cases in which the stakes are much higher.

Whatever the reason, we can infer very little about false convictions by studying exonerations for misdemeanors and non-violent felonies—in general. But we do have a unique window on errors in ordinary, low-level drug cases.

Sixty percent of the drug exonerations we know about occurred in Harris County, Texas, home to Houston (133/221). The defendants in these cases pled guilty to drug possession before the supposed drugs they possessed were tested in a crime lab, and were exonerated weeks, months or years later after testing was done and no illegal drugs were found.

Why did these defendants plead guilty even though they possessed no controlled substances? Some may have had powders or pills that they *thought* contained illegal drugs but did not. As far as we can tell, however, most pled guilty to get out of jail.

In a typical case, the defendant had a criminal record⁴¹ and could not post the comparatively high bail that was set. At the first court appearance, the prosecutor made a for-today-only take-it-or-

³⁸ Gross, Samuel. [What We Think, What We Know, and What We Think We Know About False Convictions](#), forthcoming in *Ohio State J. of Crim. Law*, Vol. 14, No. 2 (Spring 2017): pp. 13-16.

³⁹ Bureau of Justice Statistics, U.S. Dep’t of Justice. [Felony Sentences in State Courts](#). (2000).

⁴⁰ Natapoff, Alexandra. [Misdemeanors](#). *Southern California Law Review*, Vol. 85, Iss. 5 (2012). pp. 1313–1375.

⁴¹ Seventy-four of the 133 Harris County drug-guilty plea exonerees had felony records, overwhelmingly drug and other non-violent felony convictions; another 30 had prior misdemeanor convictions.

leave-it offer to the defendant: plead guilty and go home immediately, or in a few days or weeks. If the defendant pled not guilty, however, she would remain in jail until trial—usually for months, sometimes for a year or longer—and then risk years in prison if convicted. It’s hardly surprising that many innocent defendants took the deal.

The only reason we know about these false guilty pleas is that the Harris County and Houston Police crime labs test the materials seized from the drug defendants after they enter guilty pleas. Few crime labs do that, which means that lab tests are rarely done in routine drug cases, since 95% or more of drug possession convictions are based on guilty pleas that are usually entered before lab tests. If crime labs across the country routinely conducted post-plea drug tests, we would learn about thousands of additional false drug convictions in other counties.

Thirty-nine percent of the Harris County guilty-plea drug exonerations were misdemeanors (53/133)—compared to 1% for the rest of the Registry (18/1,882). Only 5% of the Harris County drug exonerees (7/133) were sentenced to prison, all but two of them for two years each. By contrast, 66% of the other drug exonerees in the Registry (58/88) were sent to prison for two years or longer, including seven who got life sentences.

In other words, the Harris County guilty-plea exonerations look a lot more like routine drug prosecutions than the other drug exonerations we know about. The reason is simple: the Harris County drug defendants were exonerated by a fortuity—routine post-conviction drug tests that just happened to show up—rather than as a result of deliberate case-by-case investigations by the defense or the prosecution.

Despite the unique setting, the racial composition of the Harris County drug exonerations is familiar: 62% of the exonerees are African American in a county with 20% black residents, about seven times the rate for other racial groups.

Most, if not all of these innocent black defendants in Harris County pled guilty rather than go to trial because it was their best option, given that they had been arrested and charged, and were held in jail. But why were so many innocent black defendants arrested for drug possession when there is no reason to believe that African Americans are more likely than whites to use illegal drugs?

Two-thirds of the arrests in the Harris County guilty-plea exoneration cases (89/133) were based on cheap and notoriously inaccurate “presumptive” field tests for drugs, usually on substances found in searches following traffic stops.⁴² Anybody who is subjected to that process is at risk of

⁴² Gabrielson, Ryan and Topher Sanders. [How a \\$2 Roadside Drug Test Sends Innocent People to Jail](#). *New York Times*. (July 7, 2016). Recently the Texas panel on wrongful convictions recommended that lab tests for drugs be required as a basis for criminal prosecutions. See Gabrielson, Ryan. [Texas Panel on Wrongful Convictions Calls for Ending Use of Unverified Drug Field Tests](#). *ProPublica*. (Jan. 18, 2017).

false arrest and conviction.⁴³ Across the country, African Americans drivers are about as likely to be stopped as white drivers, but after that, they are three times as likely to be searched.⁴⁴ As a result, they bear much of the brunt of drug-law enforcement—including false drug possession convictions, which may number in the thousands if not tens of thousands a year.

Why do officers search African-Americans for drugs at such a high rate? The short answer is that the War on Drugs is pursued more aggressively against minority group suspects, African Americans in particular, than against members of the white majority. Several overlapping strands contribute to this practice.

Some drug arrests are the result overt racial discrimination. In June 2016, for example, a federal judge found “substantial evidence of racially selective [drug-law] enforcement by the San Francisco Police Department”⁴⁵ in a program that resulted in the indictment of 37 defendants for drug dealing, all African Americans. The officers involved made derogatory comments about “black males” and ignored drug dealers of other races. Six months later, all pending charges were dismissed.

More often, however, the discrimination is not explicit.

African Americans are subject to more attention and surveillance from police than whites. One reason that is often offered is that they are more likely to live in high crime areas, but that is not a complete explanation. In 2013, for example, a federal judge found that New York City’s notorious stop-and-frisk program—under which police made more than 4.4 million street stops from 2004 through 2012, 80% of them of African Americans or Hispanics—could not be justified on that basis because the stops were more closely linked to the racial composition of the neighborhoods and the race of those detained than to crime rates.⁴⁶

Once stopped, African Americans are more likely to be searched. An explanation that is sometimes given is that they are more likely than white suspects to have criminal records, but that explanation is partly circular, especially for drug crimes. A major reason that African Americans are more likely to have drug-crime records is that police are more likely to stop, search and arrest them. Those records, however obtained, also mean that bail is likely to be higher. As a result, African American drug defendants are more likely than whites to face the Hobson’s choice of plea bargaining: plead guilty or stay in jail.

⁴³ See, e.g. Cardona, Claire. [Texas Man Arrested on Meth Possession Charge Says Substance Deputy Found was Cat Litter](#). *Dallas Morning News*. (January 10, 2017).

⁴⁴ Bureau of Justice Statistics, U.S. Dep’t of Justice. [Contacts between Police and the Public, 2008](#). Tables 9 and 14.

⁴⁵ Ho, Vivian. [Charges dropped in SF Drug Busts that Prompted Racial Bias Claims](#). *San Francisco Chronicle*. (January 24, 2017).

⁴⁶ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.NY, 2013).

And, of course, African Americans are the prime targets of racial profiling—especially in the context of drug-law enforcement. Racial profiling was first named in the late 1990s when it was identified with “driving while black”—systematic programs of police officers trolling for drugs on the highway by searching cars with black or Hispanic drivers.⁴⁷ The practice has been widely condemned, but it continues and not just on highways. For example, the stop-and-frisk program in New York that was declared unconstitutional in 2013 was racial profiling on city sidewalks.

Wherever they are conducted, most of the victims of these illegal searches are inconvenienced, scared and humiliated, but they are not arrested because no drugs are found. Some, however, are arrested and convicted of drug possession. Judging from what we see in Harris County, quite a few of them are innocent.

2. *Group exonerations*

Many exonerations that we know about are not included in the Registry. Since 1989, in addition to the 1,900 individual exonerations in the Registry, a nearly equal number of defendants were cleared in 15 “group exonerations” in 13 cities and counties across the country. The great majority of these defendants were African Americans.

Exonerations can be “grouped” in many ways. What we mean by “*group exoneration*” is very specific: *The exoneration of a group of defendants who were falsely convicted of crimes as a result of a large-scale pattern of police perjury and corruption.* These are highly important cases, but—as we explain—they cannot usefully be studied in the same database as individual exonerations.

When we released our first Report, in May 2012, we discussed 12 group exonerations that included “at least 1,100” defendants.⁴⁸ We now know of 15 group exonerations, and the total of exonerated defendants has climbed to at least 1,840, the great majority of whom were framed for drug crimes that never happened.

Two of the best-known group exonerations illustrate the range of police behavior that produced these frame-ups:

- *Los Angeles, California, 1999-2000.* In 1999, authorities learned that for several years or longer, a group of officers in the Rampart division of the Los Angeles Police Department had routinely lied in arrest reports and testimony, and framed many innocent defendants by planting drugs or guns on them. On several occasions, they had shot and wounded unarmed suspects, and then planted guns on them. In the aftermath of this scandal, “approximately 156” criminal defendants had their convictions vacated and dismissed by Los Angeles County judges in late 1999 and

⁴⁷ See Gross, Samuel R. [The Rhetoric of Racial Profiling, in Social Consciousness](#). *Legal Decision Making: Psychological Perspectives*. R. Wiener, B. Bornstein, R. Schopp & S. Willborn, eds. (Springer: New York, 2007).

⁴⁸ Gross, Samuel R. and Michael Shaffer. [Exonerations in the United States, 1989-2012](#). (2012): p. 84.

2000. The great majority were young Hispanic men who were believed to be gang members. Almost all pled guilty to false felony drug or gun charges.⁴⁹

- *Tulia, Texas, 2003.* In 1999 and 2000, 39 defendants, almost all of them black, were convicted of selling cocaine in Tulia, Texas, on the uncorroborated word of a corrupt undercover narcotics agent named Tom Coleman. In 2003, 35 of them—all who were technically eligible—were pardoned by the governor after a judge investigated the cases and concluded that Coleman had engaged in “blatant perjury” and was “the most devious … law enforcement witness this court has witnessed....” The investigation revealed that Coleman had charged the defendants with selling quantities of highly diluted cocaine that he actually took from a personal drug stash. Two additional defendants were exonerated when their convictions were vacated and dismissed by courts. In 2005, Coleman was convicted of perjury.⁵⁰

Table 1 summarizes basic information on the group exonerations we know about. A short description of each of these scandals is included in the Appendix. One of the oldest—from Oaklyn, New Jersey, in 1991—is an outlier: 155 convictions for driving under the influence of alcohol were dismissed because a single police officer faked the results of breathalyzer tests, and then stole money from the wallets and purses of the suspects he arrested. All of the rest consisted primarily or exclusively of bogus drug cases.

⁴⁹ Covey, Russell. [Police Misconduct as a Cause of Wrongful Convictions](#). 90 Wash. U. L. Rev. 1133 (2013).

⁵⁰ *Id.*; Barnes, Steve. [Rogue Narcotics Agent in Texas Is Found Guilty of Perjury](#). *New York Times* (January 15, 2005).

Table 1: Group Exonerations, 1995- 2017

PLACE AND DATE	NUMBER OF EXONERATED DEFENDANTS	CRIMES CHARGED	RACIAL AND ETHNIC IDENTITY OF DEFENDANTS
Washington DC 1990	32	Drugs	Overwhelmingly Black
Oaklyn NJ 1995	155	Drunk driving	Unknown
Philadelphia PA 1995-1998	Approximately 230	Mostly drugs	Overwhelmingly Black
Los Angeles CA 1999-2000	Approximately 156	Mostly drugs & gun possession	Overwhelmingly Hispanic
Los Angeles CA 2001-2002	At least 10	Drugs	Overwhelmingly Black
Dallas TX 2002	6 to 15	Drugs	Overwhelmingly Hispanic
Oakland CA 2003	76	Mostly drugs	Overwhelmingly Black
Tulia TX 2003	37	Drugs	Overwhelmingly Black
Louisville KY 2004	Approximately 50	Mostly drugs	Overwhelmingly Black
Tulsa OK 2009-2012	At least 28	Mostly drugs	Unknown
Benton Harbor MI 2010-2012	At least 69	Mostly drugs	Overwhelmingly Black
Camden NJ 2010-2012	193	Mostly drugs	Overwhelmingly Black
Mansfield OH 2012	20	Drugs	Overwhelmingly Black
Philadelphia PA 2013-2016	812	Mostly Drugs	Overwhelmingly Black
East Cleveland OH 2016-2017	43	Drugs	Overwhelmingly Black
ALL CASES	AT LEAST 1,840	PRIMARILY DRUG CHARGES	PRIMARILY BLACK

The biggest change from the list we published in 2012 is the addition of more than 700 exonerations in Philadelphia—which leads the nation in this category of injustice by a huge margin and accounts for a majority of all known group exonerations.

A couple of examples from Philadelphia illustrate the range of penalties suffered by the victims of these frame-ups:

In March 2005, Jeffrey Walker and other narcotics unit officers arrested Mia Whittaker on drug charges in her Philadelphia home. Despite her claim that the drugs were planted, Whittaker pled guilty and was sentenced to three years' probation. In May 2013, the FBI arrested Walker in a sting; ultimately he admitted that he and other officers had fabricated the case against Whittaker and hundreds of other defendants over more than a decade. In November 2013, Whittaker's conviction was vacated and the charge was dismissed.

In January 2001, 23-year-old Kareem Torain was arrested by Officer Walker and charged with possession of drugs. He refused to plead guilty and denied that he was carrying any drugs. In May 2002, Torain was convicted at a trial and sentenced to 12½ to 22½ years in prison. He was exonerated and released in February 2014, after more than 13 years in prison.

Sentences imposed by courts are only part of the undeserved punishment meted out in many of these scandals. Some suspects were beaten, had property stolen, or both—including some who were never charged with crimes. For example, the initial investigation that led to the first Philadelphia group exoneration was instigated by an event in 1991 when narcotics officers in the police department's 39th district arrested an African American college student named Arthur Colbert. Over a period of six hours, they called him “nigger,” took him to an abandoned crack house where they beat him, took him to the precinct where they continued to beat him, held a loaded pistol to his head and threatened to kill him, broke into his apartment and searched it—and eventually released him, after promising to kill him if they ever saw him again.⁵¹

The list in Table 1 is far from complete. We have not conducted a systematic, in-depth search for group exonerations. They are not easy to study from a distance. Most do not receive national attention; some barely make regional news beyond a few articles about the corrupt officers, and local news coverage is often sketchy. We have probably missed more group exonerations than we have found.

We also know of several police corruption scandals that did not produce group exonerations, but might have if the authorities had identified defendants with tainted convictions and exonerated them. In some instances, prosecutors did not conduct systematic reviews of the cases the corrupt

⁵¹ Kramer, Michael. “How Cops Go Bad.” *Time*. (December 15, 1997).

officers had brought.⁵² In others, they left it up to the convicted defendants themselves to seek dismissal of their convictions, if they learned that it was possible and had the resources to try; it rarely happened.⁵³

Wholesale police frame-ups of innocent defendants are at one end of a continuum of deliberate false convictions. At the opposite end are isolated acts of perjury in particular cases; some individual exonerations that include police perjury fit that mold. In between, there are serial perjurers: officers who frame innocent defendants occasionally over the course their careers, but not as part of a concerted plan or large scale conspiracy. In all likelihood, the great majority of false convictions that result are never discovered, from one end of the spectrum to the other.

As we have noted, the group exonerations we have found are primarily cases in which police officers planted drugs on suspects. It takes a lot to overcome the practical presumption that police tell the truth in court, especially when the competing story comes from the accused. The cases that come to light are those in which the evidence of corruption becomes overwhelming, which is most likely in scandals with many innocent victims. When that point is reached, the dam breaks and a flood of dozens or hundreds of convictions are recognized as unreliable or baseless.

In sum, as with individual exonerations, there clearly are many more false convictions of drug defendants who were framed by police than we have identified in these 15 groups.

Group exonerations are fundamentally different from exonerations based on individual investigations and cannot usefully be studied together.

⁵² For example, beginning in the 1990s and extending into the late 2000s, a series of Chicago police corruption scandals resulted in convictions of more than a dozen police officers on charges relating to the falsification of drug cases, theft of narcotics from drug dealers and users, and the filing of false reports. Possley, Maurice. [When Cops Go Bad, Everyone Pays](#). *Chicago Tribune*. (October 22, 2006); Main, Frank. “‘Cops’ Arrests Get 10 Felony Cases Tossed Out.” *Chicago Sun-Times*. (May 9, 2005); Possley, Maurice and Gary Marx. “Austin 7 Arrests Fall Apart In Court.” *Chicago Tribune*. (January 25, 1997); Warnick, Mark. “City Cop Scandals Dash Drug Trials.” *Chicago Tribune*. (December 25, 1997); Heinzmann, David and Annie Sweeney. “Federal Probe Nets 4 SOS Cops, No Brass.” *Chicago Tribune*. (April 8, 2011). The Cook County State’s Attorney’s office told us it has no idea how many convictions were later dismissed, although a review of federal lawsuits reveals that several defendants sued the City of Chicago after their convictions were vacated. Email from Andrew Conklin, Media Spokesperson, Cook County State’s Attorney’s Office (March 2012).

⁵³ In 2002, for example, the Dallas District Attorney’s Office dismissed pending charges against 20 defendants who were apparently framed by two former Dallas police officers who were themselves convicted of stealing money from suspects and falsifying reports. Three convicted defendants who were still imprisoned also had their convictions reversed, but prosecutors made no attempt to identify other defendants who had been falsely convicted in this conspiracy on the ground that it was “up to the individual defendant.” Bensman, Todd. “False Drug Convictions May Linger.” *Dallas Morning News*. (September 8, 2002).

The unit of observation for an individual exoneration is the defendant and his case. The investigations that lead to these exonerations produce a great deal of information about each case, and much of that information is publicly reported.

The defining feature of a group exoneration is the corrupt officer or the police conspiracy. Once that picture comes into focus, specific exonerations may be handled summarily and receive little or no separate attention. As a result, many group exonerations are for comparatively minor false convictions that would never be reinvestigated on their own. For example, 27 of the 37 Tulia exonerees pled guilty; most of them received probation and fines or short periods of incarceration. It is nearly prohibitively expensive to establish the innocence of the defendants in such cases. It almost never happens—except in the context of group exonerations, or in some other situation that obviates the need for costly investigation, such as the drug testing in the Harris County drug guilty-plea exonerations.

Because of this summary process, we know next to nothing about many of the individual cases that were dismissed in these groups: not the dates of arrest, conviction and exoneration; not the facts of the alleged crimes; not the mode of conviction or the sentence; sometimes, not even the names of the exonerated defendants. For the Rampart scandal in Los Angeles, for example, we don't even know the number of exonerated defendants. (On the other hand, we have detailed information on each defendant in the Tulia group exoneration.⁵⁴)

For some group exonerations, it is also likely that quite a few of the defendants who were cleared were in fact guilty. Professor Russell Covey has assembled reasonably detailed information on 87 of the Rampart exonerations in Los Angeles.⁵⁵ He concluded that 38 cases qualified as exonerations by the Registry's criteria, and the defendants are highly likely to be innocent; 27 cases included "evidence of criminal culpability" by the defendant; and 22 cases were too unclear to call. This suggests that half or more of the Rampart exonerees were innocent, but many others were not. On the other hand, Covey concluded that with one or two unlikely exceptions, all the exonerated Tulia defendants were innocent;⁵⁶ based on the evidence we have reviewed, we agree.

In short, we have too little information on most group exonerations to include them in our database of individual exonerations; and in any event, the two categories should be studied separately rather than mixed together.

Perhaps the most striking aspect of group exonerations for drug crimes is their racial composition. In almost every jurisdiction, over a period of decades, the exonerated drug defendants were overwhelmingly minority group members. In Los Angeles and Dallas they were Hispanic;

⁵⁴ See Blakeslee, Nate. *Tulia: Race, Cocaine, and Corruption in a Small Texas Town*. (2005).

⁵⁵ Covey, Russell. [Police Misconduct as a Cause of Wrongful Convictions](#). 90 Wash. U. L. Rev. 1133 (2013).

⁵⁶ *Id.* at pp. 1150-51.

everywhere else, they were African American. In Philadelphia, where a majority of all group exonerations took place, Bradley Bridge, a Deputy Public Defender who has been handling and tracking that city's group exonerations for decades, estimates that "at least 95%" of the more than 1,000 exonerated defendants are minorities,⁵⁷ and the vast majority are black.

Why did these scandals happen?

We don't *know* the motives of the dishonest officers who framed all these defendants, but there are a few obvious possibilities. Some of the corrupt officers involved took bribes or stole money and drugs from real drug traffickers and may have framed innocent defendants to deflect suspicion. Some probably did it because they believed the defendants they framed were drug dealers or gang members or both and deserved to be sent to prison, even by dishonest means. And some did it to build their careers. Tom Coleman, for example, lost his job as a deputy sheriff and was then indicted for theft in a different Texas county before he was hired as an undercover agent in Tulia. After he arrested 46 people on fabricated drug charges, the Texas Department of Public Safety named him as the 1999 Outstanding Lawman of the Year.⁵⁸

But why did they focus so heavily on minorities, especially African Americans?

It's impossible to miss the obvious racism at the core of some of these cases. In addition, many black defendants—especially poor, inner-city dwellers in Philadelphia, Camden, Oakland, and elsewhere—have limited resources and little political clout. They are unlikely to be able to defend themselves successfully, even if innocent.

But the most powerful reason the officers who carry out these outrages focus on African Americans is simple: That's what they always do. Drug-law enforcement in general bears more heavily on African Americans than on whites, as we saw in Harris County. As any forger knows, the way to create convincing fakes is to make them look like the real thing. For drug cases, that means arresting mostly black suspects.

One of the many costs that the War on Drugs inflicts on the black community is this outrageous practice of framing innocent defendants. We have no idea how often it really occurs.

V. Conclusion

Most innocent defendants who have been exonerated in the United States in the past 28 years are African Americans—almost half of the nearly 2,000 individual exonerations that we know about,

⁵⁷ Email, Bradley S. Bridge to Maurice J. Possley. (December 5, 2016).

⁵⁸ Blakeslee, Nate. [The Color of Justice](#). *Texas Observer*. (June 2000).

and the great majority of a similar number of group exonerations. There is every reason to believe that this is also true of the much larger group of all wrongful criminal convictions.

There is no single explanation for this huge racial disparity. It has several causes, all of which point in the same direction.

- *The high homicide rate in the African American community.* This is a major cause of the high number of African American murder exonerees. If the real criminal is black, anybody who is mistakenly convicted for that crime will almost inevitably be black as well. These exonerated defendants, and a much larger group of falsely convicted murder defendants who have not been exonerated, are innocent casualties of the high homicide rates in some African American communities.
- *The risk of eyewitness misidentification in cross-racial crimes.* We see this most starkly for sexual assaults: Most African American sexual assault exonerees were misidentified by white victims. The same problem very likely contributes to the high proportion of black exonerees in murder cases, but to a lesser extent. It probably also contributes to false convictions for other violent crimes that we have not examined in detail.
- *Race-of-victim disparities.* Murder exonerations include about twice as many cases with African American defendants and white victims as all murders in America. Some of that difference may be due to cross-racial eyewitness misidentifications, as we have noted, but not all. Investigations of murders in which African Americans killed white victims are less accurate than other murder investigations even when eyewitness identification is not a factor.
- *African Americans are more often stopped, questioned and searched than whites.* This appears to be the major cause for the heavy over-representation of African Americans among innocent defendants exonerated for drug crimes. There might be legitimate justifications for some of these practices, but there is strong evidence that they also reflect racial profiling and other forms of discrimination against African Americans in drug-law enforcement.
- *Black suspects and defendants are more likely to be the targets of police and prosecutorial misconduct.* Racial profiling, which we just mentioned, is a type of misconduct that is inherently racially discriminatory. Other forms of official misconduct show racially disparate patterns as well:
 - *Murder exonerations.* Official misconduct occurred in fewer than two-thirds of murder exonerations with white defendants but more than three-quarters of those with black defendants—and that difference is greater among exonerations of

defendants who were sentenced to death. Most of the racial disparity is caused by a higher rates of misconduct by police officers rather than prosecutors.

- *Group exonerations.* More than 1,800 exonerations since 1989 are for convictions of groups of innocent defendants who were systematically framed by police for fictitious crimes. The great majority were black defendants who were convicted of drug crimes that never occurred. This may be the most shocking example of the many ways in which the War on Drugs bears most heavily on minorities, especially African Americans.
- *African-American exonerees spent more time in prison before they were released than did white exonerees.* African American murder exonerees were imprisoned for three years longer than white exonerees; those exonerated for sexual assault spent almost four-and-a-half more years in prison than white sexual assault exonerees. For both crimes, a large portion of the difference reflects a heavy concentration of African Americans among those exonerees who served 25 years in prison or longer. Some of these differences reflect longer average sentences imposed on the innocent black defendants, but the data also suggest that there is more resistance to releasing innocent defendants if they are black.
- *Many innocent black defendants encounter bias and discrimination throughout their ordeals.* Several of the factors we have identified embody racial discrimination—racial profiling in drug-law enforcement, for example, and especially the systematic framing of innocent black drug defendants in group exonerations. Other types of discrimination are more subtle and harder to spot but may be equally pernicious. Unconscious bias, for example, may explain why some black exonerees were convicted despite overwhelming alibi evidence from black witnesses who testified at trial. In some cases, there is no need to speculate: the racism of those who investigated, prosecuted and punished the innocent black defendants is explicit and unmistakable.

APPENDIX – Group Exonerations

1. **Washington, D.C. 1990.** In 1990, U.S. Attorney Jay Stephens obtained dismissals of 32 drug convictions following an investigation of narcotics cases handled by D.C. Metropolitan police officer Lugenia Dorothy King. King's cases came under scrutiny after she tested positive for cocaine use in 1989.⁵⁹
2. **Oaklyn, New Jersey, 1995.** In August, 1991, Oaklyn police officer Robert Kane pled guilty and was sentenced to prison for falsifying the results of breathalyzer tests on drivers he stopped for drunk driving, and stealing money from their purses and wallets when he booked them. In 1995, a total of 155 convictions for driving under the influence were dismissed.⁶⁰
3. **Philadelphia, Pennsylvania, 1995-1998.** On February 28, 1995, five narcotics officers of the 39th District of the Philadelphia Police Department were indicted by a federal grand jury for a variety of felonies stemming from a long-standing pattern of theft, perjury, deception and violence. Among other crimes, they planted drugs and manufactured evidence in numerous cases. Over the next several years, felony convictions were dismissed against 138 defendants from the 39th District. The investigation of the 39th spread to other districts and ultimately resulted in the dismissal of nearly 100 additional convictions.⁶¹
4. **Los Angeles, California, 1999-2000.** In 1999, authorities learned that for several years or longer, a group of officers in the Rampart division of the Los Angeles Police Department had routinely lied in arrest reports and testimony, and framed many innocent defendants by planting drugs or guns on them. On several occasions, they had shot and wounded unarmed suspects, and then planted guns on them. In the aftermath of this scandal, "approximately 156" criminal defendants had their convictions vacated and dismissed by Los Angeles County judges in late 1999 and 2000. The great majority were young Hispanic men who were believed to be gang members. Almost all pled guilty to false felony drug or gun charges.⁶²

⁵⁹ Gellman, Barton. "'Interests Of Justice' Often Slow; Few Freed Despite Tainted Drug Cases." *Washington Post*. (February 3, 1990); see also Interview with Jay Stephens, Former U.S. Attorney (March 2012).

⁶⁰ Jennings, John Way and Larry Lewis. "Judge Overturns Convictions Of 155." *Philadelphia Inquirer*. (July 20, 1995).

⁶¹ Bowden, Mark and Mark Fazlollah. "Lying Officer Never Counted On FBI; Officer John Baird Had Beaten 22 Complaints. Then Came Case 23." *The Philadelphia Inquirer*. (September 12, 1995); Terry, Don. "Philadelphia Shaken by Criminal Police Officers." *The New York Times*. (August 28, 1995); Kramer, Michael. "How Cops Go Bad." *Time*. (December 15, 1997); Slobodzian, Joseph A. "Jailed Officer Set To Go Home." *Philadelphia Inquirer*. (Nov. 21, 2000); see also Interview with Bradley S. Bridge, Attorney, Philadelphia Defender Association (March 2012).

⁶² Covey, Russell. [Police Misconduct as a Cause of Wrongful Convictions](#). 90 Wash. U. L. Rev. 1133 (2013).

5. ***Los Angeles, California, 2001-2002.*** As the Los Angeles Police Department’s Ramparts District scandal was unraveling in the late 1990’s, two officers assigned to the Department’s Central District, Christopher Coppock and David Cochrane, were found to have arrested numerous homeless people and planted drugs on them. The officers were charged with assaulting a homeless man in 1997 and later pleaded no-contest and were sentenced to a year in prison. Ultimately, at least 10 defendants had their drug convictions set aside and the cases dismissed in 2001 and 2002.⁶³
6. ***Dallas, Texas, 2002.*** The Dallas “Sheetrock Scandal” came to light in January of 2002. At least 80 defendants in Dallas, Texas, were falsely charged with possession of quantities of “cocaine” that turned out, when finally analyzed, to consist of powdered gypsum, the primary constituent of the building product Sheetrock. Most of the Sheetrock cases were dismissed before trial, but some innocent defendants had pled guilty and were in prison or had been deported to Mexico.⁶⁴
7. ***Oakland, California, 2003.*** In November 2000, four Oakland police officers known as “The Riders” were charged with assault, making false arrests, filing false reports and other crimes. One officer remains a fugitive. The other three were tried twice, but the charges were dismissed after the juries deadlocked in both trials. Oakland settled lawsuits for more than \$11 million brought on behalf of more than 120 people who alleged they were victimized by the officers. By 2003, a total of 76 convictions had been set aside and another 25 probation or parole revocations also were dismissed.⁶⁵
8. ***Tulia, Texas, 2003.*** *Tulia, Texas, 2003.* In 1999 and 2000, 39 defendants, almost all of them black, were convicted of selling cocaine in Tulia, Texas, on the uncorroborated word of a corrupt undercover narcotics agent named Tom Coleman. In 2003, 35 of them—all who were technically eligible—were pardoned by the governor after a judge investigated the cases and concluded that Coleman had engaged in “blatant perjury” and was “the most devious...law enforcement witness this court has witnessed....” The investigation revealed that Coleman had charged the defendants with selling quantities of highly diluted cocaine that he actually took from a personal drug stash. Two additional defendants were exonerated when their convictions

⁶³ Glover, Scott and Henry Weinstein. “Lawsuit accuses 2 LAPD Officers of Wrongful Arrest.” *Los Angeles Times*. (December 16, 1999); Glover, Scott and Matt Lait. “2 Former LAPD Officers Indicted in Assault Case.” *Los Angeles Times*. (October 20, 2000); Berry, Steve. “Ex-Officers Face Jail in Assault.” *Los Angeles Times*. (August 2, 2002).

⁶⁴ Donald, Mark. [Dirty or Duped? Who's to Blame for the Fake-Drug Scandal Rocking Dallas Police? Virtually Everyone.](#) *Dallas Observer*. (May 2, 2002); Duggan, Paul. “‘Sheetrock Scandal’ Hits Dallas Police.” *Washington Post*. (January 18, 2002).

⁶⁵ Ashley, Guy. “Riders’ Suits Settled; \$11 million.” *Contra Costa Times*. (February 21, 2003); see also interview with James Chanin, Plaintiffs’ attorney in lawsuit, Berkeley, CA (March 2012).

were vacated and dismissed by courts. In 2005, Coleman was convicted of perjury.⁶⁶

9. **Louisville, Kentucky, 2004.** In 2003, two detectives assigned to a narcotics unit staffed by Louisville and Jefferson County law enforcement were convicted of obtaining warrants with false affidavits and pocketing money meant for informants. By 2004, Jefferson County prosecutors had dismissed about 50 convictions.⁶⁷
10. **Tulsa, Oklahoma, 2009-2012.** In 2010, six Tulsa police officers and one federal agent were indicted after a federal investigation of law enforcement corruption in Tulsa on charges that included planting drugs and faking drug buys. By 2012, at least 28 convicted defendants were released from prison after drug and related charges were dismissed.⁶⁸
11. **Benton Harbor, Michigan, 2010-2012.** In 2009 and 2010, two Benton Harbor police officers were indicted on federal corruption charges related to dozens of drug arrests from 2006 to 2008. Among other crimes, they were charged with embezzling money from the police department, stealing from suspects, fabricating drug buys, and planting drugs on suspects or in their homes. They were eventually sentenced to 37 months and 30 months in prison. By 2012, at least 69 defendants who were convicted of drug crimes based on testimony by those officers had their convictions vacated and charges dismissed.⁶⁹
12. **Camden, New Jersey, 2010-2012.** In the summer of 2008, the new Camden police chief initiated an investigation into corruption in his own department, which he later turned over to the FBI. By 2012, three former Camden police officers had pleaded guilty to federal conspiracy charges, another officer was convicted at trial and a fifth officer was acquitted. As a result, 193 drug convictions were dismissed.⁷⁰
13. **Mansfield, Ohio, 2012.** In May 2007, Jerrel Bray, a long-time drug dealer and police informant

⁶⁶ Covey, Russell. [Police Misconduct as a Cause of Wrongful Convictions](#). *90 Wash. U. L. Rev.* 1133 (2013); Barnes, Steve. [Rogue Narcotics Agent in Texas Is Found Guilty of Perjury](#). *New York Times*. (January 15, 2005). Blakeslee, Nate. “Tulia: Race, Cocaine, and Corruption in a Small Texas Town.” (2005).

⁶⁷ Hall, Gregory A. “Police-Corruption Trial Opens Tomorrow.” *Courier-Journal*. (January 13, 2003); see also Interview with Harry Rothgerber, First Assistant, Commonwealth’s Attorney’s Office, Jefferson County, Kentucky (March 2012); Flack, Eric. “Convicted Cop Says He ‘Just Got Lost.’” *Wave 3 News*. (February 12, 2004).

⁶⁸ Harper, David. [Case linked to Tulsa police probe dismissed, inmate freed](#). *Tulsa World* (February 2, 2012); see also Interview and E-mail with James D. Dunn, Assistant District Attorney, Tulsa County District Attorney’s Office (March 2012).

⁶⁹ Melzer, Eartha Jane. “Drug Cases Dismissed Following Pleas by Corrupt Narcotics Cops.” *Michigan Messenger*. (September 28, 2009); Swidwa, Julie. “Hall sentenced to 30 months: Prosecutor, police chief say Bernard Hall and Andrew Collins’ actions will have lingering effects.” *The Herald-Palladium*. (March 5, 2010); See also interview with Arthur Cotter, Berrien County District Attorney (March 2012).

⁷⁰ Anastasia, George. “Former Camden Officer’s Appeals Rejected in Corruption Case.” *Philadelphia Inquirer*. (March 8, 2012); E-mail from Jason Laughlin, Spokesman for Camden County Prosecutor’s Office (March 2012).

from Mansfield, Ohio, was in jail in nearby Cleveland for shooting a man in a drug deal. A public defender came to talk to him about a different drug case in which Bray had provided evidence against the lawyer's client. Bray—who was worried that his work as a snitch might get him killed in jail—began to talk about how he and his police handlers had faked evidence in dozens of drug cases, among other crimes. Ultimately, a Richland County sheriff's detective pled guilty to perjury during a drug trial, and a federal Drug Enforcement Administration agent was indicted and acquitted of charges of perjury and false arrests. By 2012, 20 convicted drug defendants had been exonerated and released.⁷¹

14. **Philadelphia, Pennsylvania, 2013-2016.** In May 2013, Philadelphia police narcotics officer Jeffrey Walker was arrested in an FBI sting for trying to shake down a drug dealer for drugs and cash. Walker cooperated in a federal investigation that led to the indictment in 2014 of six other narcotics unit members for framing defendants on drug charges dating back to 2006—although authorities believe the illegal conduct dated as far back as 2000. Through 2016, a total of 812 convictions attributed to the seven officers had been vacated and dismissed. The total is expected to surpass 1,000 when the investigation is complete.⁷²
15. **East Cleveland, Ohio, 2016-2017.** In 2016, the conviction integrity unit of the Cuyahoga County Prosecutor's office said it had begun vacating convictions and dismissing the cases of more than 40 defendants who were framed by three East Cleveland police officers. The officers pled guilty to federal crimes and were imprisoned for planting drugs, stealing cash and filing false search warrants. Sgt. Torris Moore and fellow officers Eric Jones and Antonio Malone admitted framing suspected drug dealers—all of whom were black—after they were charged in October 2015 following a two-year FBI investigation. As of November 2016, the conviction integrity unit had identified 43 defendants whose convictions would be vacated and dismissed.⁷³

⁷¹ Caudill, Mark. "Deputy Gets Probation, Weekend Jail." *Mansfield News Journal*. (February 17, 2010); see also E-mail from Jon Loevy, attorney for exonerated defendants in federal civil rights lawsuit (March 2012).

⁷² Slobodzian, Joseph A. "Philadelphia Judge tosses 7 drug convictions tainted by police corruption probe." *Philly.com*. (November 16, 2016); email, Bradley S. Bridge, Attorney, Philadelphia Defender Association, (November 2016).

⁷³ Interview with Jose Ortiz, Assistant Prosecuting Attorney, head of conviction integrity unit, Cuyahoga County Office of the Prosecutor, (November 28, 2016).

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Jessica Gabel Cino ^{a1}

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BAD SCIENCE BEGETS BAD CONVICTIONS: THE NEED FOR POSTCONVICTION RELIEF IN THE WAKE OF DISCREDITED FORENSICS

I. INTRODUCTION

The headlines trumpet delayed justice: “Innocent Man Freed after 35 Years has an Incredible Outlook on Life,”¹ “North Carolina Frees Innocent Man Who Spent Half His Life in Jail,”² and “DNA Helps Free Inmate after 27 Years.”³ In the limelight is modern science’s ability to rectify decades-old wrongs. There is no question that scientific developments, particularly in the area of DNA, have advanced how criminal cases are investigated, prosecuted, and presented in court. Overlooked in the wake of such acclaim, however, is the fact that forensic science is far from infallible.

While progress in DNA testing has provided a more exacting tool with which to explore guilt and innocence, scientific developments that call previously accepted forensic techniques into question often escape attention. Headlines such as “FBI Admits Flaws in Hair Analysis over Decades,”⁴ “How the Flawed ‘Science’ of Bite Mark Analysis has Sent Innocent People to Prison,”⁵ and “Fuzzy Math: Advances in DNA Mixture Interpretation Uncover Errors in Old Cases”⁶ *2 underscore problems with forensic science that have largely escaped accountability and remain unchecked.

Undoubtedly, forensic science is a vital component of the criminal justice system. Thousands of guilty defendants have been convicted with the help of forensic techniques. At the same time, the Innocence Project estimates that forensic evidence with little to no probative value caused or contributed to a wrongful conviction in nearly half of the DNA exoneration cases the Project has evaluated.⁷ Many forensic techniques, such as hair and fiber analysis, toolmark comparisons, and fingerprint analysis, rely upon little more than a matching of patterns where a forensic analyst compares a known sample to a questioned sample and makes the highly subjective determination that the two samples originated from the same source. Although lacking a true scientific foundation, what passes as “science” plays a prominent role in many cases because of the availability of trace evidence, which is easy to leave and easy to find at a crime scene. Other forensic fields, including forensic pathology, arson investigation, and firearms identifications, rely on assumptions that are “under-researched and oversold.”⁸

In theory, scientific expert testimony must meet certain standards of reliability before being admitted in court. In federal court and some state courts, the *Daubert* standard governs the admissibility of such testimony.⁹ Under *Daubert*, a judge acts as a “gatekeeper” and may admit scientific evidence as long as it is both “relevant” and “reliable.”¹⁰ Other

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state courts have continued to follow the earlier *Frye* standard, under which scientific evidence “must be sufficiently established to have gained general acceptance in the particular field in which it belongs” to be admissible.¹¹ Despite these roadblocks to admissibility, courts have routinely accepted much of the so-called science underlying forensic testing with little, if any, inquiry.¹²

Forensic science's armor has some cracks in it, however. In 2005, the Federal Bureau of Investigation (“FBI”) discontinued its Comparative Bullet Lead Analysis (“CBLA”) program, finding that “neither scientists nor bullet manufacturers are able to definitively attest to the significance of an association made between bullets in the course of a bullet lead examination.”¹³ The FBI Laboratory performed CBLA examinations for decades, and the resulting evidence was used to *3 convict many defendants.¹⁴ In 2015, the U.S. Department of Justice (“DOJ”) and FBI formally admitted that almost every examiner in the FBI's microscopic hair unit gave misleading, exaggerated, or otherwise flawed testimony in criminal cases between 1972 and 1999.¹⁵ A cloud of doubt now hangs over cases involving hair evidence, but they are not alone. A committee at the National Academy of Science (“NAS”) concluded in 2009 that “no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”¹⁶ Simply put, the criminal justice system is “sending people to jail based on bogus science.”¹⁷

The President's Council of Advisors on Science and Technology (“PCAST”), released a report on forensic science in September 2016.¹⁸ While the Council acknowledged the ongoing efforts to improve forensic sciences after the 2009 NAS Report, its report also emphasized the significant problems in multiple disciplines of forensic sciences.¹⁹ The PCAST Report focused on “pattern identification evidence” - the evidence that requires interpretation by an examiner.²⁰ The main question asked by PCAST is whether these types of evidence are supported by reproducible research.²¹

PCAST suggested that there are two types of validity a discipline of forensic science must pass.²² The first is foundational validity, which means that the discipline is based on research and studies that are accurate and reproducible.²³ The *4 second type of validity is applied validity, which means that the method is reliably applied in practice.²⁴ Among the disciplines of forensic science PCAST examined, including DNA analysis, bite marks, latent fingerprints, firearms identification, and footwear analysis, the only valid discipline (using both foundational and applied validity) was single-sourced DNA analysis.²⁵

What can the criminal justice system do about bad science? This article provides an answer to that question in three parts. First, this article looks at the inability of certain fields of forensic science to produce reliable results. Second, it discusses problems with the current methods of challenging convictions based on unreliable science. Finally, it proposes a new framework to better enable prisoners to seek review of such convictions. What this article does not do is propose ways to prevent wrongful convictions in the future. Many issues, including the need for more research, accurate testing, judicial acceptance, and shifts in forensic laboratory culture will need to be addressed in order to protect innocent individuals from being convicted in the first instance. This article proposes a way to confront faulty forensics retrospectively, by providing an avenue of relief for the numerous current prisoners who were convicted based on misleading scientific evidence.

II. FAULTY FORENSICS: SHROUDING GUESSWORK IN THE CLOAK OF SCIENCE

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The cases are many, but the differences are few. Whether it was a bullet from a smoking gun or a fingerprint left on a glass, the evidence (and the alleged science behind it) produced wrongful convictions. Critics have attempted to shed light on the weaknesses in forensic science, but a policy of willful blindness prevails. The examples below are only a fraction of the larger problem, but should serve as a reminder that innocence cannot be ignored.

A. THE ERROR IN HAIR: MICROSCOPIC HAIR EXAMINATION

Hair analysis, also referred to as microscopic hair examination or hair microscopy, was used in criminal investigations from the 1970s through 2000, when DNA testing supplanted it. Even in 2000, the FBI stated that hair recovered from a crime scene was beneficial because it transferred during physical contact among and between the suspect, the victim, and the crime scene. The logic followed that *5 hair evidence could be used to associate a suspect with a crime scene or a victim.²⁶ Hairs recovered from a scene and hairs from a sample were analyzed and compared against each other to determine whether a transfer occurred.²⁷ Generally, this evaluation was done by an examiner who placed both the sample and the evidence under a comparison microscope for simultaneous viewing.²⁸ That enabled the examiner to determine whether the hairs came from the same source.²⁹

Although hair microscopy evidence received some criticism, it remained relatively unscathed for decades.³⁰ It appears, however, that the past-tense is finally an appropriate fit for hair comparison. In April of 2015, the FBI admitted major flaws in the analysis procedure.³¹ The DOJ and FBI “formally acknowledged” that almost all examiners in a forensic unit gave flawed testimony in trials for over two decades.³² The unsound testimony favored prosecutors in more than 95 percent of the initial 268 trials that had been reviewed by April of 2015.³³ Most often, this flawed testimony was in relation to the level of certainty the experts claimed.³⁴ “The review confirmed that FBI experts systematically testified to the near-certainty of ‘matches’ of crime-scene hairs to defendants, backing their claims by citing incomplete or misleading statistics drawn from their case work.”³⁵

This review began in July 2012, when the DOJ and the FBI began an evaluation of more than 10,000 cases in which hair analysis was used at trial.³⁶ Before that, although hair analysis was considered to be “highly unreliable” by the 2009 NAS Report on Forensic Science,³⁷ it still remained a feature in some cases. Of the 268 trials reviewed by April 2015, at least thirty-five cases involved defendants who received death sentences.³⁸

*6 Since these results became public, many other cases have come under review.³⁹ For example, in 1991 a man in Virginia was convicted of rape based on a single hair found on the victim.⁴⁰ After testing the hair, the Innocence Project concluded it could not belong to Darnell Phillips, who was sentenced to 100 years in prison.⁴¹ He has been granted the right to test the new evidence.⁴² Additionally, the DOJ proposed in March of 2016 to expand its review from hair analysis to include fingerprint examinations and bullet-tracing.⁴³

B. TAKING THE BITE OUT OF BAD SCIENCE: BITE MARK ANALYSIS

Bite mark evidence gained national attention in the Ted Bundy trial in 1979.⁴⁴ Since then, American courts have time and again improperly legitimized this allegedly “scientific” evidence.⁴⁵ The common--yet untested--assumption is that each person produces a unique bite mark, unlike any other in the world.⁴⁶ Unlike DNA analysis, however, there is

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no scientific basis for the testimonial that an expert can identify a single individual based on bite mark analysis.⁴⁷ As a result the NAS Report recommended that the only probative value of such analysis in criminal prosecutions be in *excluding* an individual from suspicion rather than identifying a suspect.⁴⁸

In 2014, the American Academy of Forensic Sciences further evaluated forensic odontologists and determined that they lacked the ability to simply conclude which marks were actually bite marks.⁴⁹ What may initially appear to be bite marks can actually be just another injury; a cut or scrape that looks strikingly similar to a tooth pattern.⁵⁰ Moreover, bite marks, unlike a dental mold taken of a suspect's *7 teeth, are left in malleable material: human skin, making it difficult to truly define the boundaries of an impression.⁵¹

As part of a larger examination of forensic science for which the validity has been called into question, in 2014 the Texas Forensic Science Commission began a sweeping review of cases where bite mark analysis played a role in the conviction.⁵² The Commission is now considering the validity of the entire field of bite marks.⁵³ Furthermore, the White House Science Advisor has also thrown doubt on the reliability of bite mark analysis.⁵⁴

The assumed reliability of "forensic odontology" is particularly dangerous due to the esoteric nature of the discipline and the simple fact that most jurors and attorneys are unfamiliar with either its terminology or methodology, and are more likely to uncritically accept the conclusions of a bite mark expert.⁵⁵ The cases of faulty bite mark evidence are numerous and appalling.⁵⁶ In March 2016, Keith Allen Harward was released from prison based on DNA evidence due to a rape conviction based entirely on the testimony of two forensic odontologists, who told the jury that the bite-mark found on the surviving woman's legs conclusively came from Harward.⁵⁷ Harward spent 33 years in prison.⁵⁸

Similarly, Bennie Starks was convicted of a brutal rape in 1986 and sentenced to sixty years in prison as a result of faulty forensic testimony.⁵⁹ The prosecution's forensic serologist testified that, based on her analysis of a semen sample taken from the victim's underpants and a sample obtained from Starks, she could not exclude Starks as the source.⁶⁰ The prosecution also hired two dentists who self-identified as "experts" in forensic odontology to testify that bite marks on the *8 victim's shoulder had been made by Starks.⁶¹ The dentists testified that after comparing the evidence, photos, X-rays, and a model of Starks's teeth, the bite marks shared sixty-two characteristics with Starks's teeth.⁶² Hearing the forensic "experts" testimony tying the defendant to the crime, the jury convicted Starks of two counts of aggravated criminal sexual assault, attempted aggravated sexual assault, and aggravated battery.⁶³

In 2006, after spending nearly twenty years behind bars, a DNA test categorically excluded Starks as the source of the semen.⁶⁴ Additionally, two other odontologists' independent examinations of the bite mark evidence completely discredited the conclusions and testimonies presented at trial.⁶⁵ Their reports pointed out that the examination method used by the State's odontologists had since been rejected by its own creators and concluded that the dentists "misapplied the methodology and used flawed preservation and photography techniques."⁶⁶

The appeals court ordered Starks released on bond pending a new trial.⁶⁷ His convictions were vacated and the last charges dismissed in January 2013, which led to his full exoneration.⁶⁸ During the twenty years Starks spent behind bars, advancements in technology progressed exponentially (see the DNA that helped set him free), and it left bite marks behind. Even though bite mark evidence continues to suffer from fatal flaws and a low threshold of reliability, somehow it still perseveres.

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Bite mark evidence's absurd perseverance is equally obvious in the case of William Richards.⁶⁹ In 1997, a California jury convicted Richards in the murder of his wife, Pamela.⁷⁰ Bite mark evidence provided the proverbial smoking gun.⁷¹ The analyst testified that he compared an autopsy photo of Pamela's body to the unusual gap in William's dentition and found a match.⁷² More than a decade later, the analyst recanted his testimony and called the once-matching gap a defect in the photo.⁷³ To add insult to injury, the analyst further stated that he no longer even believed the bite was made by a human.⁷⁴ Finally, four other forensic odontologists *9 said that the photo did not offer enough detail to provide a match to William Richards.⁷⁵

Roundly criticized as the "worst opinion of [2012],"⁷⁶ the California Supreme Court upheld Richards's conviction.⁷⁷ The court concluded that Richards would have to prove that the evidence used against him went beyond the bounds of exaggeration: he would have to prove that it was false.⁷⁸ Thus, even though the bite mark analyst retracted his prior testimony, Richards cannot fight the conviction because *at the time of trial*, the analyst thought he was giving accurate testimony.⁷⁹ In light of the decision, the California legislature has begun a series of amendments to its false evidence statute, discussed *infra*,⁸⁰ and Richards has, yet again, found himself in front of the California Supreme Court.⁸¹

C. LATENT RELIABILITY: FINGERPRINT EXAMINATION

Fingerprint identification involves a comparison of questioned friction skin ridge impressions from fingers (or palms) left at a crime scene to known fingerprints. Once an examiner determines that there are enough areas of agreement between the two prints, the conclusion is that the questioned print is attributed to the suspect.⁸² Over the years, the terminology associated with this connection ranges from "match" to "identification" to "individualization." These absolute terms rest on a premise ingrained in our minds since childhood and prevalent for more than a century: no two fingerprints are alike. In fact, there are three basic assumptions on which fingerprint identification depends:

1. [N]o two fingers have ever been found to possess identical ridge characteristics.
2. A fingerprint will remain unchanged during a person's lifetime.
3. Fingerprints will have general ridge characteristics that permit them to be systematically classified and examined with great efficiency and efficacy.⁸³

*10 Since fingerprint evidence has been venerated for so long, its admissibility rarely receives challenges. There is no actual evidence, however, that an individual's fingerprints are unique to all others in the world.⁸⁴ Instead, like hair analysis, fingerprint analysis is another exercise in an examiner's subjective attempt at visual comparisons. Fingerprint evidence cannot fall short of admissibility, and for obvious reasons: it would upend more than a century of convictions.⁸⁵

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Indeed, American courts have (and will continue) to accept forensic fingerprint identification without subjecting it to the kind of scrutiny that would be required of novel scientific or technical evidence today. Courts accepted the untested arguments that fingerprint identification was: (1) generally accepted, (2) science, and (3) reliable. Courts also accepted the claim that there were no two fingerprints in the world exactly alike. None of these claims were subjected to adequate scrutiny from either a scientific or a legal standpoint.⁸⁶ This logic requires a leap of faith rather than a fact of science: that if no two fingerprints are exactly alike in all the world, then the method of forensic fingerprint identification must be correspondingly reliable. Judicial acceptance (and in some cases judicial notice) became an important source in legitimating forensic fingerprint evidence. That is, people outside the legal system believed that fingerprinting was scientific and reliable because courts said it was so.

Consequently, the interpretation of forensic fingerprint evidence must rely upon the expertise of latent print examiners rather than on science. The NAS Report underscored the shortcomings and called for research to measure the accuracy and reliability of latent print examiners' decisions. Seven years later, however, research is still wanting. Even later reports and investigations cannot seem to give courts pause on the admissibility of fingerprint evidence. A 2012 report by a Committee of 34 scholars and forensic scientists, including at least 12 working latent print examiners, jointly convened by the National Institute of Standards and Technology ("NIST") and the National Institute of Justice ("NIJ") recommended that the report of the examination should ensure that the findings and their limitations are intelligible to non-experts.⁸⁷

Another report by the U.S. Justice Department Office of the Inspector General⁸⁸ noted that the FBI Laboratory Standard Operating Procedures "now require *11 that examiners create sufficient documentation, including annotated photographs and case notes, to allow another examiner to evaluate the examination and replicate any conclusions, and they include specific documentation requirements for each phase of the ACE-V process."⁸⁹ Rarely does this occur, and there's little incentive to effectuate a change. Such requirements have failed to sway the perception that latent print evidence is sufficiently reliable such that it deserves an automatic "pass" into admissibility.

In a recent (and fairly notable) decision, the Seventh Circuit, in *Herrera v. United States*,⁹⁰ effectively approved of the free pass. Judge Posner, writing for the court, concluded that a proponent of fingerprint evidence need not demonstrate reliability because it possessed some preternatural form of inherent reliability. The court's substitution of its own unsupported indicia of reliability effectively created a series of logical leaps that exceed the bounds of current fingerprint research. *Herrera* found fingerprint identification evidence to be reliable for five reasons: (1) the prosecution's fingerprint experts were certified by the International Association for Identification ("IAI"); (2) none of the first 194 prisoners exonerated by the postconviction DNA testing in the United States was convicted by faulty fingerprint evidence;⁹¹ (3) Francis Galton estimated the "probability of two people in the world having identical fingerprints" to be 1 in 64 billion;⁹² (4) "errors in [fingerprint] matching appear to be very rare;" and (5) examiner training encompassed "instruction on how to determine whether a latent print contains enough detail to enable a reliable matching to another print."⁹³

Unfortunately, some of these points are factually inaccurate. Moreover, not one point supports a conclusion that fingerprint identification evidence could be admitted through expert testimony without a *Daubert* analysis. It is worth, however, scrutinizing the Seventh Circuit's analysis and reliability conclusion because it represents one of the more recent (albeit bewildering) assessments of fingerprint analysis.

*12 The fact that an occupation runs a certification program does not constitute evidence about how accurately (or "reliably") members of that occupation perform various tasks. To have such evidence effectively creates a *per se* rule

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that certification breeds reliability.⁹⁴ Beyond that, it seems misplaced to pin an argument on the fact that the “first 194 prisoners in the United States exonerated by DNA evidence” lacked a conviction based on erroneous fingerprint matches. This is, in part, because Stephan Cowans, the 141st person exonerated by postconviction DNA testing in the United States, was convicted in large measure on the basis of erroneous fingerprint evidence.⁹⁵ In addition, data demonstrates that at least five cases involving fingerprint analysis errors are among the 337 postconviction DNA exonerations to date.⁹⁶ Finally, postconviction DNA exonerations neither provide a representative sample nor statistically valid information about the prevalence of fingerprint analysis errors.

The Seventh Circuit's assertion that the “great statistician Francis Galton” estimated a probability of “1 in 64 billion” for two people bearing identical fingerprints is also incorrect.⁹⁷ Galton's estimate stemmed from a calculation of one specific “fingerprint” to *another* specific fingerprint (i.e., a 1:1 comparison).⁹⁸ Galton's true estimate for the probability that a given fingerprint would be identical to *any* other fingerprint in the world population (estimated in 1892 at 1.6 billion) was a far more humble 1 in 4.⁹⁹ At the end of the day, the pertinent probability related to the court's question should have been the probability of finding the common features between a suspect's known prints and the latent prints offered into evidence against him *if* someone other than the suspect was the source of those latent prints. It is well understood in the literature, and it was stated in the NAS Report, *13 that neither Galton's estimate nor any estimate of the probability of exact duplication addresses this question.¹⁰⁰

The Seventh Circuit's fourth reason for reliability--that “errors in [fingerprint] matching appear to be very rare”--is a nebulous one. It lacks any empirical data to support the “appearance” of error rarity. The NAS Report found a dearth of information on the error rate of fingerprint identification in 2009, and not much has changed since then.¹⁰¹ Finally, the Seventh Circuit focused on the presence of training as part of its indicia of reliability. Simply because some examiners are trained does not propel fingerprint analysis to reliability. If reliability can be understood to be a three-legged stool, then one of those legs encompasses the reliability of the specific examiner (the other two being the reliability of the method and the reliability of the application of that method). That type of information would be one of the subjects of a *Daubert* inquiry--not a reason to discount it altogether. Yet, time and again courts have done just that.

As a post-script, there is hope for fingerprint analysis. In 2015, the National Institute for Standards and Technology awarded \$20 million to several universities to begin the process of developing comparable standards, research, and statistics in pattern evidence analysis, including fingerprints.¹⁰²

D. COMMUTED CALCULATIONS: DNA MIXTURES

For decades, fingerprints were the gold standard in criminal evidence. By the late 1980s, however, DNA was poised to inherit that label. DNA brought a new level of science to forensics--one built upon foundations of biochemistry, molecular biology, and genetics. But even DNA evidence can produce errors, and the potential for miscalculations is particularly ripe in DNA mixture cases. DNA mixtures occur when two or more donors have contributed to a forensic sample.¹⁰³ Because of the prevalence of this type of sample, many samples collected and processed in forensic laboratories are DNA mixtures.¹⁰⁴ Standard mixture analysis involves taking a separate sample of DNA from a suspect and comparing it to the mixture being tested.¹⁰⁵ This means it is “inherently subjective - the analyst sees the subject's genotype during the analysis.”¹⁰⁶

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***14** This method of comparison and analysis has been criticized because it relies heavily on interpretation. For example, an individual reference sample may have two allele peaks in common with the mixture sample.¹⁰⁷ While this may seem like conclusive evidence, one out of every fifteen people could match those two peaks out of the sample.¹⁰⁸ For unmixed samples, “analysts look at two sets of peaks at a given locus: one for the victim and one for the perpetrator.”¹⁰⁹ But mixtures are a different story: analysts look at multiple peaks at the same loci “with no indication of which pairs go together, or which source they came from.”¹¹⁰ Sorting out which peaks belong to which individual is “highly subjective,” but this DNA evidence, combined with a statement from another involved perpetrator (given in exchange for a lenient sentence), was enough to send a Georgia man to prison.¹¹¹

In the summer of 2015, the FBI discovered that numerous labs had been using incorrect protocol when calculating the probability of a match from a DNA mixture.¹¹² Originally, the FBI believed this error would not affect too many cases.¹¹³ But when labs began reanalyzing results, it became clear that the change in protocol significantly changed the probabilities in some (but not all) cases.¹¹⁴ For example, a Texas lawyer describes a case in which the original probability of the DNA sample matching his client was more than one million to one.¹¹⁵ With the new protocols in place, the lawyer believes the probability was significantly lower - in the neighborhood of thirty or forty to one.¹¹⁶ Nonetheless, the Texas Forensic Science Commission data states that the greatest difference in probability was from 1 in 260,900,000 to 1 in 225,300,000.¹¹⁷ Regardless of the true probability changes, any change is concerning because it is not difficult to imagine a scenario where a conviction was based solely, or at least primarily, on a seemingly conclusive ***15** DNA match from a mixed sample.¹¹⁸ If there are doubts surrounding DNA mixture evidence (whether it is in the accuracy of the result or the accuracy of the statistics), it could affect many cases.

Because of these drastic differences, the Texas Forensic Science Commission began investigating the discrepancies.¹¹⁹ The Commission noted that the science behind DNA analysis is still sound, but “well-defined guidelines for interpretation are necessary when analyzing DNA samples containing multiple contributors, because of the complexity of the samples and the possibility of missing data (e.g., allele dropout and other stochastic effects).”¹²⁰ In August 2015, the Commission released a letter to the Texas Criminal Justice Committee explaining these issues and encouraging lawyers to determine whether their evidence was calculated using “current and proper mixture interpretation protocols.”¹²¹ A few months later, the Commission released a list of criteria for evaluating laboratories’ DNA mixture interpretation protocol.¹²²

Texas is not the only state to take notice of the limits of DNA mixture analysis. In 2015, a New York supreme court discussed and analyzed the viability of DNA mixture analysis in *People v. Collins*.¹²³ Specifically, the court looked at the “Forensic Statistical Tool” or FST, a computer program created by the New York City Office of Chief Medical Examiner to calculate the likelihood that a sample contains the DNA of a specific subject.¹²⁴ The court notes that “[t]he enormous value of such statistical results, compared to simple statements like ‘the individual cannot be excluded as a contributor’ is obvious--if the statistics are accurate.”¹²⁵ The operative phrase here is *if* the statistics are accurate. After examining the FST and hearing from experts in the field (on both sides of the issue), the court ruled that the FST did not pass the *Frye* test and was not admissible.¹²⁶ The court also noted that it did not exclude the evidence because it was proven to be false, but merely because it had yet to be accepted in the relevant scientific community.¹²⁷

***16** It is, however, important to note that DNA mixture interpretation has not been completely discredited. Even with the issues described above, many experts believe that the science behind DNA mixture analysis is still sound.¹²⁸ Keith

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Inman, a forensic science professor, says that laboratories are stuck in a hard place.¹²⁹ The newest analysis method for DNA mixtures, probabilistic genotyping, takes time to implement, which has left laboratories knowing that a better method exists but still being required to analyze samples using the old method.¹³⁰ Similarly, the New York court in the *Collins* case did not dismiss the DNA mixture analysis entirely - it merely determined that the method was not up to the standards required by the scientific community.¹³¹

Nonetheless, juries still tend to give a great deal of weight to any DNA evidence that points to a defendant.¹³² Until the technology and analysis methods have progressed to the point of eliminating the potential for the results to vary based on which laboratory completes the analysis, the criminal justice community needs to be wary of placing too much emphasis or reliance on DNA evidence.¹³³

E. RIDING SHOTGUN: FIREARMS EXAMINATIONS

Firearms analysis is another forensic science that has been subject to criticism, but has not been completely discredited. Firearm examination can be divided into two groups: internal and external ballistics. External ballistics refers to the bullet's flight before it strikes a target, and terminal or impact ballistics, referring to the bullet striking a target.¹³⁴ It also includes the study of the flight path of projectiles.¹³⁵ "Internal ballistics" pertains to what happens inside the gun from the time it is fired until the bullet leaves the muzzle.¹³⁶ This can also be referred to as firearm tool mark analysis.¹³⁷ Internal ballistics often revolves around examinations of rifling marks on a bullet and comparing those marks to those left by a gun in evidence.¹³⁸ This section focuses on internal ballistics.

*¹⁷ Firearms examination evidence has widely been accepted by courts, even when evidence was challenged under the *Daubert* standard.¹³⁹ Much like other pattern examinations, internal ballistics has come under criticism for its subjectivity.¹⁴⁰ As the 2008 NAS Ballistics Imaging Report noted, gun identification comes down to a subjective assessment on whether or not the reference sample matches the bullet from the gun in evidence.¹⁴¹ Firearms experts often testify that the bullet in evidence was fired by the specific gun in evidence, to the exclusion of any other gun.¹⁴² This statement has been walked back some (in response to criticism), but it effectively operates the same--that it is a "practical impossibility" that another gun could have made the same marks. The conclusion of the report was succinct: "The validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated."¹⁴³ That conclusion, however, was handicapped by a further statement that the "baseline level of credibility" has been met by the existing research and the acceptance in judicial proceedings for years.¹⁴⁴ Judicial acceptance should not be scientific evidence of credibility.

The 2009 NAS Report also addressed this issue, noting that there is not enough known about the differences between guns to establish how many points of similarity are required to attain a statistically significant quantification about the accuracy of the conclusion.¹⁴⁵ The report suggested that additional studies should be conducted in order to make the analysis more "precise and repeatable."¹⁴⁶

Adina Schwartz, professor at John Jay College of Criminal Justice, lists three central pitfalls related to toolmarks and firearms.¹⁴⁷ First, she discusses the possibility that individual characteristics are actually a combination of non-unique marks.¹⁴⁸ It is entirely possible that examiners confuse marks that are made by two separate tools with marks that are

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made by one unique tool.¹⁴⁹ Second, she notes that characteristics of marks can change over time.¹⁵⁰ In fact, “firearms and toolmark examiners do not expect the toolmarks on bullets fired from the same gun to ever be exactly alike.”¹⁵¹ This is because the gun will change as it is used, as well as from damage or corrosion.¹⁵² The final difficulty identified by Schwartz is *18 the danger of an examiner confusing an individual characteristic with what is known as a subclass mark.¹⁵³ A subclass mark is a microscopic mark that distinguishes one type of gun from another, not an individual gun of the type from another gun of the same type.¹⁵⁴ Subclass marks are common to all guns of a certain type.¹⁵⁵ This type of confusion could lead to either false positives or false negatives.¹⁵⁶

III. THE CURRENT MODEL: INCONSISTENT AND INEFFECTIVE APPROACHES TO BAD SCIENCE

The preceding section discussed how conjecture and exaggeration, masquerading as science, failed innocent people. The Innocence Project estimates that faulty forensic evidence played a role in at least 51 percent of the convictions overturned by DNA evidence.¹⁵⁷ It is impossible to know how many other innocent people have been convicted based on the same faulty forensic evidence where DNA is not available to exonerate them. Moreover, the preceding section only identified a handful of problematic forensic fields. There are other forensic specialties with similar weaknesses.

While DNA has become the new arbiter of guilt and innocence, it has also negatively affected prisoners who cannot take advantage of such compelling evidence. States have enacted statutes that provide for postconviction DNA testing in cases of alleged innocence. Lost in the shuffle, however, is DNA's other implication: that many fields of forensic science, despite widespread acceptance, frequently yield incorrect results. This section discusses the current framework for how a factually innocent person can challenge faulty forensics if DNA evidence is not available. As this section makes clear, the current postconviction framework (absent exculpatory DNA evidence) is ineffective to handle cases involving unreliable science.

A. AVAILABLE METHODS OF SEEKING DIRECT AND COLLATERAL REVIEW OF CONVICTIONS

1. DIRECT REVIEW

A motion for a new trial is the first form of direct review by which convicted individuals can seek to overturn their convictions on the basis of newly discovered evidence. All federal and state jurisdictions provide a mechanism by *19 which prisoners can move for a new trial. The rules of most jurisdictions explicitly recognize newly discovered evidence as a basis for such a motion.¹⁵⁸

In most jurisdictions, prisoners have only three years or less from a particular event--usually the verdict or finding of guilty, entry of judgment, or sentencing--to request a new trial based on new evidence¹⁵⁹ (though many jurisdictions extend or toll this time limit if newly discovered evidence is the primary basis for bringing the motion).¹⁶⁰ The time limits vary widely among jurisdictions, ranging from three years or more in federal court, the District of Columbia, and four states,¹⁶¹ to a month or less in fifteen states.¹⁶² In four other states, a prisoner may *20 potentially bring a new trial motion on the basis of newly discovered evidence at any time, subject to the court's discretion.¹⁶³ Only seven states allow a prisoner to seek a new trial at any time.¹⁶⁴

In addition to the often-limited amount of time available to seek a new trial based on newly discovered evidence, a prisoner may only make such a motion if several other requirements are met. For example, the evidence must not have

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been discoverable by “reasonable diligence” prior to the time of trial.¹⁶⁵ Also, the newly discovered evidence may only be sufficient to require a new trial if a prisoner can show that the evidence, if available at the time of trial, would have changed the verdict.¹⁶⁶ Many jurisdictions do not allow new trials based on new evidence where that evidence would be used only for impeachment or is cumulative of other evidence *21 introduced at trial.¹⁶⁷ As a result, the requirements a prisoner must meet to get a new trial all but ensure that an innocent person in many jurisdictions will not be able to do so under direct review procedures.

2. COLLATERAL REVIEW

A. STATE POSTCONVICTION PROCEDURES

Every state has at least one postconviction remedy by which a prisoner can challenge the validity of his or her conviction after direct approaches have failed. These postconviction remedies may or may not be available to a prisoner who claims that newly discovered evidence establishes his or her innocence. In some states, a free-standing, or “bare” claim of innocence, which is a claim of innocence that is not accompanied by a constitutional claim,¹⁶⁸ cannot be the basis for postconviction relief.¹⁶⁹ Even where such a claim is cognizable, the standards a prisoner must meet to establish entitlement to relief can be quite strict and nearly impossible to meet.¹⁷⁰

Each jurisdiction has particular procedural requirements that a prisoner must satisfy to bring a petition for postconviction relief. In several jurisdictions, there is no time limit on when a prisoner may apply for such relief.¹⁷¹ In most others, however, a court may waive the time limit only if the prisoner: (a) has a claim based on new evidence that, with “due diligence” could not have been discovered in time to be presented at trial;¹⁷² (b) has filed a claim within a certain time after discovery of the evidence;¹⁷³ (c) has a claim of actual innocence;¹⁷⁴ and/or (d) can *22 show that barring the petition on procedural grounds would be unjust.¹⁷⁵ Generally, second or successive petitions for postconviction relief are not allowed.¹⁷⁶ Nonetheless, a prisoner may be able to bring a successive petition if he or she could not have raised the claim in a previous petition.¹⁷⁷

The various hurdles placed in postconviction procedures work against the wrongly convicted. Their entitlement to counsel suffers from similar disabilities. In several states, the appointment of counsel is up to the discretion of the court or the state public defender.¹⁷⁸ Even where a prisoner has the right to counsel in a postconviction proceeding, the appointment of counsel usually does not occur until after the petition is filed. Without counsel, prisoners must either resort to proceeding *pro se*, or forego postconviction remedies altogether. The lack of counsel diminishes (and perhaps prohibits) an innocent person's ability to challenge his or her conviction.

B. FEDERAL POSTCONVICTION PROCEDURES

The disjointed patchwork of postconviction procedures is not unique to state law. The federal system also establishes similar indefinite and unreasonable requirements. State prisoners who have exhausted state postconviction remedies and whose claims are not procedurally barred may seek habeas relief from the federal courts under 28 U.S.C. § 2254.¹⁷⁹ As in many states, federal courts do not recognize a freestanding claim of actual innocence as a basis for relief. In *Herrera v. Collins*, the United States Supreme Court affirmed that without an accompanying claim of a constitutional violation, a bare claim of innocence based on newly discovered evidence does not warrant federal habeas relief for a state prisoner.¹⁸⁰

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The *Herrera* majority assumed for the sake of argument that a state prisoner sentenced to death may be entitled to federal habeas relief where the prisoner makes “a truly persuasive demonstration of actual innocence” and there is no way to pursue the claim under state law.¹⁸¹ While the Supreme Court has subsequently *23 declined to decide whether the exception suggested in *Herrera* does in fact exist,¹⁸² most circuits have recognized it in post-*Herrera* cases.¹⁸³ Because the exception would apply in such a narrow set of hypothetical circumstances, however, federal habeas relief is effectively unavailable to prisoners convicted under state law who seek to advance bare claims of innocence.

Federal prisoners who have unsuccessfully challenged their convictions on direct appeal may petition for habeas relief under 28 U.S.C. § 2255. While the Supreme Court has not ruled on the issue, two circuits have extended *Herrera*'s rationale to petitions brought under § 2255, the counterpart to § 2254 for federal prisoners.¹⁸⁴ Considering that the trend is for courts to extend Herrera's rationale to § 2255 petitions, federal prisoners with bare claims of innocence likely may only bring those claims in a motion for a new trial.

In more recent renderings, the Supreme Court has allowed a proper showing of “actual innocence” to excuse the Anti-Terrorism and Effective Death Penalty Act’s (“AEDPA”) statute of limitations. But those cases (as Justice Ginsburg noted) are few and far between: “[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare.”¹⁸⁵

3. CLEMENCY OR PAROLE

Clemency is the “historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”¹⁸⁶ It is available under federal law and the law of all fifty states.¹⁸⁷ The United States Constitution vests the power to pardon in the President, and most state constitutions similarly vest the power to pardon *24 in governors.¹⁸⁸ Clemency is not without its own cast of procedural nightmares.

In most jurisdictions a prisoner seeking clemency must have exhausted all other possible avenues of relief.¹⁸⁹ In several jurisdictions a prisoner must have additionally served a certain portion of his or her sentence before being eligible to apply for clemency.¹⁹⁰ If an application for clemency is denied, the prisoner may have to wait a certain amount of time before reapplying, or may be barred from reapplying altogether.¹⁹¹

While some jurisdictions permit the grant of a full pardon, including the restoration of civil rights,¹⁹² other jurisdictions allow for the commutation of a sentence only.¹⁹³ As a result, a grant of clemency will not necessarily lead to a prisoner's immediate release.¹⁹⁴ The grant of clemency may be revocable in some jurisdictions, subject to the grantee's compliance with certain conditions.¹⁹⁵ Consequently, clemency is available in highly specialized circumstances and even when granted may not provide adequate relief for innocent prisoners.

Parole does not offer any better alternative for a claim of innocence, and most do not have that option. For those that do, they are generally required to admit guilt as a condition of parole.

Fred Swanigan was 20 years old when he was convicted of murder in 1980. With no physical or forensic evidence to link Swanigan to the crime, prosecutors built the case on four eyewitnesses who identified Swanigan as the killer. While the

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California appeals court did not find those eyewitnesses to be terribly *25 persuasive or reliable, the 1981 jury convicted Swanigan and he received a sentence of 27 years-to-life in prison.¹⁹⁶

Before, during, and after the trial, Swanigan maintained his innocence. Once he became eligible for parole in 1996, he never waived on his innocence and refused to admit guilt. Admitting guilt--holding oneself accountable for the crime--often factors as the key component of the consideration for granting parole (in addition to risk assessment and recidivism).¹⁹⁷ Recently, the California Court of Appeals ruled that his claim of innocence should not be a bar to release.¹⁹⁸ But for the inmate who is innocent, this presents a problem: admit guilt and get out, or maintain innocence and stay put. It is a no-win situation that often boils down to a personal decision of how badly a person wants to get out of prison and what he or she is willing to say to make that happen. Swanigan's case may seem like a rare glitch in the system, but it is a common-enough occurrence that it even has its own Wikipedia entry.¹⁹⁹

B. PROBLEMS WITH CURRENTLY AVAILABLE METHODS OF RELIEF

As the foregoing overview suggests, a prisoner with a free-standing claim of innocence based on the discrediting of a forensic technique faces a litany of obstacles in seeking to overturn his or her conviction. The passage of time is a particular problem: relief simply may be unavailable after a certain amount of time has passed. Even if there are available avenues for challenging a conviction, the high standards for establishing exceptions to procedural bars and entitlement to relief may effectively preclude a successful challenge.

1. FORECLOSURE OF CLAIMS BY THE PASSAGE OF TIME

In several jurisdictions, the time for moving for a new trial is limited and claims of innocence based on newly discovered evidence are not cognizable in petitions for postconviction relief. For example, if three years have passed since a federal prisoner's conviction, he or she may not move for a new trial on the basis of newly discovered evidence.²⁰⁰ In addition, under *Herrera v. Collins*, he or she may not seek habeas relief for a bare claim of innocence.²⁰¹ In Louisiana, a prisoner can only move for a new trial on the basis of "new and material evidence" within a year after the verdict or judgment,²⁰² and a claim of actual innocence is not a *26 cognizable ground for postconviction relief unless the claim rests on the results of DNA testing.²⁰³ In other states, a prisoner with a claim of actual innocence has an even shorter window of time to bring a claim of actual innocence. For example, in Arkansas, a prisoner must move for a new trial within thirty days after entry of judgment,²⁰⁴ and newly discovered evidence is not a ground for postconviction relief.²⁰⁵ The overriding theme is that time does not stop for innocence.

In addition to time constraints, jurisdictions impose substantive criteria on prisoners seeking relief for claims of innocence that may result in limiting relief to narrow circumstances. For example, in Illinois, only prisoners sentenced to death may bring claims based on newly discovered evidence, and even then only if the evidence "establishes a substantial basis to believe that the defendant is actually innocent by clear and convincing evidence."²⁰⁶ Because the time limit for bringing a new trial motion in Illinois is thirty days after the verdict,²⁰⁷ a prisoner convicted of a non-capital crime is not able to challenge his or her conviction on the basis of a claim of innocence after that time has passed. The crazy part to this is that Illinois abolished the death penalty in 2011, but this draconian law remains on the books.²⁰⁸

Even if a claim of innocence on the basis of newly discovered evidence is cognizable in a petition for postconviction relief, strict procedural requirements for bringing such petitions, in combination with the time limit for bringing a motion for

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a new trial, may also render relief unavailable after a certain amount of time has passed. For example, while Alaska law recognizes newly discovered evidence as a basis for postconviction relief, a prisoner may only file one motion for postconviction relief, without exception.²⁰⁹ Where a prisoner cannot bring either a motion for a new trial or a petition for postconviction relief after a certain period of time, clemency will be the only form of relief left. The granting of clemency, however, is extremely rare.²¹⁰ A prisoner whose only chance at being exonerated is to *27 seek clemency faces an uphill battle, both because of the political considerations that make executives reluctant to grant pardons and because of the lack of checks on an executive's discretion to refuse relief.²¹¹

When a motion for a new trial or a postconviction petition are no longer available, even an innocent prisoner has little hope of gaining freedom. On the whole, states differ dramatically in the availability and procedural aspects of postconviction relief. In practice, however, the effect is the same: an innocent person may well be in no better position to be released from prison than a guilty one.

2. THE DIFFICULTY OF ESTABLISHING EXCEPTIONS TO PROCEDURAL BARS AND ENTITLEMENT TO RELIEF

Even if a claim of innocence based on the discrediting of a forensic technique may be a basis for postconviction relief, there are usually high standards for establishing entitlement to relief and exceptions to procedural bars. It may be difficult for prisoners with such claims to advance them through traditional postconviction remedies. One potential pitfall is that the discrediting of a forensic technique is not a traditional form of newly discovered evidence, so that the substantive and procedural rules which involve a showing of newly discovered evidence may not be easy to meet. A related problem is that the discrediting of a forensic technique may nullify evidence used to convict a person at trial, but does not have the potential to conclusively prove that person's innocence. Thus, prisoners convicted on the basis of a discredited forensic testing technique may not be able to make a sufficient showing of innocence. Finally, because the laws of many jurisdictions either do not provide for a right to counsel in postconviction proceedings or do so only after a petition is filed, many prisoners will be in the position of filing a petition for postconviction relief without the assistance of counsel. As a result, petitioners with meritorious claims may not have the chance to present them adequately, if at all, much less obtain relief based upon them.

Characterizing a recently discredited forensic technique as newly discovered evidence raises the issue of when a technique is sufficiently discredited to constitute new evidence. To illustrate the gravity of these cases, look to the case of Santae Tribble. He was convicted of killing a taxi driver in 1978.²¹² During the investigation, *28 a police dog uncovered a stocking mask one block away from the crime scene; the stocking contained a total of 13 hairs. The FBI's hair analysis concluded that one of the 13 hairs belonged to Tribble. Tribble took the stand in his defense, testifying that he had no connection to the taxi driver's death. Nevertheless, the jurors gave weight to the one "matching" hair and found Tribble guilty of murder. The judge sentenced him to 20 years-to-life in prison.²¹³

Both in prison and later, while on parole, Tribble maintained his innocence, and in January 2012, Tribble's lawyer, succeeded in having the evidence retested. A private lab concluded through DNA testing that the hairs could not have belonged to Tribble.²¹⁴ A more thorough analysis at the time of the crime--even absent DNA testing--would have revealed the same result: one hair had Caucasian characteristics and Tribble is African-American. Tribble served 25 years, plus an additional three years for failing to meet the conditions of his parole for a crime he did not commit.²¹⁵

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In another case, Kirk L. Odom was convicted of sexual assault in 1981.²¹⁶ The star prosecution witness--an FBI Special Agent--testified that a hair discovered on the victim's nightgown was microscopically similar to Odom's hair, "meaning the samples were indistinguishable."²¹⁷ To illustrate the credibility of the evidence, the agent also testified that he had concluded hair samples to be indistinguishable only "eight or 10 times in the past 10 years, while performing thousands of analyses."²¹⁸ Odom presented alibi evidence, but the jury convicted him after just a few hours of deliberation. Odom was paroled in March 2003 and required to register as a sex offender.²¹⁹

That would have been the end of Odom's story had it not been for his lawyer's crusade to right the wrongs resulting from the erroneous hair comparisons.²²⁰ In February 2011, Sandra Levick (who had also represented Tribble) filed a motion for DNA testing under the D.C. Innocence Protection Act.²²¹ In response, the government located stained bedsheets, a robe, and the microscopically examined *29 hair from the crime scene.²²² Subsequent DNA testing of those items, in addition to mitochondrial testing of the suspect hair, excluded Odom.²²³ A convicted sex offender would later be linked to the crime, and Odom was exonerated on July 13, 2012.²²⁴

The Tribble and Odom cases illustrate one potential conundrum for prisoners using currently available avenues to challenge convictions based on a claim of a forensic testing technique being discredited: the evidence must cast sufficient doubt upon a forensic testing technique in order to support a claim. Thus, prisoners must wait for scientists to do research that discredits the technique to a satisfactory degree. On the other hand, once evidence that does sufficiently discredit the technique becomes available, a prisoner may have to bring a claim based on that evidence quickly in order to comply with applicable time limits. Consequently, the prisoner must negotiate the fine balance between waiting to gather enough evidence to demonstrate that a forensic technique is unreliable and risking the possibility that more conclusive research will be done but will not come to the prisoner's attention.

3. POSTCONVICTION DISCOVERY AND PRESENTATION OF EVIDENCE

Another problem faced by prisoners in using current procedures to challenge their convictions is obtaining the evidence necessary to establish their claims. Postconviction DNA testing statutes provide a procedure by which prisoners can obtain testing of biological evidence associated with their convictions, usually at the state's expense if the prisoner is indigent.²²⁵ In addition, DNA testing statutes may provide for access to other relevant evidence, such as the results of previous testing.²²⁶ In contrast, the rules governing new trial motions and postconviction procedures are usually silent on the issue of discovery. As a result, there is no clear mechanism by which prisoners can acquire the physical evidence used in a particular forensic technique and other relevant information that may be used to prove their innocence.

Further, even if prisoners can gather the relevant evidence, they may be handcuffed by the high standards they must meet to show their innocence. In Texas, for instance, "[e]stablishing a bare claim of innocence is a Herculean task."²²⁷ To establish entitlement to relief, "the applicant must show 'by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.' This showing must ... unquestionably establish [the] applicant's innocence."²²⁸ In *30 addition, the applicant must provide "affirmative evidence" of innocence, not just raise doubt about his or her guilt.²²⁹

As explained below, it may be easier to discredit forensic science in Texas than it is to demonstrate actual innocence. The innocent applicant would need "affirmative evidence" that "unquestionably establishes" a prisoner's innocence. Even

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assuming that a forensic technique was shown to be completely unreliable, it will not provide affirmative evidence of a prisoner's innocence.

For example, if a prisoner showed that hair evidence was not a legitimate technique, it would, at most, exclude a hair from belonging to the suspect or the victim. While this might remove a critical piece of evidence from the conviction equation, such a showing would not prove that a prisoner did not commit the crime at issue. Because hair evidence cannot be used to tie individual hairs to individual persons, it cannot be used to prove that a person was or was not associated with the crime or the victim. Thus, a prisoner challenging his or her conviction in a jurisdiction that requires a strong showing of innocence probably will not be entitled to relief even if he or she conclusively shows that a forensic testing technique has insufficient probative value.

In many cases, even if a prisoner could otherwise establish exceptions to procedural bars to relief, he or she will not have the help of counsel in preparing a petition for postconviction relief. Where the discrediting of a forensic technique is the basis for a claim, it is important to obtain scientific research in support of the technique's discreditation. Without the aid of counsel, a prisoner will be poorly positioned to marshal the evidence necessary to support a petition and avoid its summary dismissal. Texas law does not make any provision for the appointment of counsel to aid indigent, non-capital prisoners in filing habeas petitions.²³⁰ After filing, for the petition to proceed, the judge must find "controverted, previously unresolved facts which are material to the legality of the applicant's confinement."²³¹ Even then, the judge has the discretion to decide whether to hold an evidentiary hearing.²³² In light of such stringent requirements for establishing a claim of innocence, a prisoner who files a petition without the aid of counsel may not be able to highlight the new evidence establishing his or her innocence and state a claim sufficient to require further consideration.

The need for the aid of counsel is even more pronounced in jurisdictions that have detailed requirements governing the contents of postconviction petitions. For example, in Virginia, a prisoner with a claim of innocence based on newly discovered evidence may file a petition for a "writ of actual innocence."²³³ If newly discovered "nonbiological evidence" is the basis for the petition, the prisoner must *31 allege, "categorically, and with specificity," a detailed list of eight facts.²³⁴ In addition, the "petition [must] contain all relevant allegations of facts that are known to the petitioner at the time of filing, [must] be accompanied by all relevant documents, affidavits and test results, and [must] enumerate and include all relevant previous records, applications, petitions, appeals and their dispositions."²³⁵ Compliance with these requirements is necessary to avoid summary dismissal.²³⁶ Unfortunately, a petitioner is entitled to counsel only after, and only if, the petition is not summarily dismissed.²³⁷ Furthermore, it is up to the court's discretion whether to appoint counsel before deciding whether to summarily dismiss a petition.²³⁸ Without the aid of counsel, it is much less likely that a prisoner with a claim of innocence based on a discredited forensic technique will be able to prepare a petition that complies with Virginia's strict requirements.

IV. WRIT LARGE: THE NEED FOR JUNK SCIENCE STATUTES

The previous section provided just a handful of examples that illustrate the obstacles in proving that bad science produced a wrongful conviction. As the foregoing demonstrates, current postconviction remedies are insufficient to manage the evolution or test the bounds of science in the courtroom. Absent changes to currently available methods of relief, innocent people will remain in prison, convicted by unreliable science. However, two states have made positive steps toward statutory schemes aimed squarely at addressing bad science.

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A. THE TEXAS TWO-STEP: A FORENSIC SCIENCE BOARD AND A JUNK SCIENCE STATUTE

In June 2013, the Texas legislature adopted Article 11.073 of the Code of Criminal Procedure to provide postconviction relief to individuals wrongfully convicted *32 as a result of unavailable or erroneous scientific evidence.²³⁹ The statute was initially enacted in response to the denial of Neal Hampton Robbin's application for writ of habeas corpus for a conviction of capital murder under Article 11.07 of the Code of Criminal Procedures, the state's false evidence statute, and a claim of actual innocence.²⁴⁰ In *Ex Parte Robbins*, the defendant was convicted of capital murder based in part on the testimony of the assistant medical examiner who performed an autopsy on the child victim's body and declared the cause of death to have been homicide.²⁴¹ After the medical examiner revised her opinion, finding the cause of death to have been "undetermined,"²⁴² Robbins applied for a writ of habeas corpus.²⁴³ The court denied relief, holding that the State did not use false evidence to obtain the defendant's conviction because, although subsequently revised, the medical examiner's trial testimony was not false and did not create a false impression. *33 The court further held that the medical examiner's re-evaluation of her trial opinion did not unquestionably establish defendant's innocence.²⁴⁴

Initially proposed in February 2013, adopted in June 2013, and effective as of September 2013, Article 11.073 expanded the basis for postconviction relief based on inadequate evidence provided in 11.071 to address faulty science specifically. The statute thus applies to "scientific evidence that ... (1) was not available ... at trial; or (2) contradicts scientific evidence relied on by the state ..."²⁴⁵ The statute allows a writ of habeas corpus to be granted if, first, "the evidence was not ascertainable through the exercise of reasonable diligence" before or during the trial and, second, the court finds that "had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted."²⁴⁶ The statute further asks the court to "[c]onsider whether the scientific knowledge or method on which the relevant scientific evidence is based has changed since" the trial date or dates of previously considered applications for writ of habeas corpus.²⁴⁷

Under the newly enacted statute, the Texas Court of Criminal Appeals granted Robbins's second application for habeas relief on the same factual basis and allowed for a new trial.²⁴⁸ The court held that the change in opinion constituted a change in the relevant "scientific knowledge" that contradicted scientific evidence relied upon by the State because both the expert's original and revised opinions were derived from the scientific method.²⁴⁹ The court further held that, had the new evidence been available at trial, the defendant would not have been convicted of capital murder.²⁵⁰

The initial five-to-four vote granting habeas relief in *Robbins II* reflected judicial unease and uncertainty with the recently enacted statute. In May 2015, a less favorable Court of Criminal Appeals, with three of the *Robbins II* majority judges retired and all of the dissenting judges remaining, granted the state's motion for rehearing in *Robbins II*, making defendant's second writ application again a pending writ application.²⁵¹ In response to the court's grant of the state's motion, the Texas legislature moved quickly to codify the *Robbins II* interpretation of the statute and amended Article 11.073 by House Bill 3724 to explicitly include expert *34 testimony in the definition of "scientific knowledge."²⁵² Approved on June 20, 2015, this amendment became effective on September 1, 2015.²⁵³ The intent to expand the meaning of "scientific knowledge" is made explicit: "House Bill 3724 amends the Code of Criminal Procedure to expand the factors a court must consider when making a finding as to whether scientific evidence constituting the basis for an application for a writ of habeas corpus was not ascertainable."²⁵⁴

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Following the adoption of the amendment, the Texas Court of Criminal Appeals concluded that the state's motion for rehearing was improvidently granted and denied the state's motion for rehearing.²⁵⁵ In his concurrence, Judge Alcala asserted that it was the change in the court's constitution that led to the granting of the state's motion and expressed his unease about the uncertainty of the statutory meaning:

I do not envy the position of future litigants who must try to decipher this Court's position on when relief is warranted under the new-science statute ... This Court's judicial decisions should not require litigants to run to the Legislature for a statutory response to correct our judicial mistakes. This Court's judicial decisions should not give the appearance of indecision or manipulation for the achievement of a desired result. And this Court's judicial decisions should not come half a decade too late *35 while a defendant remains incarcerated based on what is clearly a wrongful conviction.²⁵⁶

The ambiguity of the young statute has led to judicial uncertainty in Texas. Its efficacy in expanding relief is still unclear. Other judicial renderings of the statute take a different, more limited approach leading to a hodgepodge of reasoning over legislative intent and science.²⁵⁷ These judicial interpretations should be brought in line with the express legislative intent to expand avenues of postconviction relief for convictions based on junk science.

Some case law suggests that 11.073 successfully expanded the relief initially granted under 11.071. In *Ex parte Reed*, the defendant's execution was stayed pending further order of the Texas Court of Criminal Appeals in response to the defendant's sixth application for writ of habeas corpus on the basis of new scientific evidence under the newly enacted statute.²⁵⁸ The writ alleged that the state presented false, misleading, and scientifically invalid testimony which violated due process. The previous three applications were dismissed for failure to satisfy Article 11.071.²⁵⁹ The order of the court is still pending.²⁶⁰

The same appellate court came to a different result in *Pruett v. State*. There, the defendant was convicted of capital murder of a correctional officer and sentenced to death.²⁶¹ The conviction was affirmed on direct appeal,²⁶² and the first writ of habeas corpus denied.²⁶³ In 2013, the court granted the defendant's motion for postconviction DNA and palm-print testing, which brought back inconclusive results.²⁶⁴ The defendant's second writ of habeas corpus was dismissed because the trial court judge, relying on the Texas DNA statute, held that it was not reasonably probable that the applicant would have been acquitted had the new DNA and palmprint results been available at trial.²⁶⁵ The decision was affirmed on appeal.²⁶⁶ The *36 court subsequently denied defendant's application for a writ of habeas corpus brought under 11.073 on the same factual basis,²⁶⁷ because its previous holding that the new evidence did not support a reasonable probability of applicant's acquittal foreclosed habeas relief under Article 11.073, which calls for a "preponderance of the evidence" standard.²⁶⁸

The defendant's subsequent writ application brought under Article 11.073 relied on a different form of recently discredited scientific evidence relied upon by the state at his initial trial-- physical match comparisons of masking tape, discredited by the NAS Report.²⁶⁹ The Texas court's holding turned on its reading of the timeliness requirement under 11.073(c), which requires "a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date."²⁷⁰ The court held the consideration of the claim procedurally barred for failure to satisfy the requirement.²⁷¹ The court reasoned that the applicant's counsel could have raised this new-

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scientific-evidence claim in his 2014 writ application because the 2009 NAS Report serving as the basis of the current claim was available at the time.²⁷² The court thus dismissed the application and denied the stay of execution without reviewing the merits of the claim.²⁷³

In his dissent, Judge Alcala argued for a grant of the stay and a closer examination of the evidence to fully “consider the merits of [the] complaint that junk science played a primary role in [the defendant's] conviction” while the statutory language regarding the timeliness requirement is clarified.²⁷⁴ According to the judge, the majority misread the statute by failing to consider its meaning in the context of the larger statutory scheme, specifically the legislative intent to allow *37 postconviction challenges to conviction based on junk science.²⁷⁵ Furthermore, because it is unclear whether the report date is enough to defeat the timeliness requirement, the decision at a pleading stage is not appropriate, and the case should be determined on its merits.²⁷⁶

By effectively holding that a case will be dismissed if an applicant cannot make a *prima facie* case that relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the majority thus affirmed the existence of a narrow procedural bar on subsequent writ applications.²⁷⁷ According to the dissenting Judge, this is in clear conflict with the legislative intent.²⁷⁸

B. CALIFORNIA: THE WRIT OF WRATH

The California Penal Code § 1473 was amended in 1975 to include a claim of false evidence as a basis for a writ of habeas corpus application.²⁷⁹ The existing statute was amended further in 2014 by Senate Bill No. 1058 to specifically include the opinion of experts in the definition of “false evidence,” either repudiated by the original expert or undermined by scientific or technological advances.²⁸⁰ The amendment was in large part a reaction to the case of William Joseph *38 Richards, where a 4-3 majority of the California Supreme Court denied Richards habeas relief under the then existing § 1473 based on a repudiated forensic expert testimony.²⁸¹

Richards was convicted for first degree murder in 1997 in part on the bite mark analysis testimony of a forensic dentist, who testified that the marks found on the victim were both bite marks and consistent with the defendant's teeth.²⁸² At trial, the defense expert sought to repudiate the testimony by asserting that the photograph distortions prevented an accurate assessment of whether the marks were even human.²⁸³ Richards was sentenced to 25 years in prison.²⁸⁴

In 2007, Richards filed a habeas petition alleging, first, that the bite mark evidence introduced at trial was false and, second, that new forensic evidence indicated that he was wrongfully convicted.²⁸⁵ The state's dental expert filed a declaration supporting Richards's petition, repudiating his earlier opinion.²⁸⁶ The expert stated that his initial testimony was not based on scientific data and that he was no longer certain that the mark on the victim's body was in fact a bite mark.²⁸⁷ Additional experts testified at the evidentiary hearing that new technology which removed the distortions from the photographs made it doubtful that the indentation was a bite mark at all.²⁸⁸

While the trial court granted Richards habeas corpus relief, the California Court of Appeals reversed the decision and the Supreme Court of California affirmed, upholding his conviction.²⁸⁹ The California Supreme Court held that the expert's repudiated testimony did not constitute “false evidence” under § 1473 because he did not prove it to be “objectively false.”²⁹⁰ The repudiated testimony was *39 instead merely a “good faith expert opinion about a question as elusive as

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what may have caused an indistinct bruise.”²⁹¹ Furthermore, considered as “new evidence,” the repudiated testimony did not justify habeas relief as it did not “point unerringly to innocence,” even when considered cumulatively with the other new forensic evidence.²⁹²

The *Richards* dissent noted that § 1473(b) did not make a distinction between lay and expert testimony and that there was no reason to make such a distinction, where the majority opinion placed a heavier burden on a defendant seeking relief from false expert testimony.²⁹³ In 2013, Richards filed a motion requesting further DNA testing which was subsequently denied because “favorable DNA test results would raise only an abstract, indeed speculative possibility of a more favorable verdict.”²⁹⁴

In light of this decision, the California legislature passed two bills addressing wrongful convictions: Senate Bill No. 1058 (amending Section § 1473) and Senate Bill 618 (codifying the *In re Clark* standard for new evidence relied on in *Richards*). While Senate Bill No. 1058 amended § 1473 to include the opinion of experts in the definition of “false evidence,” as part of 2013 Cal SB 618, the legislature also passed § 1485.55, codifying “new evidence” as a possible basis for habeas relief.²⁹⁵ Section 1485.55 (g) defines “new evidence” as evidence “not available or known at the time of trial that completely undermines the prosecution case and points unerringly to innocence.” The section thus incorporates both a timeliness and sufficiency of evidence requirement. Case law interpreting the statutory changes has been limited to date.²⁹⁶

***40** Further amendments are currently pending in the legislature affecting both § 1473 and § 1485.55. The proposed amendments set forth the evidentiary and timeliness requirements governing habeas claims based specifically on new evidence.²⁹⁷ While significantly lessening the sufficiency of evidence standard under which a writ of habeas corpus may be granted based on new evidence, the proposed amendments include a repeated timeliness requirement. Like the existing statute, the proposed amendments do not explicitly address forensic or scientific evidence but continue to defer to broad language of “false” and “new” evidence.

The initial version of the bill added “new evidence” as a basis for habeas relief to § 1473 and lowered the bar from evidence that “points unerringly to innocence” to evidence that “raises a reasonable probability of a different outcome.”²⁹⁸ The subsequent version of the bill further replaced the “reasonable probability” standard with evidence “of such decisive force and value that it would have more likely than not changed the outcome of the trial.”²⁹⁹

The proposal defined “new evidence” as evidence discovered after trial “that could not have been discovered prior to trial by the exercise of due diligence,” thereby articulating a temporal and diligence requirement.³⁰⁰ The currently pending proposal further reiterates the timeliness component by requiring that the “new evidence” be “presented without substantial delay.”³⁰¹ References to “new ***41** evidence” are removed from Section 1485.55,³⁰² which is designed only to regulate appropriations in cases of granted habeas relief.³⁰³

These statutes are not perfect, but they are necessary. The procedural options a prisoner might embark on to demonstrate innocence do not offer a true road to challenging a conviction based upon old or bad science. The lack of these statutes may be of little concern to legislators in an era when criminal justice reform is popular but letting people out of prison is not. I am reminded of the late Supreme Court Justice Antonin Scalia’s message in the Troy Davis case: “This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”³⁰⁴ What might be discredited science today was okay yesterday and that seems to make it fair.

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V. PROPOSAL: DON'T MESS WITH TEXAS (WELL, MAYBE JUST A LITTLE ...)

Junk science statutes are difficult pieces of legislation to stitch together. Regardless of the amount of work invested, these laws necessarily lean more toward a one-size-fits-all rather than an individualized remedy. Moreover, by their nature, junk science statutes must be reactive rather than proactive because it applies solely to the postconviction phase. Consequently, junk science statutes cannot prevent a wrongful conviction from occurring. Criminal justice remedies are imperfect for a number of reasons, but the imperfection is particularly acute in the field of wrongful convictions because even a positive end result (freedom) will always be tainted by the harm (years of wrongful imprisonment).

None of those are good reasons to avoid putting junk science statutes on the books, but with only two states entering the fray, it certainly appears that most lawmakers would rather not have the tough conversation (or admit) that sometimes even science gets it wrong and produces bad convictions. There should be something unsettling and unfair about someone spending the rest of (or even a portion of) his or her life in prison because we put too much confidence behind shoddy science.

There is no wiggle room: we have a responsibility to correct inaccurate forensic conclusions and remedy unjust results. Even if the justice system holds fast to finality rather than fairness, our moral code should provide an avenue of relief for discredited science--such as the hundreds of cases that now hang in the balance due to the revelation that microscopic hair evidence is unreliable. In its *42 starker form, when corrupted evidence is used to sustain a conviction it causes our criminal justice system itself to be unreliable.

I will quickly dispose of the California statute because in my mind it requires such a narrow situation that it is mostly useless to address the real problem with flawed forensic evidence. True, there is at least an attempt to retrofit that bill to make it more accessible. The rewrite, if passed, may change my assessment, but as it stands, that statute helps but a few individuals who are able to demonstrate that the evidence is false. For inmates, the message is “don’t bother.” The Texas statute, on the other hand, merits real consideration for widespread adoption.

At base, the Texas statute is fundamentally a good statute, and we do not need to reinvent the wheel when we can instead plug a few holes. First, it gets the standard of proof right. Preponderance of the evidence appreciates the realities of these cases: they are difficult to bring and rarely win. Sometimes DNA exists, but in other cases there is no DNA, and imposing any higher burden would (practically speaking) likely derail most of the non-DNA cases *ab initio*. Of course, cases based mostly on eyewitness testimony would still be doomed under this standard.³⁰⁵

My endorsement of the Texas statute, however, should not be interpreted as an assessment of perfection, but rather a reflection of practicability. Texas is a large, conservative state that to its credit is attempting to tackle problems in forensic science. I do take issue with some of its phrasing, namely the use of “changed” science. What constitutes a change in science? As Simon Cole notes, there are many ambiguities attached to the nebulous phrase “changed scientific knowledge” which make it difficult to deduce an objective assessment:

[D]oes it inhere in an individual or a collective; which individual or collective; and what constitutes change - mean that courts will as ample leeway for interpretation as they have had over the admissibility of scientific evidence. What constitutes changed scientific knowledge will be, unfortunately, in the eye of its judicial beholder.”³⁰⁶

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I cannot agree more. Much like the assessment of the reliability of forensic science on the front end of a case, the determination by a judge as to what qualifies as “changed scientific knowledge” is inherently treacherous. Is it along the lines of undermining an entire forensic discipline, such as hair microscopy or bite mark evidence? Is it something less--such as a voluntary certification body changing reporting terminology such that older convictions could be called in to question like latent print comparisons? Do changed probability calculations meet the threshold, as in the DNA mixture cases? As Cole observes, “change is more conceptual; it *43 concerns the proper way of interpreting and reporting the testimony. Moreover, the scientific change did not consist of anyone ‘inventing’ or ‘discovering’ anything.³⁰⁷

Indeed, for years, lawyers and scholars have attempted to draw attention to the shortcomings of pattern identification evidence--hair, fiber, toolmarks, fingerprints and the like. Until 2009, (when the NAS Report was released), these criticisms seemed like picky defense attorneys seizing the research of scientists untrained in the forensic disciplines to try and poke holes in well-established tech-techniques. The tide appears to be changing--if ever slowly-- with research now underway by the National Institute of Technology and other research partnerships among crime labs and universities to develop standards and probabilistic methodologies for the strength and quantification of forensic evidence. But that does little for the “thousands of inmates [who] were convicted on forensic evidence reported in a categorical, qualitative fashion that ... often overstated the probative value of the evidence.”³⁰⁸ Mechanisms that help these prisoners challenge that evidence are lacking (with Texas as the standout) or poorly written (see California's statute).

I would eliminate the word “changed” all together because it is too narrow. Moreover, while the delineated circumstances in which a court can consider the so-called change--“the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based”³⁰⁹ --seem broad, they also seem to be an exclusive list. If interpreted narrowly, this omits other circumstances that might warrant a junk science statute, such as fraud, misrepresentation, or lack of qualification by the examiner. A change in probabilistic formulas might also escape review. Additionally, I would not link those delineated circumstances to the determination of whether the scientific evidence could have been discovered (as section 11.073(d) does). Instead, I would link those (and broaden them) to the determination of whether the evidence would have produced a different result by a preponderance of the evidence.

Of course, this begs the question of whether there is a way to craft a junk science statute that affirmatively addresses all of the concerns and in a way that does not deter or impede the current research being done to improve forensic science. There must also be an understanding that these statutes are not the proper mechanism for wide-scale case reviews, like those taking place for hair microscopy and bite marks. Beyond case-based reviews, the American Association for Advancement of Science is undertaking sweeping reviews of forensic science disciplines, and NIST and the National Commission on Forensic Science have spent the better part of three years evaluating forensics from top-to-bottom.³¹⁰ These case *44 and science reviews are perhaps in a better position to study and *prevent* future wrongful convictions and eliminate the continued use of shoddy science. Correspondingly, the junk science statute is the most direct way for an innocent person to *respond* to the findings of those reviews and investigations and obtain relief. The various entities should work in tandem and share information because keeping an innocent person in limbo while a reviewing body performs long-term evaluations may only extend the time spent in prison.

Thus, I propose a few tweaks to the Texas statute (see Appendix). The proposal is an effort to correct the shortcomings of challenges to scientific evidence under current postconviction procedures married with the promise of junk science statutes. It removes “changed” from the calculus altogether, because that term is plagued by ambiguity and detriment. I also think it is important that a person neither runs afoul nor exhausts other state or federal remedies by taking advantage of this legislation. Foreclosure and finality may have a place in the criminal justice system, but the time has come to stop

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letting them be the drivers of the system. Science is not static: what is thought to be reliable today may require more than one challenge as the science improves, so I have attempted to correct the concern that a successive petition might be outright denied. Science evolves, as should the way in which we approach innocence and wrongful convictions.

VI. CONCLUSION

French mathematician and physicist Jules Henri Poincare wrote: “Science is facts; just as houses are made of stones, so is science made of facts; but a pile of stones is not a house and a collection of facts is not necessarily science.”³¹¹ Our criminal justice system depends increasingly on forensic science to fill the gaps that ordinary facts cannot. We should therefore expect more from science if we continue to couch convictions within its confines. Because the criminal justice infrastructure devotes a tremendous amount of energy to preserving convictions, it is difficult to see its weaknesses laid bare as something that ultimately will strengthen the system. But the unmasking of those weaknesses will be the opportunity to correct decades of fundamentally flawed forensic applications.

Being right should not matter more than doing right. Perhaps part of the reason that admitting a mistake becomes so untenable is that it opens up the figurative floodgates to questions about other cases. Numerous crime lab scandals around the country have made the cogs of the criminal justice system leery of coming forward with errors. Junk science statutes provide the system with a much needed ability to be more accepting of mistakes. While we have made some strides through the work of the Innocence Project and other groups, changing the status quo is an uphill battle. DNA statutes that provide for postconviction testing were a good starting point for innocence, but they cannot also be our end point. Relief *45 cannot exist in a vacuum and we cannot make it available only to those who have testable biological evidence. DNA testing alone cannot eliminate wrongful convictions.

If our criminal justice system demands that guilt be proven beyond a reasonable doubt, then that same system should demand accurate and reliable science. Until we acknowledge and make an effort to correct the shortcomings of science, the headlines on shoddy science will continue. “Changed science writs are undoubtedly a promising trend with the potential to bring justice to many individuals to whom it might otherwise be denied due to an excessive legal attachment to the principle of finality.”³¹² We should not be content with operating a criminal justice system that remains wedded to inferior science and continues to tolerate a certain margin of error when things go awry. Evidence left behind at a crime scene does not always lend itself to reliable analysis, and appreciating the limitations of forensic science is a necessary step to improving the system as a whole. I submit that widespread adoption of junk science statutes would not be the Armageddon that some may fear. Instead, they might provide a collective sigh of relief by giving us the opportunity to do something to correct otherwise impenetrable injustice.

*46 APPENDIX

(a) This article applies to relevant scientific evidence that:

- (1) was not available to be offered by a convicted person at the convicted person's trial; or
- (2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

- (1) the convicted person files an application, in the manner provided by

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state law, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the [applicable state] Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) *In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the same claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.*

(d) *In making a finding as to whether a preponderance of evidence exists such that the person would not have been convicted, the court shall consider the field of scientific knowledge, the testifying expert's scientific knowledge; the scientific method on which the relevant scientific evidence, or any other relevant scientific testimony.*

(e) *Nothing in this provision shall preclude a later habeas corpus motion brought under existing state or federal law for any other claim unrelated to this statute.*

Footnotes

¹ *Associate Professor, Georgia State University - College of Law. I would like to thank my intrepid research assistants, Michael Williford, Amy Patterson, and Majda Muhic for their fierce determination in completing this article. I would also like to thank Simon Cole, Sarah Chu, and Henry Swofford for their input and inspiration.*

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120 *Id.*

121 See *EFFECTS ON DNA MIXTURE INTERPRETATION*, *supra* note 117.

122 TEX. FORENSIC SCI. COMM'N, *CRITERIA FOR EVALUATION OF DNA MIXTURE INTERPRETATION PROTOCOLS* (Oct. 15, 2015), [http://www.fsc.texas.gov/sites/default/files/Texas%20Forensic%C20Lab%C20Mixture%C20Criteria%C20101515%20\(FINAL\).pdf](http://www.fsc.texas.gov/sites/default/files/Texas%20Forensic%C20Lab%C20Mixture%C20Criteria%C20101515%20(FINAL).pdf)

123 People v. Collins, 15 N.Y.S.3d 564 (N.Y. Sup. Ct. 2015)

124 *Id.* at 577.

125 *Id.*

126 *Id.* at 587.

127 *Id.* at 584.

128 CLARIFICATION, *supra* note 112.

129 Kaste, *supra* note 115.

130 *Id.*

131 *Collins*, 15 N.Y.S.3d 564 at 577-82.

132 Dysart, *supra* note 118.

133 Kaste, *supra* note 115. "A lab using one method may find a match, while another lab, using a more conservative analysis, may judge the same sample to be inconclusive." *Id.*

134 *Firearms & Ballistics*, FORENSICS LIBRARY, <http://aboutforensics.co.uk/firearms-ballistics/> (last visited Dec. 20, 2016).

135 *Id.*

136 *Id.*

137 Adina Schwartz, *Challenging Firearms and Toolmark Identification-- Part One*, 32 CHAMPION 10, 11 (2008).

138 *Firearms & Ballistics*, *supra* note 134. Rifling refers to the series of spiraling lands and grooves produced along the inside of the barrel. *Id.* It will be cut with either a left or a right hand twist. *Id.* Rifling leaves characteristic marks on bullets, which is the basis for the comparison. *Id.*

139 Paul C. Giannelli, *Ballistics Evidence Under Fire*, 25 CRIM. JUST. 50, 50 (2011).

140 NAT'L RES. COUNCIL *BALLISTICS IMAGING* 54-57 (2008), <http://www.nap.edu/read/12162/chapter/1>.

141 *Id.*

142 *Id.*

143 *Id.* at 81.

144 *Id.*

145 NAS REPORT, *supra* note 16, at 154.

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146 *Id.*

147 Schwartz, *supra* note 137, at 12.

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* at 13.

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* (quoting [United States v. Green, 405 F. Supp. 2d 104, 108 \(D. Mass 2005\)](#)).

157 See Innocence Project, *Unvalidated or Improper Forensic Science*, <http://www.innocenceproject.org/causes/unvalidated-or-improper-forensic-science/> (last visited Dec. 21, 2016) (“In about half of DNA exonerations, unvalidated or improper forensic science contributed to the wrongful conviction.”).

158 See, e.g., [CAL. PENAL CODE § 1181\(8\)](#) (Westlaw current through 2016 Reg. Sess.). The exceptions are Arkansas, Florida, Georgia, Hawaii, Illinois, Massachusetts, Michigan, Missouri, Montana, New Hampshire, Tennessee, Texas, Utah, Virginia, and Wisconsin. See [ARK. R. CRIM. P. 33.3](#) (Westlaw current through Nov. 1, 2016); [FLA. R. CRIM. PROC. 3.590](#) (Westlaw current through Aug. 15, 2016); [GA. CODE. ANN. §§ 5-5-40, 5-5-41](#) (Westlaw current through 2016 Session of the Georgia General Assembly); [HAW. REV. STAT. § 635-56](#) (Westlaw current through Act 1 (End) of the 2016 Second Special Session); [725 ILL. COMP. STAT. 5/116-1](#) (Westlaw current through P.A. 99-912 of the 2016 Reg. Sess.); [MASS. R. CRIM. P. 30](#) (Westlaw current through Nov. 1, 2016); [MICH. CT. R. CRIM. P. 6.431](#) (Westlaw current through Nov. 15, 2016); [MO. REV. STAT. § 547.020](#) (Westlaw current through end of 2016 Regular Session and Veto Session of the 98th General Assembly, pending changes received from the Revisor of Statutes); [MONT. CODE ANN. § 46-16-702](#) (Westlaw current through 2015 session); [N.H. REV. STAT. ANN. § 526:1](#) (Westlaw current through Chapter 330 (End) of the 2016 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services); [TENN. R. CRIM. P. 33](#) (Westlaw current through Nov. 15, 2016); [TEX. R. APP. P. 21.2](#) (Westlaw current through Sept. 1, 2016); [UTAH R. CRIM. P. 24](#) (Westlaw current through Sept. 15, 2016); [VA. SUP. CT. R. 3A:15](#) (Westlaw current through Dec. 1, 2016); [WIS. STAT. § 809.30](#) (Westlaw current through 2015 Act 392, published Apr. 27, 2016).

159 See, e.g., [ARK. R. CRIM. P. 33.3\(b\)](#) (entry of judgment); [OHIO R. CRIM. P. 33\(b\)](#) (Westlaw current through Aug. 1, 2016) (verdict); [TENN. R. CRIM. P. 33\(b\)](#) (sentencing).

160 See, e.g., [ALASKA R. CRIM. P. 33](#) (Westlaw current through Aug. 1, 2016) (increasing time from 5 days to 180 days); [DEL. SUPER. CT. R. CRIM. P. 33](#) (2016) (increasing time from seven days to two years); [MD. R. 4-331](#) (Westlaw current through Dec. 1, 2016) (increasing time from ten days to one year); [N.M.R. 5-614](#) (Westlaw current through Aug. 1, 2016) (increasing time from ten days to two years); [W. VA. R. CRIM. P. 33](#) (Westlaw current through Sept. 1, 2016) (removing ten-day limit).

161 [FED. R. CRIM. P. 33\(b\)\(1\)](#) (Westlaw current through Dec. 1, 2016); [CONN. GEN. STAT. § 52-582](#) (Westlaw current through 2016 Sept. Special Session); [D.C. SUPER. CT. R. CRIM. P. 33\(b\)\(1\)](#) (Westlaw current through Oct. 1, 2016); [NEB. REV. STAT. § 29-2103\(4\)](#) (Westlaw current through the end of the 104th 2nd Regular Session (2016)); [N.H. REV. STAT. ANN. § 526:4](#); [N.D.R. CRIM. P. 33\(b\)\(1\)](#) (Westlaw current through July 1, 2016).

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- 162 [ALA. CODE § 15-17-5\(a\)](#) (Westlaw current through the end of the 2016 Regular Session and through Act 2016-485 of the 2016 First Special Session) (thirty days); [ARK. R. CRIM. P. 33.3\(b\)](#) (thirty days); [FLA. R. CRIM. P. 3.590\(a\)](#) (Westlaw current through Aug. 5, 2016) (ten days); [HAW. R. PENAL P. 33](#) (Westlaw current through July 1, 2016) (ten days); [725 ILL. COMP. STAT. 5/116-1\(b\)](#) (thirty days); [IND. R. CRIM. P. 16\(A\)](#) (Westlaw current through Nov. 1, 2016) (thirty days); [MINN. R. CRIM. P. 26.04 subdiv. 1-1\(3\)](#) (Westlaw current through May 1, 2016) (fifteen days); [MISS. UNIF. R. CIR. & COUNTY CT. PRAC. 10.05](#) (Westlaw current through June 1, 2016) (ten days); [MO. R. CRIM. P. 29.11](#) (Westlaw current through Nov. 1, 2016) (fifteen to twenty-five days); [MONT. CODE. ANN. §46-16-702\(2\)](#) (2007) (thirty days); [S.D. CODIFIED LAWS § 23A-29-1](#) (Westlaw current through 2016 Session Laws, Supreme Court Rule 16-68, and 2016 general election ballot measures) (ten days); [TENN. R. CRIM. P. 33\(b\)](#) (thirty days); [TEX. R. APP. PROC. 21.4\(a\)](#) (thirty days); [UTAH R. CRIM. P. 24\(c\)](#) (ten days); [VA. SUP. CT. R. 3A:15\(b\)](#) (twenty-one days for motion to set aside verdict); [WIS. STAT. § 809.30\(2\)\(b\)](#) (twenty days). In Hawaii, a court may extend the ten-day limit indefinitely, but may only do so within that ten-day period, in Utah, a court may extend the fourteen-day limit before expiration of the time for filing a motion for new trial. See [HAW. R. PENAL P. 33](#); [UTAH R. CRIM. P. 24\(c\)](#). In California, a motion for a new trial must be made before judgment is entered. [CAL. PENAL CODE § 1182](#).
- 163 [GA. CODE. ANN. §§ 5-5-40\(a\), 5-5-41\(a\)](#) (Westlaw current through 2016 Session of the Georgia General Assembly) (motion for new trial must be made within thirty days of judgment “except in extraordinary cases”); [KY. R. CRIM. P. 10.06](#) (Westlaw current through Sept. 1, 2016) (motion for new trial based on newly discovered evidence must be made within one year of judgment “or at a later time if the court for good cause so permits”); [OHIO R. CRIM. P. 33\(B\)](#) (motion for new trial based on newly discovered evidence must be made within 120 days of judgment unless “it is made to appear by clear and convincing proof that the prisoner was unavoidably prevented from the discovery of the evidence upon which he [or she] must rely”); [OR. R. CIV. P. 64\(F\)](#) (Westlaw current with 2016 Reg. Sess. legislation eff. through July 1, 2016 and ballot measures approved at the Nov. 8, 2016 General Election, pending classification of undesignated material and text revision by the Oregon Reviser) (motion for new trial must be made within ten days of judgment “or such further time as the court may allow”).
- 164 [COLO. R. CRIM. P. 33\(c\)](#) (motion for new trial based on newly discovered evidence must be filed “as soon after entry of judgment as the facts supporting it become known to the defendant”); [MASS. R. CRIM. P. 30\(b\)](#) (Westlaw current through Nov. 1, 2016) (no time limit for new trial motions); [N.J. R. CRIM. P. 3:20-2](#) (Westlaw current through Aug. 15, 2016) (no time limit for new trial motions based on newly discovered evidence); [N.Y. CRIM. PROC. LAW § 440.10.1](#) (Westlaw current through L.2016, chapters 1 to 503.) (no time limit for motions to vacate judgment); [N.C. GEN. STAT. § 15A-1415\(c\)](#) (Westlaw current through the end of the 2016 Regular Session of the General Assembly, pending changes received from the Revisor of Statutes) (new trial motion based on newly discovered evidence must be filed “within a reasonable time of its discovery”); [234 PA. CODE § 720\(C\)](#) (Westlaw current through Pa. Bull., Vol. 46, Num. 50, dated Dec. 10, 2016) (new trial motion based on newly discovered evidence must be filed “promptly after such discovery”); [W.VA. R. CRIM. P. 33](#) (no time limit for new trial motions based on newly discovered evidence).
- 165 See, e.g., [ALA. CODE § 15-17-5\(a\)\(5\) \(20\)](#); [CAL. PENAL CODE § 1181\(8\)](#); [IDAHO CODE ANN. § 19-2406\(7\)](#) (Westlaw current through the 2016 Second Regular Session of the 63rd Idaho Legislature); [MD. RULE 4-331\(c\)](#); [NEB. REV. STAT. §29-2101\(5\) \(2007\)](#); [N.Y. CRIM. P. LAW § 440.10.1\(1\)\(g\)](#); [OHIO R. CRIM. P. 33\(A\)\(6\)](#); [S.D. CODIFIED LAWS § 15-6-59\(a\) \(4\)](#); [WASH. SUPER. CT. CRIM. R. 7.8\(b\)\(2\)](#) (Westlaw current through June 15, 2016).
- 166 See, e.g., [LA. CODE CRIM. PROC. ANN. art. 851\(3\)](#) (Westlaw current through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions); [MISS. UNIF. R. CIR. & COUNTY CT. P. 10.05.3](#); [N.Y. CRIM. PROC. LAW § 440.10.1\(1\)\(g\)](#).
- 167 See, e.g., [Hester v. State](#), 647 S.E.2d 60, 63 (Ga. 2007); [Stephenson v. State](#), 864 N.E.2d 1022, 1048 (Ind. 2007); [Pippitt v. State](#), 737 N.W.2d 221, 226 (Minn. 2007); [State v. Tester](#), 923 A.2d 622, 626 (Vt. 2007); [Hicks v. State](#), 913 A.2d 1189, 1193-94 (Del. 2006).
- 168 See Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 133 (1996).

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169 *See, e.g.*, LA. CODE. CRIM. PROC. ANN. art. 930.3; OHIO REV. CODE ANN. § 2953.21(A)(1)(a); Jackson v. State, 573 P.2d 637, 639 (Kan. Ct. App. 1977); Barbee v. Warden of Md. Penitentiary, 151 A.2d 167, 169 (Md. 1959).

170 For example, several jurisdictions require a prisoner to make a showing of actual innocence. *See, e.g.*, 725 ILL. COMP. STAT. 5/122-1(2) (requiring that petitioner be sentenced to death and evidence “establish [] a substantial basis to believe that the defendant is actually innocent” in order to establish entitlement to relief based on newly discovered evidence); *In re Weber*, 523 P.2d 229, 243 (Cal. 1974) (requiring newly discovered evidence must “point[] unerringly to innocence,” to warrant habeas relief).

171 *See, e.g.*, HAW. R. PENAL P. 40(a)(1); MASS. R. CRIM. P. 30(a); N.M. STAT. ANN. §31-11-6(A) (Westlaw current through the end of the Second Regular and Special Sessions of the 52nd Legislature (2016)); N.Y. CRIM. PROC. LAW § 440.10.1(1).

172 *See, e.g.*, FLA. R. CRIM. P. § 3.850(b)(1); 42 PA. C.S.A. § 9545(b)(1)(ii) (Westlaw current through 2016 Regular Session Acts 1 to 169 and 171 to 175); *see also* N.J. R. 3:22-4 (excusing time limit for claims that “could not reasonably have been raised” in a prior petition); OR. REV. STAT. § 138.510(3) (2005).

173 *See, e.g.*, GA. CODE ANN. § 9-14-52(b) (2007); MCA § 46-21-102(2) (2005) (requiring petition based on newly discovered evidence be filed within a year of when evidence was or could have been discovered); S.C. CODE ANN. §17-27-45(c) (Westlaw current through the 2016 session, subject to technical revisions by the Code Commissioner as authorized by law before official publication.).

174 *See, e.g.*, ALASKA STAT. § 12.72.020(b)(2); TENN. CODE ANN. § 40-30-102(b)(2).

175 *See, e.g.*, KAN. STAT. ANN. § 60-1507(f)(2) (Westlaw current through laws enacted during the 2016 Regular and Special Sessions of the Kansas Legislature).

176 *See, e.g.*, IDAHO CODE § 19-4908; ME. STAT. tit 15, § 2128(3) (Westlaw current through July 29, 2016); MD. CODE ANN., CRIM. PROC. § 7-103(a) (Westlaw current through all legislation from the 2016 Regular Session of the General Assembly).

177 *See, e.g.*, COLO. R. CRIM. P. 35(c)(3)(VI); GA. CODE ANN. § 9-14-51; OKLA. STAT. tit. 22, § 1086 (Westlaw current through Chapter 395 (End) of the Second Session of the 55th Legislature (2016)); TEX. CODE CRIM. PROC. ANN. art. 11.07 sec. 4(a)(1), (c).

178 IND. R. POST-CONVICTION REM. 1 § 9(a) (2015); MASS. R. CRIM. P. 30(c)(5).

179 *See generally* 28 U.S.C. § 2254 (Westlaw current through P.L. 114-254. Also includes P.L. 114-256.).

180 Herrera v. Collins, 506 U.S. 390, 400-01 (1993).

181 *Id.* at 417.

182 Dist. Attorney's Office v. Osborne, 557 U.S. 57, 71 (2009); House v. Bell, 547 U.S. 518, 554-55 (2006).

183 *See, e.g.*, United States v. Sampson, 486 F.3d 13, 27-28 (1st Cir. 2007); Albrecht v. Horn, 485 F.3d 103, 121-24 (3d Cir. 2007), abrogated on other grounds by United States v. Berrios, 676 F.3d 118, 126 (3d Cir. 2012); Cress v. Palmer, 484 F.3d 844, 854 (6th Cir. 2007); *In re Davis*, 565 F.3d 810, 823 (11th Cir. 2009); Cox v. Burger, 398 F.3d 1025, 1031 (8th Cir. 2005); Clayton v. Gibson, 199 F.3d 1162, 1180 (10th Cir. 1990); Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc); Milone v. Camp, 22 F.3d 693, 699-700 (7th Cir. 1993); Spencer v. Murray, 5 F.3d 758, 765-66 (4th Cir. 1993). But see United States v. Quinones, 313 F.3d 49, 68 (2d Cir. 2002) (emphasizing that *Herrera* did not hold such an exception exists); Dowthitt v. Johnson, 230 F.3d 733, 741 (5th Cir. 2000) (rejecting existence of such an exception), overruled in part on other grounds by Lewis v. Thaler, 701 F.3d 783, 791 (5th Cir. 2012).

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- 184 Conley v. United States, 323 F.3d 7, 13-14 (1st Cir. 2003); Guinan v. United States, 6 F.3d 468, 470 (7th Cir. 1993), overruled in part on other grounds by Massaro v. United States, 538 U.S. 500, 503-04 (1993); see also Sims v. United States, No. 98-1228, 1999 U.S. App. LEXIS 34746, at *5-6 (6th Cir. Oct. 29, 1999).
- 185 McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013).
- 186 Herrera v. Collins, 506 U.S. 390, 412 (1993).
- 187 Holly Schaffer, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 724 (2002).
- 188 U.S. CONST. art. II, § 2, cl. 1; see, e.g., ALASKA CONST. art. III, § 21; CAL. CONST. art. V, § 8(a); FLA. CONST. art. IV, § 8 (a); ILL. CONST. art. V, § 12; ME. CONST. art. V, § 11; N.Y. CONST. art. V, § 4; OHIO CONST. art. III, § 11; VA. CONST. art. V, § 12; WIS. CONST. art. V, § 6; But cf., PA. CONST. art. V, § 9 (a) (allowing governor to grant clemency only upon recommendation of a Board of Pardons); S.C. CONST. art. IV, § 14 (vesting only partial power to grant clemency in governor); TEX. CONST. art. IV, § 11(b) (permitting governor to grant clemency only after a recommendation from the Board of Pardons).
- 189 See, e.g., *Apply for Clemency*, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION EXECUTIVE CLEMENCY BUREAU, <https://www.ny.gov/services/apply-clemency> (last visited May 15, 2016).
- 190 See, e.g., OR. REV. STAT. § 137.225(1)(a); *Clemency Form*, CONNECTICUT BOARD OF PARDONS AND PAROLES, <http://www.ct.gov/doc/lib/doc/PDF/form/PardonClemencyInstructions.pdf> (last visited May 15, 2016); see also ALA. CODE § 15-22-28(e) (requiring a unanimous vote to grant parole unless prisoner has served certain amount of time).
- 191 See, e.g., MINN. STAT. § 638.02; ILL. PRISONER REVIEW BD., GUIDELINES FOR EXECUTIVE CLEMENCY 1, <https://www.illinois.gov/prb/Pages/prbexeclexemex.aspx> (last modified April 03, 2013).
- 192 See, e.g., ARKANSAS LEGAL SERVICES PARTNERSHIP, PARDON (*EXECUTIVE CLEMENCY*), <https://www.arlegalservices.org/files/FSPardon.pdf> (last updated October 2014); MASS. PAROLE BD., EXECUTIVE CLEMENCY OVERVIEW, <http://www.mass.gov/eopss/law-enforce-and-cj/parole/exec-clemency-unit/executive-clemency-overview.html> (last updated Dec. 10, 2015).
- 193 See, e.g., FLA. BD. OF EXEC. CLEMENCY, RULES OF EXECUTIVE CLEMENCY, https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (last updated Mar. 9, 2011).
- 194 See, e.g., IDAHO ADMIN. CODE R. 50.01.01.450(1)(c) (2016).
- 195 See, e.g., MONT. ADMIN. R. 20.25.901A(2) (2005); VT. STAT. ANN. tit. 28, § 810 (2015).
- 196 Seth Augenstein, *Calif. Inmate Who Maintains Innocence After 35 Years Won't Be Released Soon, Despite Court Victory*, FORENSIC MAG. (Sept. 14, 2015), http://www.forensicmag.com/articles/2015/09/calif-inmate-who-maintains-innocence-after-35-years-wont-be-released-soon-despite-court-victory?et_cid=4813634&et_rid=883093763&location=top.
- 197 *Id.*
- 198 *Id.*
- 199 *Innocent Prisoner's Dilemma*, WIKIPEDIA, https://en.wikipedia.org/wiki/Innocent_prisoner%27s_dilemma (last visited Apr. 19, 2017).
- 200 FED. R. CRIM. P. 33(b)(1).
- 201 506 U.S. 390, 400-01 (1993).

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202 LA. CODE CRIM. PROC. ANN. art. 851(3), 853.

203 *Id.* at art. 930.3.

204 ARK. R. CRIM. P. 33.3(B).

205 *Chisum v. State*, 625 S.W.2d 448, 449 (Ark. 1981). In Tennessee, a prisoner must move for a new trial within thirty days after sentencing, and postconviction relief is only available for claims of constitutional error, not claims based on newly discovered evidence of innocence. TENN. R. CRIM. P. 33(b); *see also Myers v. State*, No. M2004-02411-CCA-MR3-PC, 2005 LEXIS 676, at *11-14 (Tenn. Crim. App. June 29, 2005).

206 725 ILL. COMP. STAT. 5/122-1 (a)(2).

207 *Id.* at 5/116-1(b).

208 *Illinois Abolishes the Death Penalty*, NRP (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty>.

209 ALASKA STAT. §§ 12.72.010(4), 12.72.020(a)(6) (2006). *See generally id.* at §12.72.020. Similarly, in Delaware, a prisoner must apply for postconviction relief within a year of final judgment, regardless of what the claimed ground for relief is. DEL. R. CRIM. P. 61(i)(1). In combination with the sixty day limit on bringing a motion for a new trial, this strict statute of limitations bars any review of a conviction after a certain amount of time has passed. DEL. R. CRIM. P. 33.

210 Molly M Gill, *FAMM Seeks Commutation Cases to Spark Sentencing Reform*, National Association of Criminal Defense Lawyers, Nov. 2007, at 8 (observing that clemency is rarely granted); Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POLITICS 669, 671 (2001) (noting that the granting of clemency “has dramatically declined in the last few decades.”), <http://scholarship.law.wm.edu/facpubs/1260>.

211 Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins*, 71 TEMP. L. REV. 489, 514-15 (1998) ([E]xecutive clemency is vulnerable to the whims of the political process ... [and] ‘possesses ... a lack of guaranteed procedural safeguards and, given the degree of discretion, a risk of arbitrary denial.’” (quoting Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1009 (1994)); Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 145-146 (2005) (“[T]he clemency process poses three major problems: (1) it is subject to the whims of the political process, (2) it lacks guaranteed procedural safeguards, and (3) its use is approaching the vanishing point.”)).

212 Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, WASH POST, (Apr. 16, 2012), https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justicedept/2012/04/16/gIQAWTcgMT_story.html?tid=a_inl.

213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 Innocence Project, *Kirk Odom*, <http://www.innocenceproject.org/cases/kirk-odom/> (last visited Dec. 21, 2016).

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220 Spencer S. Hsu, *Kirk L. Odom Officially Exonerated; DNA Retesting Cleared Him in D.C. Rape, Robbery*, WASH. POST, (July 13, 2012), https://www.washingtonpost.com/local/crime/kirk-l-odom-officially-exonerated-dna-retesting-cleared-him-in-dc-raperobery/2012/07/13/gJQAUH3piW_story.html.

221 See *Kirk Odom*, *supra* note 219; Innocence Project, *Santae Tribble*, <http://www.innocenceproject.org/cases/santae-tribble/> (last visited Dec. 21, 2016).

222 See *Kirk Odom*, *supra* note 219.

223 *Id.*

224 See *id.*

225 See, e.g., 18 U.S.C. §§ 3600(a), (c)(3); N.C. GEN. STAT. §§ 15A-269(a), (d5).

226 CAL. PENAL CODE § 1405(d)(1).

227 *Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006).

228 *Id.* (quoting *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996)).

229 *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002).

230 See TEX. CODE CRIM. PROC. ANN. art. 26.05(a); cf. *id.* at art. 11.071 § 2.

231 *Id.* at art. 11.07 § 3(d).

232 *Id.*

233 VA. CODE ANN. § 19.2-327.2 to 19.2-327.14.

234 *Id.* at § 19.2-327.11(A) ("The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted, and that such conviction was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence; (iv) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court; (v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court; (vii) the previously unknown or unavailable evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral.").

235 *Id.* at § 19.2-327.11(B).

236 *Id.* at §§ 19.2-327.11(B), (D).

237 *Id.* at § 19.2-327.11(E).

238 *Id.*

239 TEX. SESS. LAW SERV. ch. 410 (S.B. 344) (West 2013), amended by TEX. SESS. LAW SERV. Ch. 1263 (H.B. 3724) (West 2015).

The Statute provides:

(a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by a convicted person at the convicted person's trial; or

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- (2) contradicts scientific evidence relied on by the state at trial.
- (b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:
- (1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:
- (A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and
- (2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.
- (d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since:
- (1) the applicable trial date or dates, for a determination made with respect to an original application; or
- (2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

Id.

240 TEX. CRIM. PROC. CODE ANN. art. 11.073.

241 Robbins v. State, 27 S.W.3d 245 (Tex. App. 2000), *aff'd*, 88 S.W.3d 256 (Tex. App. 2002).

242 *Id.*

243 *Ex parte* Robbins, 360 S.W.3d 446 (Tex. Crim. App. 2011).

244 *Id.*

245 TEX. CRIM. PROC. CODE ANN. § art. 11.073.

246 *Id.*

247 *Id.*

248 *Ex parte* Robbins, No. WR-73484-02, 2013 WL 6212218, at *1 (Tex. Crim App. Nov. 27, 2013). Among the issues requested to be briefed by the Courts were "whether Article 11.073 is a new legal or factual basis under Article 11.07, § 4(a)(1)" and "whether 'the scientific knowledge or method on which the relevant scientific evidence is based,' as set out in Article 11.073(d), applies to an individual expert's knowledge and method." *Id.*

249 *Ex parte* Robbins, 478 S.W.3d 678, 692 (Tex. Crim. App 2014) [hereinafter *Robbins II*].

250 *Id.*

251 *Ex parte* Robbins, No. WR-73,484-02, 2016 WL 370157, at *11 (Tex. Crim. App. Jan. 27, 2016) [hereinafter *Robbins III*].

252 TEX. CODE CRIM. PROC. ANN. art. 11.073, *amended* by Act of June 20, 2015, H.B.3724, 84th Leg. (Tex.). The amended section reads as follows:

- (d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the *field* of scientific knowledge, *a testifying expert's scientific knowledge*, or *a scientific method* on which the relevant scientific evidence is based has changed since:
- (1) the applicable trial date or dates, for a determination made with respect to an original application; or
- (2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

Id. (emphasis added).

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253 Act of Sept. 1, 2015, ch. 1263 (H.B. 3724), 2015 Tex. Sess. Law Serv.

254 *Id.* (emphasis added). The Background and Purpose section of the Bill further makes explicit the intent to codify specifically the holding of *Robbins II*:

The observers contend that a recent Texas Court of Criminal Appeals opinion held that a change in the scientific knowledge of a testifying expert would be a basis for habeas relief under the law. C.S.H.B. 3724 seeks to codify this decision ... The bill specifies that the change in scientific knowledge that the court is required to consider is a change in the field of scientific knowledge.

Crim. Juris. Comm. Rep. C.S.H.B. 3724, 84th Leg. (Tex. 2015).

255 *Robbins III*, *supra* note 251, at *1.

256 *Id.* at *3 (Alcala, J. concurring).

257 *Ex parte* Garrett, No. WR-46210-11, 2014 WL 2491114, at *1 (Tex. Crim. App. May 7, 2014); *Ex parte* Marascio, 471 S.W.3d 832, 851 (Tex. Crim. App. 2015).

258 *Ex parte* Reed, No. WR-50,961-07, 2015 WL 831673, at *1 (Tex. Crim. App. Feb. 23, 2015) (per curiam).

259 *Ex parte* Reed, Nos. WR-50,961-04 & WR-50,961-05, 2009 WL 97260, at *1 (Tex. Crim. App. Jan. 14, 2009), and No. WR-50961-06, 2009 WL 1900364, at *2 (Tex. Crim. App. July 1, 2009).

260 *Id.*

261 State v. Pruett, No. B-01-M015-0-PR-B, 2002 WL 34391803, at *1-3 (Tex. Dist. Apr. 30, 2002).

262 Pruett v. State, No. 74370, 2004 WL 3093232, at *5 (Tex. Crim. App. Sept. 22, 2004).

263 *Ex parte* Pruett, 207 S.W.3d 767 (Tex. Crim. App. 2005).

264 Pruett v. State, NO. AP-77,037, 2014 WL 5422573, at * 1 (Tex. Crim. App Oct. 22, 2014).

265 *Id.* The Texas DNA statute provides:

After examining the results of testing under Article 64.03 and any comparison of a DNA profile under Article 64.035, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, *it is reasonably probable* that the person would not have been convicted.

TEX. CODE CRIM. PROC. ANN. art. 64.04 (emphasis added).

266 *Pruett*, 2014 WL 5422573, at *2.

267 *Ex parte* Pruett, 458 S.W.3d 535, 536-37 (Tex. Crim. App. 2015).

268 *Id.*

269 *Ex parte* Pruett, 458 S.W.3d 537, 539-40 (Tex. Crim. App. 2015) (Alcala, J. dissenting).

270 *Id.* at 538, 540-41.

271 *Id.*

272 *Id.*

273 *Id.*

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274 *Id.* at 539 (“Too many unanswered questions with respect to the meaning and application of Article 11.073 to permit a person to be executed for capital murder in a case in which it appears that junk science was used to corroborate the inherently questionable inmate testimony.”). The dissenting Judge further laid out the still ambiguous elements of the statute: Because the meaning of the temporal requirements of this statute are a matter of first impression before us, this Court should grant applicant's motion to stay the execution to fully consider whether it is this Court or the habeas court that should determine whether an applicant has pleaded facts to make a *prima facie* showing of “reasonable diligence” to secure the new-science evidence, whether such a pleading requirement exists at all in this context, and whether a habeas court rather than this Court must make a finding on the question of reasonable diligence as part of the trial court's findings and conclusions as to the merits of a complaint.

Id. at 542.

275 *Id.* at 541.

276 *Id.*

277 *Id.* at 541-542.

278 *Id.* at 542.

279 CAL. PEN CODE § 1473. The 1975 Amendment added subsections (b) through (d) to the statute:

(b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

(1) *False evidence* that is *substantially material or probative on the issue of guilt or punishment* was introduced against a person at a hearing or trial relating to his or her incarceration.

(2) *False physical evidence*, believed by a person to be *factual, probative, or material on the issue of guilt*, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

(c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to subdivision (b).

(d) This section shall not be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies.

Id. (emphasis added.) Subsection (b) thus distinguished between (1) false evidence *substantially* material or probative of guilt and, in cases of a guilty plea, (2) material *false physical evidence*. *Id.*

280 CAL. PEN CODE § 1473 (2013 California Senate Bill No. 1058, California 2013-2014 Regular Session, 2014 Cal. Legis. Serv. Ch. 623 (S.B. 1058) (WEST)) The 2014 Amendment, approved in September 2014 and effective January 2015, added subsection (e) to the existing Cal Pen Code § 1473:

(e)(1) For purposes of this section, “*false evidence*” shall include *opinions of experts* that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.

(2) This section does not create additional liabilities, beyond those already recognized, for an expert who repudiates his or her original opinion provided at a hearing or trial or whose opinion has been undermined by later scientific research or technological advancements.

Id. (emphasis added).

281 Cal S.B. 1058 (NS) (2013), 2013 CA S.B. 1058 (NS), California Committee Report; *In re Richards*, 289 P.3d 860 (2012). See also Radley Balko, *California's Senate has Approved an Important New Forensics Bill*, WASH. POST (Apr. 11, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/04/11/californias-senate-has-approved-an-important-new-forensics-bill>.

282 *In re Richards*, 289 P.3d 860, 864-66.

283 *Id.* at 866

284 *Id.*

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285 The new forensic evidence included: (1) DNA evidence on one of the alleged murder weapons; (2) hair found under victim's fingernail; and (3) a tuft of fiber resembling fiber in his shirt not lodged under the victims' fingernail. *Richards v. Superior Court*, Cal. App. 4th Dist. unpub. LEXIS 8542, *1, *10-11 (Nov. 26, 2014).

286 *Id.* at 11.

287 *Id.* at 11-12.

288 *In re Richards*, 289 P.3d 860, 863 (Cal. 2012).

289 *Id.*

290 *Id.* at 873.

291 *Id.* at 873. The court points to the "tentative" nature of the opinion by emphasizing the language used, that "petitioner's dentition is 'consistent with' the bite mark." The court elaborates further: "... in the case of a tentative opinion regarding a subjective question, the opinion is not proved false if, as here, the petitioner's experts concede it might be true. Otherwise, every criminal case becomes a never-ending battle of experts over subjective assertions that can never be conclusively determined one way or the other." *Id.*

292 *Id.* at 868-69 (quoting *In re Clark*, 855 P.2d 729, 766 (Cal. 1993)).

293 *Id.* at 869-70, 877-78.

294 *Richards*, Cal. App. 4th Dist. unpub. LEXIS 8542, *20.

295 Cal. S.B.618, 2013 Chapter 800. (Cal. 2013). The relevant portion of [Section 1485.55](#) states, "(g) For the purposes of this section, 'new evidence' means evidence that was not available or known at the time of trial that completely undermines the prosecution case and points unerringly to innocence."

296 See *Jones v. Davis*, 2015 U.S. Dist. LEXIS 120213, *1, *4-5 (E.D. Cal. Sept. 8, 2015) (imposing a diligence requirement on false evidence and filing findings and recommendations denying capital defendant's stay-and-abeyance motion and writ of habeas corpus in part due to a lack of diligence because defendant could have obtained the psychologist expert's changed opinion sooner, despite the only recent explicit inclusion of repudiated expert opinion as "false evidence" warranting relief under [§ 1473](#)). *Jones v. Davis*, 2016 U.S. Dist. LEXIS 42823 *1, *2 (E.D. Cal. Mar. 29, 2016) (affirming the magistrate's findings after conducting a de novo review). See also *Keiper v. Holland*, 2015 U.S. Dist. LEXIS 175016 *1, n.8 (C.D. Cal. Dec. 7, 2015) (filing findings and recommendations holding that the forensic pathologist's later testimony does not constitute "false evidence" under [Cal. Pen. Code §1473](#) because it has not been repudiated or undermined by later scientific advances and [Cal. Pen. Code §1473](#) inapplicable as a basis for habeas relief after the pathologist stated that there were "smaller abrasions that you might be able to exclude" from being the cause of death when pathologist earlier testified that the cause of death were multiple and combined blunt impact injuries to the head). See also *People v. Johnson*, 235 Cal. App. 4th 80, 91 (Cal. App. 1st Dist. 2015) (holding that even while the new version of the DSM may cast doubt on the validity of a paraphilic coercive disorder diagnosis, it does not reflect "scientific research that undermines expert testimony diagnosing that disorder and renders that testimony false evidence" when the commitment of a sexually violent predator does not have to be based on a disorder uniformly recognized by the mental health community).

297 CA S.B. 69 (2015)- Failed.

298 2015 Bill Text CA S.B. 694, Reg. Leg. Sess. (Cal. Feb. 27, 2015). In the initial proposal, [Section 1473\(b\)](#) was to include an additional section that states: "(3) NEW EVIDENCE EXISTS WHICH WOULD RAISE A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME IF A NEW TRIAL WERE GRANTED. *Id.* The identical phrase "RAISES A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME IF A NEW TRIAL WERE GRANTED" was added throughout [Section 1485.55](#) to lessen the petitioner's evidentiary burden.

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299 2015 Bill Text CA S.B. 694, Reg. Leg. Sess. (Cal. July 16, 2015). The proposed **1473(b)(3)(A)** states: “New evidence exists <<strikethrough>>which would raise a reasonable probability of a different outcome if a new trial were granted.<<end strikethrough>> THAT IS CREDIBLE, MATERIAL, AND OF SUCH DECISIVE FORCE AND VALUE THAT IT WOULD HAVE MORE LIKELY THAN NOT CHANGED THE OUTCOME AT TRIAL. *Id.*

300 *Id.* The added **Section 1473(b)(3)(B)** states: “FOR PURPOSES OF THIS SECTION, “NEW EVIDENCE” MEANS EVIDENCE THAT HAS BEEN DISCOVERED AFTER TRIAL, THAT COULD NOT HAVE BEEN DISCOVERED PRIOR TO TRIAL BY THE EXERCISE OF DUE DILIGENCE, AND IS ADMISSIBLE AND NOT MERELY CUMULATIVE, CORROBORATIVE, COLLATERAL, OR IMPEACHING.” *Id.*

301 2015 Bill Text CA S.B. 694, Reg. Leg. Sess. (Cal. Feb. 28, 2016).

302 *Id.*

303 *Id.*

304 *In re Davis*, 557 U.S. 952, 955 (2009) (Scalia, J. dissenting). In 1994, Justice Scalia also voted against a petition asking the Supreme Court to review the case of Henry McCollum. McCollum was North Carolina's longest-serving death row inmate. McCollum and his half-brother Leon Brown were convicted of raping and killing an 11-year-old girl. They were later exonerated in 2014 after DNA evidence cleared them of the crime. Corey Adwar, *Justice Scalia Says Executing the Innocent Doesn't Violate the Constitution*, BUS. INSIDER (Sept. 4, 2014), <http://www.businessinsider.com/antonin-scalia-says-executing-the-innocent-is-constitutional-2014-9>.

305 First, experts on the problems with eyewitness testimony often are not allowed to testify because courts deem it to be within the common knowledge of a jury that eyewitnesses might be wrong, so any “change” in the science of eyewitness identification probably would not qualify under this statute.

306 Simon A. Cole, *Changed Science Writs*. ____ AM. BAR ASSOC. J. LIT. ____ (forthcoming 2016)

307 *Id.*

308 *Id.*

309 **TEX. CODE CRIM. PROC. ANN.** Art. 11.073.

310 *Forensic Science Assessments: A Quality and Gap Analysis*, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, <http://www.aaas.org/page/forensic-science-assessments-quality-and-gap-analysis>. Unfortunately, recent events are poised to bring the work of the National Commission on Forensic Science to a possible standstill. The Trump administration announced on April 10, 2017 that it would dismantle the Commission. See Jessica Gabel Cino, Sessions Assault on Forensic Science Will Lead to More Unsafe Convictions, NEWSWEEK (April 20, 2017) <http://www.newsweek.com/sessionss-assault-forensic-science-will-lead-more-unsafe-convictions-585762>.

311 Jules Henri Poincare (1851-1912).

312 Cole, *supra* note 306.

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POLICE MISCONDUCT AS A CAUSE OF WRONGFUL CONVICTIONS

RUSSELL COVEY*

ABSTRACT

This study gathers data from two mass exonerations resulting from major police scandals, one involving the Rampart division of the L.A.P.D., and the other occurring in Tulia, Texas. To date, these cases have received little systematic attention by wrongful convictions scholars. Study of these cases, however, reveals important differences among subgroups of wrongful convictions. Whereas eyewitness misidentification, faulty forensic evidence, jailhouse informants, and false confessions have been identified as the main contributing factors leading to many wrongful convictions, the Rampart and Tulia exonerees were wrongfully convicted almost exclusively as a result of police perjury. In addition, unlike other exonerated persons, actually innocent individuals charged as a result of police wrongdoing in Rampart or Tulia only rarely contested their guilt at trial. As is the case in the justice system generally, the great majority pleaded guilty. Accordingly, these cases stand in sharp contrast to the conventional wrongful conviction story. Study of these groups of wrongful convictions sheds new light on the mechanisms that lead to the conviction of actually innocent individuals.

I. INTRODUCTION

Police misconduct causes wrongful convictions. Although that fact has long been known, little else occupies this corner of the wrongful convictions universe. When is police misconduct most likely to result in wrongful convictions? How do victims of police misconduct respond to false allegations of wrongdoing or to police lies about the circumstances surrounding an arrest or seizure? How often do victims of police misconduct contest false charges at trial? How often do they resolve charges through plea bargaining? While definitive answers to these questions must await further research, this study seeks to begin the

* Professor of Law, Georgia State University College of Law. Special thanks are owed to Eric Coffelt, who worked hard and traveled far to help me collect data for this study. I also wish to thank Brandon Garrett and Sam Gross for their excellent comments on earlier drafts, and to Max Compton for his research assistance.

inquiry. Specifically, this study attempts to improve our understanding of the intersection of police misconduct and criminal justice, and, more generally, to contribute to the ever-growing bank of knowledge about wrongful convictions.

What we do know about wrongful convictions comes largely from studies of cases terminating in exonerations. These exoneration studies have produced a rich dataset from which several factors that contribute to wrongful convictions have been identified. While critically important, this dataset has significant limitations, chief of which is selection bias. The vast majority of the exonerations studied to date occurred in rape cases following DNA testing and murder cases often involving the death penalty. Such cases, comprising a tiny sliver of the criminal justice system workload, are relatively unrepresentative of the vast majority of felony convictions. As a result, and as researchers compiling these datasets acknowledge, the most closely analyzed data on wrongful convictions does not capture a representative sample of the probable distribution of wrongful convictions that occur.¹

Drawing on new empirical data, this article adds to the wrongful convictions dataset by assessing another group of exonerees—those exonerated following revelations of systemic police and/or prosecutorial misconduct. Specifically, this Article examines two high-profile scandals that saw the wrongful conviction and later formal exoneration of large numbers of persons. To date, little attention has been paid to such exonerees. This, I argue, has affected perceptions of the scope and nature of the wrongful conviction problem. The profile of persons exonerated following revelations of major police misconduct varies dramatically from that of the typical capital murder or DNA exoneree. The defendants in the mass exoneration cases were convicted of different types of crimes, faced less severe punishments, and were far more likely to plead guilty than other exonerated defendants. Using extant data, earlier exoneration studies have found that the primary cause of the wrongful convictions in those studies is witness misidentification.² Based on those findings, some

1. See Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases* 11–12 (Mich. Law Sch. Pub. Law Res. Paper No. 93, 2007), available at <http://ssrn.com/abstract=996629>.

2. See, e.g., D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 773 n.19 (2007) (finding, based on analysis of sixty-two DNA exonerations as of 2000, that mistaken eyewitness identification is the most common factor); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005) (reporting based on study data that the “most common cause of wrongful convictions is eyewitness misidentification”). Edwin Borchard reached the same

commentators and reform-minded organizations have drawn the conclusion that witness misidentification is, in general, the leading cause of wrongful convictions.³ While the former claim was correct at the time those observations were made, the latter generalization likely was not warranted. The data we currently have is simply too limited to permit any accurate generalizations about how frequently wrongful convictions occur, or which contributing factors generate them, in specific or even rough proportion.⁴

Moreover, as one of the nation's leading experts on exonerations, Professor Samuel Gross, has frequently emphasized, the primary causes of wrongful convictions are almost certainly crime-specific.⁵ That is, the factors that tend to cause wrongful convictions in rape cases are different from those that cause wrongful convictions in murder cases, and different from the causes of wrongful convictions in burglary cases, assault cases, and drug cases. The next generation of research must approach wrongful convictions in a more fine-grained manner.

To that end, this study gathers data from two mass exonerations resulting from major police scandals. These exonerations are starkly different than most of the exonerations previously studied. In the "mine-run" cases (if there is such a thing) resulting in individual exonerations, often as a result of DNA testing, several contributing factors, ranging from eyewitness misidentification to false confessions to faulty forensic evidence and testimony, have been identified. In contrast, wrongful convictions in the mass exoneration cases are tied together by a single dominant causal factor: police misconduct. Prior exoneration studies have not focused on this group of exonerees, nor, by and large, have they

conclusion in his 1932 study of wrongful convictions. See EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE xiii (1932).

3. Drawing on its database of persons exonerated through DNA testing, the Innocence Project also claims that mistaken witness identifications are the leading cause of wrongful convictions. See *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/351.php>. See also Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006) (describing "mistaken eyewitness identifications" as "the most frequent single cause of wrongful convictions").

4. In any event, new data on wrongful convictions suggests that witness misidentification no longer can claim the top spot as a contributing cause of known exonerations. See Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012* 40 (Mich. Law Sch. Pub. Law and Legal Theory Working Paper Series, Working Paper No. 277, 2012), available at <http://ssrn.com/abstract=2092195> (identifying "perjury or false accusation" as the leading known cause of wrongful convictions during time period studied).

5. See *id.* at 102.

incorporated data from these cases into the datasets.⁶ This Article does just that. The experiences of those wrongfully convicted as a result of police misconduct differ from other exonerees in interesting and potentially important ways. The exonerations resulting from the Rampart and Tulia police scandals raise the profile of police misconduct as a known cause of wrongful convictions. In addition, the tendency of exonerees in these cases to plead guilty rather than go to trial confirms what many have long suspected: that the problem of wrongful convictions is not limited to the small number of cases in which innocent defendants unsuccessfully contest their guilt in a jury trial.

The article proceeds as follows: Part II describes the Rampart and Tulia cases in detail, and sets forth the circumstances leading to mass exonerations in those cases. Part III provides a brief description of data about wrongful convictions that has been generated in the literature to date. Part IV begins by describing the data used in this study. It then examines the Rampart and Tulia exonerations in more detail, identifying a subset of “actually innocent” exonerees in these cases that can be compared with exonerees in other studies. Part IV then undertakes a closer analysis of the circumstances and mechanisms that led to convictions of innocent Rampart and Tulia defendants. One of the most interesting contrasts between the mass exoneration cases studied here and other instances of wrongful conviction is that, as compared to other groups of exonerees, the great majority here pleaded guilty. Part V takes a closer look at this critically important phenomenon and offers some hypotheses as to why innocent defendants plead guilty in these cases at such a high rate. Disturbingly, the evidence suggests that the factors at work here—coercive penalties for contesting guilt at trial, coupled with few effective defense strategies and unsympathetic forums—may describe the prevailing conditions for a large number of, perhaps even most, criminal defendants. Part VI considers various types of police misconduct, documenting the prevalence of both “procedural perjury” and “substantive perjury,” and the fine line between them. Part VI then compares the experiences of actually innocent exonerees with those who the evidence suggests, though wrongfully convicted, were probably not actually innocent. Based on this comparative data, it finds evidence that innocence does dissuade some defendants from pleading guilty, but that any “innocence effect” has only a minor impact on guilty plea rates. Part VII briefly concludes.

6. One major exception is a new project attempting to compile a comprehensive catalogue of known exonerations, including mass exonerations, in a “National Registry of Exonerations.” *See id.* at 2.

II. THE RAMPART AND TULIA EXONERATIONS

On December 16, 1997, the L.A.P.D. arrested police officer David Mack on charges of stealing \$722,000 from a Los Angeles area Bank of America. Three months later, the department fired two other officers, Brian Hewitt and Daniel Lujan, for severely beating a handcuffed prisoner in an interrogation room.⁷ The common thread was that all three officers were either former or current members of the Rampart CRASH, or Community Resources Against Street Hoodlums, unit.⁸ Rampart is an area covering 7.9 square miles to the northwest of downtown Los Angeles.⁹ It is the most densely populated portion of Los Angeles, with 36,000 people per square mile, and is widely known as a locus of gang activity.¹⁰ At the same time, the Rampart CRASH unit had a reputation for operating in a largely autonomous fashion with little to no oversight.¹¹ The arrest of Officer Mack and termination of Officers Hewitt and Lujan motivated L.A.P.D. Chief of Police Bernard C. Banks to form a special task force to investigate the Rampart CRASH unit.¹²

Then, on March 2, 1998, six-and-a-half pounds of cocaine disappeared from an evidence room in Los Angeles.¹³ Within a week, the special task force investigators honed in on Los Angeles police officer Raphael Perez, a member of Rampart CRASH, as the primary suspect. A year later, trial on the charge ended with a hung jury.¹⁴ Shortly thereafter, Perez cut a deal with prosecutors, agreeing to cooperate with a government investigation of police wrongdoing in the Rampart CRASH unit.¹⁵ Perez worked with investigators over the next year, divulging over 4,000 pages of interrogation transcripts.¹⁶ Perez's testimony revealed police corruption on

7. BOARD OF INQUIRY INTO THE RAMPART AREA CORRUPTION INCIDENT, LOS ANGELES POLICE DEPARTMENT PUBLIC REPORT 2 (2000).

8. *Id.* at 1.

9. *Id.* at 55.

10. *Id.*

11. *Id.* at 69 ("Separate roll calls from the patrol division, a unique patch, jackets, an emphasis on narcotics enforcement, and an outward appearance of elitism were common CRASH traits that Rampart shared with other CRASH . . . units."); *see also id.* at 77–78 (discussing the lack of oversight of the Rampart CRASH unit due to the physical separation of the unit from the rest of the Rampart division and other affirmative acts taken by the unit to isolate itself).

12. *Id.* at 1.

13. Peter J. Boyer, *Bad Cops*, THE NEW YORKER, May 21, 2001, at 67.

14. *Id.* at 69.

15. CRASH is the acronym given to L.A.P.D.'s specialized anti-gang units. Terry McDermott, *Rafael Perez: The Road to Rampart*, L.A. TIMES, Dec. 31, 2000, available at <http://articles.latimes.com/2000/dec/31/news/mn-6831>.

16. RAMPART RECONSIDERED: THE SEARCH FOR REAL REFORM SEVEN YEARS LATER 53 (2006).

an unimagined scale, implicating police officers in wrongful killings, indiscriminate beatings and violence, theft, and drug dealing. Perez's testimony also implicated dozens of police officers in systematic acts of dishonest law enforcement, exposing hundreds of instances in which evidence or contraband was planted on suspects, false statements were coerced or fabricated, and police officers offered perjured testimony in court. Perez's confessions prompted the L.A.P.D. to re-name its investigative task force the "Rampart Task Force."¹⁷ The Task Force was charged with corroborating Perez's allegations of corruption within Rampart CRASH.¹⁸ What followed was, in the words of one independent commission, one of the "worst police scandals in American history."¹⁹ Ultimately, the District Attorney was able to corroborate hundreds of Perez's allegations and the L.A.P.D. entered into a consent decree with the U.S. Department of Justice, submitting to federal oversight of departmental operations.²⁰ As a result of the scandal, more than three hundred prisoners filed writs of habeas corpus seeking to overturn allegedly tainted convictions, and approximately 156 felony convictions were dismissed or overturned as a result of "Rampart related" writs,²¹ 110 of which were either initiated or unopposed by the District Attorney.²²

The extent of wrongdoing by the L.A.P.D., however, remains a mystery to this day largely due to the overall ineffectiveness of the L.A.P.D.'s internal investigation of the police force.²³ Although Officer Perez claimed that "ninety percent of the officers that work CRASH, and not just Rampart CRASH, falsify a lot of information" and "put cases on people,"²⁴ no investigation or follow-up was ever undertaken to explore, or

17. *Id.*

18. *Id.*

19. REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL 1 (2000), available at <http://www.ci.la.ca.us/oig/rirprpt.pdf>.

20. RAMPART RECONSIDERED: THE SEARCH FOR REAL REFORM SEVEN YEARS LATER, *supra* note 16, at 6–7, 37–38.

21. RAMPART RECONSIDERED: THE SEARCH FOR REAL REFORM SEVEN YEARS LATER App. C. Fourteen Rampart related writs remained pending at the time these statistics were compiled. *Id.*

22. *Id.* To the best of my knowledge, all of the writs initiated or unopposed by the D.A.'s office were granted. Courts were far more skeptical in writ cases initiated by defendants if the D.A. opposed the writ. Although relief was granted in approximately forty such cases, the large majority of contested writ applications were denied.

23. RAMPART RECONSIDERED: THE SEARCH FOR REAL REFORM SEVEN YEARS LATER, *supra* note 16, at 47 (concluding that basic facts regarding Rampart corruption scandal remain unknown seven years afterwards, including "[t]he extent of Rampart CRASH-like misconduct in the CRASH units of other divisions, other specialized units and LAPD policing generally"); *see also id.* at 54 ("The [L.A.P.D.] appeared to lack a clear and well-defined investigative approach and strategy and did not establish a plan for interagency coordination.").

24. *Id.* at 53.

even clarify, those allegations.²⁵ In speaking with an investigative panel, some officers, who spoke anonymously out of fear of retribution, expressed concerns that the department did not genuinely seek to uncover the extent of the corruption.²⁶ In fact, the L.A.P.D. failed to produce a promised “after-action” report which, according to the department, was going to include “the exact nature and disposition of each allegation.”²⁷ Consequently, whatever the department may have uncovered about widespread corruption throughout the force remains outside the public domain.²⁸

In the spring of 2003, while the Rampart story was winding down, news of another major police scandal broke, this time not out of a major metropolitan police force but instead in the tiny west Texas town of Tulia, located in Swisher County. The Tulia operation began as a roundup of suspected drug dealers in the summer of 1999, but transformed into what some described as a wholesale assault on the black residents of Tulia. The operation was spearheaded by a freelance agent named Tom Coleman.²⁹ Working undercover, Coleman claimed to have bought powder cocaine from more than 20% of the adult black residents of Tulia.³⁰ In all, nearly fifty persons were convicted of selling drugs to Coleman, in most cases based solely on Coleman’s uncorroborated testimony.³¹

The first several Tulia defendants fought the drug charges at trial and were convicted and sentenced to draconian prison terms.³² After seeing the

25. *Id.* at 48, 54.

26. *Id.* at 65 n.95.

27. *Id.* at 62 (internal quotations omitted).

28. *Id.* at 63.

29. New York Times reporter Bob Herbert had covered the story even before Coleman’s credibility was shattered and the cases fell apart. See Bob Herbert, *Tulia’s Shattered Lives*, N.Y. TIMES (Aug. 5, 2002), <http://www.nytimes.com/2002/08/05/opinion/tulia-s-shattered-lives.html?scp=7&sq=tulia&st=cse>.

30. NATE BLAKESLEE, *TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN* 5 (2005).

31. *Id.*

32. *Id.* at 6. Joe Moore was charged with making two drug deliveries: a single gram of crack cocaine and an eight ball of powder cocaine. With two prior drug felonies on his record, Moore faced a potential sentence, if convicted, of twenty-five to ninety-nine years in jail. *Id.* at 44. At trial, Coleman testified that he purchased the drugs at Moore’s house. Moore acknowledged that Coleman and another individual had come by his house, but contended that he chased Coleman away and that Coleman was lying about purchasing the drugs. *Id.* Apart from a small bag of cocaine that Coleman claimed to be the fruits of the sale, no evidence corroborated either of the alleged transactions. *Id.* In a contest of credibility pitting law-enforcement officer against convicted drug dealer, the jury banked on the officer. Moore was convicted and sentenced to ninety years. *Id.* at 59.

The next two defendants, Chris Jackson and Jason Williams, were convicted based on virtually identical evidence. *Id.* at 82–83. Jackson received a twenty year sentence for allegedly selling an eight ball of cocaine. *Id.* at 83. Williams was convicted of multiple transactions and, based on the additional

writing on the wall, however, most of the remaining defendants agreed to plead guilty. In all, forty-seven persons were charged and thirty-five were convicted. Of the twelve who were not convicted, several were placed on deferred adjudication.³³

As these cases were tried, however, it became increasingly evident that Coleman's testimony was not credible. Defense attorneys discovered that Coleman had been arrested on theft charges in a neighboring county and lied about it on his employment application to the task force.³⁴ They also learned that Coleman had a history of employment problems, mental health problems, and significant unpaid debts.³⁵ Worse still, it became increasingly evident that Coleman's bosses in Tulia, as well as the prosecutor in the Tulia cases, knew of Coleman's problems and lied about them under oath in the course of the Tulia trials.³⁶

After the Texas Court of Criminal Appeals remanded four of the Tulia convictions for evidentiary hearings on claims that the prosecutor had failed to turn over material exculpatory evidence as required by *Brady v. Maryland*,³⁷ hearings were conducted before a different trial judge. In the course of the hearings, it became clear that Coleman had perjured himself on numerous occasions during the Tulia trials, and that other law enforcement officials may have done so as well.³⁸ Ultimately, the state agreed to a global settlement with defense attorneys in which it stipulated that Coleman was not a credible witness, vacated every conviction obtained as a result of the sting operation without seeking new trials against any of the defendants, and provided \$250,000 to be divided among the defendants.³⁹ In exchange, the defendants agreed not to sue the county.⁴⁰ The state judge who presided at the hearing found "that Mr.

allegation that the sales occurred in a drug-free zone, received a forty-five year sentence, notwithstanding that he was only nineteen years old and had no prior convictions. *Id.*

Cash Love, one of the few white suspects arrested in the sting operation, was convicted of making eight sales, some in a drug-free zone, and was sentenced to 361 years. *Id.* at 92. Another defendant, Donnie Smith, was convicted of the first of several drug charges and sentenced to two years. *Id.* at 136. He pleaded guilty to the remaining charges and received a twelve and a half year sentence. *Id.* at 136–37. After Smith, two more defendants gambled on jury trials and lost. Freddie Brookins, Jr. was sentenced to twenty years. *Id.* at 157. Kareem Abdul Jabbar White received a sixty year sentence. *Id.* at 177.

33. *Id.* at 409.

34. *Id.* at 103–04.

35. *Id.* at 302–05.

36. *Id.* at 305–07, 388–89.

37. 373 U.S. 83 (1963). See BLAKESLEE, *supra* note 30, at 317.

38. BLAKESLEE, *supra* note 30, at 388–89.

39. *Id.* at 384, 386.

40. *Id.* at 385.

Coleman had engaged in ‘blatant perjury’ and was ‘the most devious, nonresponsive law enforcement witness this court has witnessed in twenty-five years on the bench in Texas.’”⁴¹ Coleman was eventually tried and convicted of one count of perjury and sentenced to ten years probation.⁴²

Although the settlement was contingent on approval by the Court of Criminal Appeals, when that approval was not immediately forthcoming, the Texas legislature passed a bill “specifically authorizing” the judge “to grant bond to the defendants.”⁴³ Texas Governor Rick Perry then asked the Texas Board of Pardons and Paroles to review the cases. Pardons were granted to all thirty-five Tulia defendants convicted as a result of the sting operation.⁴⁴ Two more individuals later were exonerated by courts.⁴⁵

Rampart and Tulia together account for nearly two hundred cases of wrongful conviction and represent two large sets of exonerations stemming from police corruption scandals. But these are not the only major scandals that have recently beset law enforcement organizations in the United States, or even in Texas. In Hearne, Texas, numerous cases in 2001 were dismissed following revelations that a drug task force was systematically targeting black residents in an effort, allegedly, to drive them from the community.⁴⁶ As in Tulia, the evidence against the defendants in these cases consisted solely of the uncorroborated assertions of a single, unreliable, police informant. Although most cases were dismissed prior to conviction, some innocent defendants pleaded guilty before the police wrongdoing was exposed.⁴⁷ A year later, in the so-called “Dallas Sheetrock scandal,” at least thirty-nine criminal cases were dropped or dismissed after it was discovered that white powder allegedly recovered from criminal suspects and identified through field-tests as cocaine was actually ground up sheetrock packaged to look like cocaine.

41. Steve Barnes, *Rogue Narcotics Agent in Texas Is Found Guilty of Perjury*, N.Y. TIMES (Jan. 15, 2005), <http://www.nytimes.com/2005/01/15/national/15tulia.html> (last visited, Sept. 30, 2011).

42. BLAKESLEE, *supra* note 30, at 408.

43. *Id.* at 389.

44. A lawsuit brought against Coleman and the “26-county Panhandle Regional Narcotics Trafficking Task Force” by forty-five individuals caught up in the sting operation was settled in 2004 after the defendants in the lawsuit agreed to payment of six million dollars. See Barnes, *supra* note 41.

45. Janelle Stecklein, *Judge reverses probation decision of Tulia brothers*, AMARILLO GLOBE-NEWS (Feb. 5, 2011, 1:12 AM), <http://amarillo.com/news/local-news/2011-02-05/decision-reversed-tulians>.

46. A.P., Texas: Suit Filed Over Drug Arrests, 11/2/02 N.Y. TIMES (Abstracts), 2002 WLNR 10823176.

47. See First Am. Compl. For Inj. Relief And Damages And Jury Trial at 5, Kelly v. Paschall, No. 02-A-02-CA-702 JN (W.D. Tex. Apr. 2, 2003).

All of the victims in the scandal were blue-collar Mexican immigrants who spoke little or no English.⁴⁸

Another Tulia-like scandal erupted more recently in St. Charles Parish, Louisiana, where seventy narcotics cases made by a single undercover officer were dismissed following revelations that the undercover officer had lied under oath in a criminal investigation. Before the scandal broke, at least twenty persons in cases made by the undercover officer had already pled guilty.⁴⁹ An even larger Rampart-style corruption case has unfolded in Camden, New Jersey.⁵⁰ Other incidents have also grabbed recent headlines.⁵¹ Gross and Shaffer have identified twelve separate incidents involving group exonerations based on police misconduct involving exonerations of at least 1,100 people.⁵²

48. See Paul Duggan, 'Sheetrock Scandal' Hits Dallas Police: Cases Dropped, Officers Probed After Cocaine 'Evidence' Turns Out to Be Fake, WASH. POST (Jan. 18, 2002), <http://www.washingtonpost.com/ac2/wp-dyn/A229-2002Jan18?language=printer>.

49. See Cop's Alleged Past Ruins 70 St. Charles Parish Drug Cases, FOX EIGHT LIVE (Sept. 20, 2010, 2:40 PM), <http://www.projectnola.com/the-news/news/42-fox-8/106713>; Lori Lyons, St. Charles drug arrests in jeopardy after undercover cop discredited, authorities say, THE TIMES-PICAYUNE (Sept. 20, 2010, 8:15 PM), http://www.nola.com/crime/index.ssf/2010/09/st_charles_drug_arrests_in_jeo.html. To the best of my knowledge, however, and unlike Tulia, none of those guilty pleas have been overturned.

50. The full scope of the Camden scandal is still not clear. More than two hundred people have had convictions vacated or charges dismissed as a result of confessed misconduct implicating at least five officers in wrongdoing. The misconduct includes planting evidence on innocent persons and providing false testimony to convict them of crimes they did not commit. See Barbara Boyer, Two Former Camden Officers Face More Federal Charges, THE INQUIRER (Sept. 10, 2011), http://articles.philly.com/2011-09-09/news/30135226_1_original-indictment-amount-of-illegal-drugs-special-operations-unit.

51. In Tulsa, at least five Tulsa police officers have been charged with perjury and witness tampering. One defendant faced fifty-eight counts of wrongdoing. At least eleven people were released from prison as a result, with more cases under review. See Emory Bryan, Five Tulsa Police Officers Indicted in Corruption Probe, THE NEWS ON 6 (July 20, 2010, 9:17 PM), <http://www.newsone6.com/story/12840428/five-tulsa-police-officers-indicted-in-corruption-probe?redirected=true>. In Denver, one out of every seventeen police officers has been subject to administrative discipline for "departing from the truth" or similar conduct in matters related to their official duties. That figure counts only those who have been formally sanctioned. It excludes those who are currently under investigation for similar violations, those who were investigated but insufficient proof of wrongdoing was presented to sustain a charge, and those whose misdeeds have not yet been detected. Christopher N. Osher, Denver cops' credibility problems not always clear to defenders, juries, DENVER POST (July 10, 2011), http://www.denverpost.com/news/ci_18448755 (reporting that eighty-one officers still on the force out of 1,434 are on a list citing violators "in at least one of the following categories: departing from the truth, violating the law, making false reports, making misleading or inaccurate statements, committing a deceptive act, engaging in conduct prohibited by law, engaging in aggravated conduct prohibited by law, conspiring to commit conduct prohibited by law, soliciting or accepting a bribe, removing reports or records, destroying reports or records or altering information on official documents"). This list only includes the names of officers against whom violations have been formally substantiated. It does not include officers who are under investigation, or who were investigated but not cited. *Id.*

52. Gross & Shaffer, *supra* note 6, at 84.

In short, Rampart and Tulia produced numerous exonerations and received a significant amount of national attention, but they are not unique. Revelations of large-scale police misconduct both preceded and post-dated them, suggesting that police misconduct leading to the wrongful conviction of innocent persons is a disturbingly common feature of the criminal justice system.

III. WHAT WE KNOW ABOUT EXONEREES GENERALLY

When it comes to wrongful convictions, very little hard data exists.⁵³ After all, it is extraordinarily difficult to systematically identify erroneous convictions of innocent persons. Because the criminal justice process itself is assumed to provide the definitive test of guilt or innocence, there are few external Archimedean points from which its results may be tested. Our knowledge about innocent persons who are wrongfully convicted, therefore, is derived primarily from exonerations—that is, cases in which some government official, acting in an official capacity, has made a formal finding or declaration that a defendant is “not guilty of a crime for which he or she had previously been convicted.”⁵⁴

Wrongful convictions have been the subject of academic inquiry since Edwin Borchard published his pathbreaking studies on the matter in the early part of the twentieth century.⁵⁵ Other studies, including an influential article by Hugo Bedau and Michael Radelet, followed.⁵⁶ Until quite recently, however, the leading study of criminal exonerations has been Gross, Jacoby, Matheson, Montgomery, and Patil’s analysis of exonerations occurring between 1989 and 2003 (“Gross Study”).⁵⁷ That study has now been updated and greatly expanded in an examination of exonerations through 2012.⁵⁸ Brandon Garrett has also made major contributions to the bank of knowledge of the exonerated through a series of articles, and a book (collectively, the “Garrett Study”) on DNA

53. See Robert Carl Schehr, *The Criminal Cases Review Commission As A State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1290–91 (2005) (describing the number of wrongfully convicted persons as a “dark number, a statistical unknown”).

54. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

55. See Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684 (1913); EDWIN BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (Yale Univ. Press 1932).

56. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

57. Gross et al., *supra* note 54.

58. See Gross & Shaffer, *supra* note 6.

exoneration cases.⁵⁹ As the authors of both the Gross and Garrett Studies concede, the fact that an individual has been exonerated does not conclusively prove that the individual is actually innocent, although often the nature and circumstances of the evidence will leave little doubt. Nonetheless, formal exoneration is the best that our legal system is usually capable of doing, and thus provides the best indicator we have of instances in which an actually innocent person has been wrongfully convicted.

These studies have identified some commonalities in cases resulting in exoneration. First, most exonerees were convicted of very serious crimes, typically resulting in sentences of death or long terms of imprisonment.⁶⁰ Second, the vast majority of exonerees contested their guilt at trial. Only a tiny handful of exonerees, about 6%, pled guilty.⁶¹ This fact is particularly striking because the vast majority of criminal convictions, upwards of 90%, are obtained through guilty pleas. Third, although many types of procedural and evidentiary errors have been identified in cases of wrongful conviction, earlier studies consistently pointed to eyewitness misidentification as the leading cause of wrongful convictions, followed closely by faulty forensic evidence.⁶² Fourth, the studies suggest that persons of color are at far greater risk of false conviction than whites.⁶³ The authors of these studies are quick to deny that the data is in any way representative of the wrongfully convicted more generally. As Gross and Shaffer observe in a more recent study, “[e]xonerations are unlikely, uncommon and unrepresentative of the mass of invisible false

59. Garrett's main findings regarding the profile of innocent persons who were wrongfully convicted can be found in Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008). Those findings were updated through 2010 in his book. See BRANDON L. GARRETT, CONVICTING THE INNOCENT (Harvard Univ. Press 2011).

60. Gross et al., *supra* note 54, at 535 ("With a handful of exceptions, everyone on our list of exonerees was sentenced to death or to a long term of imprisonment. Ninety-three percent were sentenced to ten years in prison or more; 77% were sentenced to at least twenty-five years. . . .") (footnote omitted).

61. *Id.* at 536 (finding that 5.8% of exonerees (20/340) pleaded guilty); GARRETT, *supra* note 59, at 150 (reporting that 6%, or sixteen of 250 DNA exonerees, pleaded guilty).

62. Gross, *supra* note 2, at 542; GARRETT, *supra* note 59, at 48, 89 (reporting that eyewitness misidentifications factored in 76% of DNA exoneration cases, and faulty forensic testimony or evidence in 74%). Gross's more recent study, which includes data from a broader source of exonerations, including the mass exonerations, finds that perjury or false accusation is the leading contributing factor to wrongful convictions overall, but that the prevalence of various contributing factors turns heavily on crime of conviction. See Gross & Shaffer, *supra* note 6, at 40.

63. Of the first 250 persons exonerated by DNA evidence, 62% were black, 30% were white, and 8% were Hispanic. Asians constituted less than 1% of the total. See GARRETT, *supra* note 59, at 5. Moreover, as Brandon Garrett has observed, although minorities are overrepresented in the prison population, their numbers among exonerees, or at least DNA exonerees, are even greater. Garrett, *supra* note 59, at 66.

convictions.⁶⁴ Nonetheless, because their data is the best and most reliable that we have concerning wrongful convictions, there is an inevitable tendency to generalize or draw inferences about the characteristics, frequency, and causes of wrongful convictions from the data.⁶⁵

As this Article will show, however, the mechanisms that produce exonerations in the police scandal cases differ substantially from those in other sorts of cases where exonerations have been most common. In trying to understand the role of police misconduct in causing wrongful convictions, then, it is imperative to deploy a narrow lens.

It is impossible to know how frequently police misconduct of the type uncovered in Rampart and Tulia occurs, or how many wrongful convictions result from such misconduct. What happened in Rampart and Tulia appears to have involved widespread misconduct by police officers and prosecutors. In these cases, investigators discovered a culture of corruption that fostered official misconduct. Even if instances in which entire police departments, or at least entire units within a department, succumb to such cultural corruption are rare, the type of misconduct that led to the wrongful conviction of defendants in Rampart and Tulia could just as easily be perpetrated by smaller groups of corrupt officers, or even by officers acting on their own. Wrongful convictions resulting from occasional police misconduct involving only a single officer, or a relatively small group of corrupt police officers, scattered throughout the nation's police departments, would be almost impossible to detect. And yet, the aggregate effect of such misconduct could easily generate a very large number of wrongful convictions. It is also possible that such cases may truly be rare. We simply do not have any way to know.

In either case, the lack of attention paid to date to the mass exoneration cases has tended to reinforce some misconceptions about the causes and characteristics of the convictions of innocent persons. The vast majority of exonerations studied to date arose from murder and rape cases, in which defendants received typically severe sentences—often long prison terms or death sentences. The vast majority of these exonerations—some 94%—involved defendants who contested their guilt at trial and who were, as a result, able to pursue the full panoply of post-conviction remedies

64. Gross & Shaffer, *supra* note 6, at 9.

65. For example, based on this data some have concluded that the rate of false convictions is much lower among guilty pleas than trials. See, e.g., Larry Laudan, *Is It Finally Time to Put 'Proof Beyond a Reasonable Doubt' Out to Pasture?* 15 (U. of Tex. Public Law & Legal Theory Working Paper Series, Paper No. 194, 2011), available at <http://ssrn.com/abstract=1815321>.

available to them. These defendants make up an unrepresentative pool in a criminal justice system characterized by overwhelming rates of guilty pleas.⁶⁶ As a result, while the exoneration data currently available tells us something about how innocent people can be convicted in rape and murder cases at trial, it tells us very little about how innocent people might agree to plead guilty in cases involving the more mundane criminal offenses that make up the bulk of criminal courts' daily workloads. Little research to date illuminates this important corner of the wrongful convictions problem.⁶⁷

The present study seeks to partially rectify that problem in two ways. First, the study examines, to the extent available data permits, the causes and characteristics of the wrongful convictions identified in the mass exonerations. Second, the study contrasts that data with the data gathered in earlier exoneration studies to challenge some common assumptions about wrongful convictions more generally. By examining data from exonerations which arose in settings very different from the typical DNA-based exonerations, my goal is to provide more nuance to our understanding of wrongful convictions, to debunk some suggested inferences from earlier data sets, and to identify new avenues for investigation and reform.

IV. ACTUALLY INNOCENT RAMPART AND TULIA EXONEREES

A. *The Data*

The data used in this study comes from two well-publicized incidents of systematic police misconduct, the Rampart and Tulia scandals. Both incidents involved dozens of criminal defendants. More than 150 persons were exonerated as a result of Rampart, and thirty-seven as a result of Tulia.⁶⁸ Unlike some other recent police misconduct scandals,

66. See, e.g., United States Sentencing Commission's 2011 Annual Report, Chapter Five: Research 33 (2011), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/2011_Annual_Report_Chap5.pdf (reporting that 96.9% of federal felony convictions were the result of guilty pleas).

67. See Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 834–35 (2010) (observing that “research offers few glimpses into errors” affecting “lesser” felonies, and certainly misdemeanors”).

68. Thirty-five persons were pardoned by Texas Governor Rick Perry. Adam Liptak, *Texas Governor Pardons 35 Arrested in Tainted Sting*, N.Y. TIMES (Aug. 23, 2003), <http://www.nytimes.com/2003/08/23/us/texas-governor-pardons-35-arrested-in-tainted-sting.html>. Two others were exonerated by courts on petitions for habeas relief. See *Ex parte Barrow*, 2010 WL 2618851 (Tex. Crim. App., June 30, 2010); Janelle Stecklein, *Judge reverses probation decision of Tulia brothers*,

investigations of alleged police misconduct did not reveal wrongdoing until tens of defendants in Tulia, and hundreds in Rampart, had seen their cases through to conviction. Accordingly, the Rampart and Tulia cases provide an extensive set of data regarding not only how police misconduct can lead to wrongful arrest or wrongful charges, but to wrongful convictions.

The vast bulk of the data on the Rampart scandal relied on in this study was extracted from files obtained from the Los Angeles District Attorney's Office. These files contained office memoranda tracking developments in the Rampart investigation and most helpfully, writs filed by the District Attorney and defense counsel seeking relief for wrongfully convicted defendants. This data was supplemented with other information gleaned from official reports, newspaper articles, and other articles on the scandal appearing in the popular press and in academic commentary. With respect to Tulia, I relied extensively on the facts and case descriptions compiled by Nate Blakeslee in his thorough and engaging account of the Tulia scandal.⁶⁹ I have cross-checked Blakeslee's data, to the extent possible, with other published reports about Tulia, and with data made available to me by attorneys involved in the Tulia cases.

Of the two, the Rampart material provides the greatest insight into how police misconduct "on the ground" can trigger a disastrous chain of events for innocent persons directly resulting in criminal convictions. Because the writs filed on behalf of wrongly convicted Rampart defendants often included narrative accounts of the circumstances of arrest, the Rampart cases provide an illuminating glossary of the many ways that police misconduct can lead to wrongful convictions. Study of these cases in the aggregate provides a fairly detailed empirical picture of wrongful convictions resulting from dishonest policing. The data pertaining to the Tulia cases shows less variation in the factual circumstances surrounding the charges, primarily because of the relatively uniform way in which the Tulia convictions were generated: each Tulia defendant was convicted based almost exclusively on the uncorroborated testimony of a single corrupt undercover agent. However, the Tulia data permits useful observations about the adjudicative procedures in such cases, and deepens the data pool in this regard.

AMARILLO GLOBE-NEWS (Feb. 5, 2011), <http://amarillo.com/news/local-news/2011-02-05/decision-reversed-tulians>.

69. NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN 409–17 (2005).

The data breaks down as follows. Although more than 150 exonerations resulted from the Rampart scandal, the District Attorney's files contained case-specific data for only ninety-seven of those cases, and detailed case data as to eighty-seven of these. None of the case information was complete in any sense of the word.⁷⁰ As a result, there is more information about some cases than others, depending on the extent of factual detail provided in the affidavits and writs for habeas corpus.

Not all of the individuals whose convictions were reversed or vacated, however, were "actually innocent" of the crimes for which they were convicted. Many defendants obtaining relief in Rampart did so because of procedural misconduct on the part of the police, not because the police were without evidence of wrongdoing. For example, many Rampart defendants were exonerated when it became clear that the police officers who had arrested them lied about the circumstances leading to the discovery of contraband. Where evidence of this sort of police misconduct surfaced convictions were rightly reversed, but there is no reason to believe that these defendants were not in fact engaged in criminal conduct.

Prior exoneration studies have focused on cases involving what often is referred to as "actual" or "factual" innocence.⁷¹ Actual innocence cases are those in which either the wrong person was convicted of a crime committed by another, or a person was convicted of a crime that did not actually occur.⁷² In the first Gross study, all 340 exonerees had been absolved through "an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted"⁷³ premised on "strong evidence of factual innocence" and no "unexplained physical evidence of the defendant's guilt."⁷⁴ The first Gross Study excluded from its purview exonerations in cases where the evidence indicated that the exonerees had been "involved in the crimes for which they were convicted."⁷⁵ The Garrett Study similarly focused only on those who "did

70. The D.A.'s office has maintained files from the Rampart cases, but the information was not well-organized and consisted mostly of the legal pleadings prepared in habeas corpus proceedings. We did not have access to the investigative files in individual cases. Useful information that might further clarify the circumstances in these cases no doubt could be found in such files, if they exist. In any event, we did not have access to them.

71. See, e.g., D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007).

72. *Bousley v. United States*, 523 U.S. 614, 615 (1998) ("Actual innocence means factual innocence, not mere legal insufficiency.").

73. Gross, *supra* note 2, at 524.

74. *Id.* at 524 n.4.

75. *Id.* at 527.

not commit the charged crime,”⁷⁶ adopting the criteria used by the Innocence Project to identify its set of innocent exonerees.⁷⁷

Accordingly, I subdivided the Rampart cases into three categories: the “actually innocent” group, the “maybe innocent” group, and the “not innocent” group. In making these divisions, I followed Gross and Garrett in defining an actually innocent exoneree as one who was not involved in the commission of the supposed crime, did not commit the charged crime, or who was convicted of a crime that never occurred.

In assigning the Rampart exonerees to these various groups, I relied heavily on the factual findings presented to reviewing courts by the District Attorney’s Office in petitions for writs of habeas corpus filed by the state, conceding the wrongful conviction and seeking the release of the defendant. I also relied on the factual statements included in the declarations and affidavits filed by investigating agents accompanying the D.A.’s filings. Where habeas petitions were initiated by defendants, I relied on factual allegations made by the petitioners only where those allegations were conceded in the state’s response. I also only assumed the truth of factual allegations made by defendants and their witnesses if the D.A.’s Office affirmatively stated in its filings that prosecutors or investigators had discovered evidence corroborating those accounts.

Based on my review of the files, misconduct unrelated to the factual guilt or innocence of the defendant seems to have been the primary basis for exonerations in forty-nine cases.⁷⁸ In those cases, defendants were exonerated because police officers lied about probable cause, about where a search took place, or about whether the suspect consented to a search. In thirty-eight cases, however, the police misconduct plainly did implicate the guilt/innocence determination. In these cases, police planted drugs or guns on suspects, lied about observing defendants committing crimes, or coerced confessions from innocent individuals. Where convictions were reversed based on reliable evidence of such misconduct, they constitute “exonerations” in the fullest sense of the term and are consistent with the

76. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1645 (2008).

77. GARRETT, *supra* note 59, at 285–86 (explaining that the list of 250 DNA exonerations matches that maintained by the Innocence Project, which conservatively defines DNA exonerations by, for example, omitting “cases in which there has been no exoneration despite DNA evidence of innocence,” and only includes cases in which there is no doubt that the “convicts are actually innocent”).

78. In twenty-seven cases, defendants were exonerated for procedural misconduct by the police, but there remained evidence of criminal culpability on the part of the defendants. Exonerees in these cases were coded as “not innocent.” In another twenty-two cases, the guilt or innocence of the exonerees was not clear from the record. These cases were coded as “maybe innocent.” For a further discussion, see *infra* Part VI.

criteria used by others, including Gross and Garrett, who have studied the wrongful convictions of innocent persons. This study thus focuses primarily on those thirty-eight cases.

Tulia supplies another thirty-seven cases. Thirty-five Tulia exonerations resulted from pardons recommended by Texas Governor Rick Perry. Two defendants were granted writs of habeas corpus vacating their convictions. Several other defendants were also wrongly charged or convicted in the scandal but were never pardoned. One such defendant was a minor who was sent to boot camp and who had already completed his sentence when Governor Perry recommended the Tulia pardons. Other defendants negotiated deals for deferred adjudication. Because convictions were never formally entered in those cases, pardons were not deemed necessary. Although these defendants too were wrongfully convicted, they were not included in the study because no official exonerations were ever granted in their cases.⁷⁹

There are those who continue to assert that at least some of the Tulia defendants were, in fact, guilty. Indeed, about a half-dozen of the Tulia defendants admitted that they helped undercover agent Coleman purchase crack cocaine.⁸⁰ None of the defendants, however, ever admitted involvement in the sale of powder cocaine, and it was the powder cocaine charges that provided the basis for the most serious sentences imposed on the Tulia defendants. Differentiating among Tulia defendants is made more difficult because the Tulia defendants were pardoned *en masse*, based on the fact that the cases were uniformly predicated on the word of a proven liar, and thus no formal individual findings of innocence were ever made. However, what evidence we do have points strongly toward innocence of virtually all of the Tulia defendants. First, in a sting resulting in the arrest of forty-six individuals, where most arrests occurred in the early morning hours, by surprise, at the suspects' homes, not a single suspect was caught in possession of cocaine or crack.⁸¹ Second, none of the alleged drug transactions were recorded on audio or video tape. Indeed, there was virtually no corroborating evidence presented to implicate any of the defendants in the charged crimes. Third, the charges were relatively implausible by their nature. The defendants were drawn

79. At least one person wrongfully charged in the Tulia drug sting, Etta Kelly, did not receive a pardon because she pleaded guilty in exchange for deferred adjudication and thus a conviction was never actually entered in her case. See John Reynolds, *Pardons Urged in Drug Cases*, LUBBOCK AVALANCHE-J. (July 31, 2003), http://lubbockonline.com/stories/073103/reg_073103064.shtml.

80. BLAKESLEE, *supra* note 30, at 296.

81. See Herbert, *supra* note 29.

from Tulia's poorest classes where the drug of choice was crack cocaine. Yet all of the alleged transactions involved small amounts of powder cocaine. These facts strongly undermine the credibility of the charges and support the theory that Tom Coleman, the investigating undercover officer, may have been scamming the Drug Task Force for money by claiming to have engaged in fake sales and then logging into evidence powder cocaine that he himself severely diluted.⁸² In short, while it is possible that one or two of the Tulia defendants were in fact guilty, substantial evidence demonstrates that the vast majority of the Tulia defendants were innocent of any criminal wrongdoing, and the exonerations granted them by the Texas governor based on this evidence is sufficient to bring all of the Tulia defendants within the category of the "actually innocent."

B. Rampart and Tulia Exoneree Demographics

The vast majority of those wrongfully convicted in Rampart and Tulia were persons of color. Although the data available for this study did not specify race or ethnicity of the Rampart defendants, an informal review of the surnames of the defendants strongly suggests that most, if not all, of the Rampart exonerees were of Hispanic origin. That conclusion fits with the population of the Rampart area, which is heavily Hispanic,⁸³ and the demographics of the Rampart area street gangs that the CRASH unit at the center of the Rampart scandal policed.

More precise data exists with respect to the Tulia defendants, the overwhelming majority of whom were persons of color. Of the thirty-five Tulia defendants who received pardons, thirty-one were black, two were Hispanic, and two were white.

The average age of the Tulia exonerees was 29.8 years. There was insufficient data to determine the average age of the Rampart exonerees.⁸⁴ With respect to gender, as is true in criminal law generally, the great

82. Coleman was subsequently convicted of perjury for false testimony given during hearings of Tulia defendants. See Steve Barnes, *Rogue Narcotics Agent in Texas Is Found Guilty of Perjury*, N.Y. TIMES (Jan. 15, 2005), <http://www.nytimes.com/2005/01/15/national/15tulia.html?ref=tomcoleman>.

83. One 2010 study of the area reported that 63% of Rampart's residents are Latino, 26% are Asian-American, and 5% are African-American. The dominant ethnic groups in Rampart are Mexicans, Salvadorans, and Guatemalans. THE URBAN INSTITUTE, EVALUATION OF THE LOS ANGELES GANG REDUCTION AND YOUTH DEVELOPMENT PROGRAM: RAMPART ZONE PROFILE 2 (2010), available at <http://www.urban.org/uploadedpdf/412274-Rampart.pdf>. The two most violent gangs operating in Rampart are 18th Street and Mara Salvatrucha, or MS-13. Both gangs recruit heavily, if not exclusively, from Latinos. *Id.* at 3.

84. See Summary of Data (on file with author).

majority of the exonerees from the Rampart and Tulia scandals were male. Of ninety-seven Rampart exonerees, approximately 90% were male.⁸⁵ Interestingly, among the Rampart exonerees determined in this study to be “actually innocent,” all were male.⁸⁶ Although there is no definitive answer as to why there were no females among the actually innocent Rampart exonerees, it is possible to speculate. The strong gender disparity might reflect an array of factors, including the fact that street gangs are predominantly, if not exclusively, male organizations; that the CRASH unit’s specific mission was to target gang activity in Rampart; and that females tend less often to be involved in the types of activities—street-level drug dealing and armed conflict—around which most of the false allegations arose. It might also be the case that false uncorroborated allegations of wrongdoing by males are more plausible than similar allegations against females, and thus dishonest police trying to lie credibly are more likely to make such allegations against male suspects.

A somewhat larger percentage—19% (7/37)—of exonerated defendants in Tulia were female. An even larger percentage—24% (11/47)—of the total Tulia defendants were female.⁸⁷ The somewhat smaller percentage of women who received pardons reflects the fact that more women had their cases dismissed prior to prosecution, negotiated a deferred prosecution, or otherwise avoided receiving the type of lengthy prison sentence for which a pardon was needed.

C. Offenses of Conviction

The types of crimes leading to wrongful convictions in the mass exoneration cases are strikingly different from those leading to exonerations in other cases. Whereas most known exonerees typically have been convicted of rape or murder, the vast majority of the exonerees in the police scandal cases were convicted of relatively low-level drug crimes. All thirty-seven of the Tulia exonerees were convicted of drug crimes,⁸⁸ while nearly half of the actually innocent Rampart exonerees (18/38) were convicted of drug crimes.⁸⁹ In addition, an almost equal number of actually innocent Rampart exonerees (16) were convicted of

85. *Id.*

86. *Id.*

87. See BLAKESLEE, *supra* note 30, at 409–17 (providing list of defendants).

88. Drug crimes here refer to any narcotics offense, including possession, transportation, and trafficking, of illegal narcotics, usually cocaine, crack cocaine, and heroin.

89. See *supra* note 84.

gun possession offenses.⁹⁰ Of these, defendants were most frequently charged as felons in possession of firearms, although California law provides a variety of unlawful gun possession offenses, making it unlawful for minors, gang members, probationers, and parolees to possess firearms as well.⁹¹ Actually innocent exonerees include persons convicted of each of these various offenses. A few were convicted of both drug and gun offenses. A larger number were initially charged with drug and gun offenses, but, through plea bargaining, negotiated a conviction on only one offense. Four of the actually innocent defendants also were convicted of assaulting police officers. Often, those convictions were enhanced with false allegations that the assailant used a gun or another deadly weapon to commit the assault. One Rampart exoneree was convicted of the offense of “giving false information to a police officer.”⁹²

What these offenses of conviction primarily have in common is that they are all easily manufactured by the arresting officers. Drugs and guns are easily planted and, once “found,” constitute completed offenses. To the extent there were alleged victims in any of these cases, the victims uniformly were police officers. In none of the cases was there a need to obtain any corroborating evidence or eyewitness testimony from persons other than police officers. As a result, it was easy for police to falsely charge suspects with commission of these crimes, and extremely difficult for defendants to defend against them.

Most of the actually innocent Rampart exonerees received relatively light sentences. Several of the exonerees were sentenced only to terms of probation. Most were sentenced to short prison terms ranging from 6 months to a few years. A few of the actually innocent defendants, however, received quite severe sentences. The median sentence of the actually innocent Rampart exonerees was two years. The average sentence was a little more than three years, and the disparity between the median and average sentence reflects the small number of severe sentences that were imposed on a few of the defendants.

The most severe, and in many ways the most egregious, Rampart-related sentence was imposed on Javier Ovando. In the case that probably did the most to trigger the Rampart scandal, police officers shot Ovando, then nineteen years old and a member of the 18th Street gang, four times

90. *Id.*

91. *Id.*

92. Pet. for Writ of Habeas Corpus at 2, *In re James Edward Thomas*, No. JJ04795 (Cal. Super. Ct. May 22, 2000).

in the neck and the chest.⁹³ In official reports of the incident submitted by police officers Rafael Perez and Nino Durden, the officers claimed that Ovando had broken into a vacant apartment where Perez and Durden were conducting surveillance. Ovando allegedly was armed with a semiautomatic rifle and a "military-style 'banana clip.'"⁹⁴ The officers said, and later testified under oath, that they shot Ovando after he refused to comply with their order to put the weapon down.⁹⁵ As a result of the shooting Ovando was left paralyzed from the waist down.⁹⁶ Despite the severe injuries he suffered and the fact that he had no prior felony convictions, Ovando was charged with two counts of assault with a firearm on a police officer and one count of exhibiting a firearm in the presence of a police officer.⁹⁷ Firearm use enhancements were also alleged. A jury convicted Ovando essentially as charged, and the court sentenced him to twenty-three years and four months in state prison.⁹⁸

The allegations regarding Ovando's conduct, however, were pure fiction. Officer Perez subsequently admitted in a deposition that Ovando was unarmed at the time of the shooting, that the shooting was unprovoked, and that he and Officer Durden had planted a gun on Ovando to cover up that fact.⁹⁹ According to Perez, the gun planted on Ovando had been obtained during a "gang sweep" a few days prior to the incident,¹⁰⁰ and the serial number had been filed off so that the officers could use the weapon as a "throwaway."¹⁰¹ Perez further stated that the gun was wiped clean of prints by the officers before it was placed next to the injured man.¹⁰² Thus, Ovando had the double misfortune of being shot and paralyzed, and then convicted of a serious crime he did not commit.

Apart from the Ovando case, the longest Rampart sentences were imposed in drug cases. Russell Newman was sentenced to twelve years,

93. For a news analysis discussing details of the case, see Lou Cannon, *One Bad Cop*, N.Y. TIMES, Oct. 1, 2000, at SM32.

94. Pet. for Writ of Habeas Corpus, Ex. A at 2, Decl. of Richard A. Rosenthal, *In re Javier Francisco Ovando*, No. BA139642 (Cal. Super. Ct. Sept. 16, 1999).

95. See Cannon, *supra* note 93.

96. *Id.*

97. *Id.*

98. Rosenthal Decl., *supra* note 94, at 2.

99. *Id.* at 3.

100. *Id.*, Ex. B at 1-2. The reasons for the shooting remain unclear. Perez testified that Durden shot Ovando during the course of an argument, and that he shot Ovando "reflexively." Others have speculated that after Durden shot Ovando, Perez "tried to finish off Ovando so that there would be no witness to the crime." Cannon, *supra* note 93, at SM37. Ovando himself has little recollection of the shooting, and "still has no idea why the officers shot him." *Id.*

101. Cannon, *supra* note 93, at *5.

102. *Id.*

Esaw Booker to nine years, and Walter Rivas to seven years, all for allegedly dealing cocaine.¹⁰³

In comparison, the Tulia cases resulted in substantially harsher sentences. All of the Tulia defendants were convicted of selling small quantities of powder cocaine. Despite the small quantities, many of the defendants received draconian sentences, often as a result of prior felony convictions. William Cash and Joe Moore both received prison sentences in excess of ninety years. Kareem Abdul Jabbar White was sentenced to sixty years. Jason Jerome Williams and Kizzie White received sentences of forty-five and twenty-five years, respectively. The average sentence of the exonerated Tulia defendants was 157.8 months or a little over thirteen years. The median sentence, however, was thirty-six months, which was well below the average sentence primarily because of the large number of defendants who were sentenced to extended terms of probation in lieu of prison.¹⁰⁴ Two defendants, Mandis and Landis Barrow, spent ten years in jail as a result of a probation revocation before a Texas court granted their habeas writ and ordered them released.¹⁰⁵

D. Causes of Wrongful Conviction

While the leading identified cause of wrongful convictions in past studies of exonerations is witness misidentification, a very different dynamic is at work in the police misconduct cases. Police misconduct generally, and perjury in particular, was the primary cause of wrongful convictions in every Rampart and Tulia case resulting in exonerations. Witness misidentifications played virtually no role in any of the cases.

Police misconduct in these scandals took many forms. Police officers filed false police reports detailing observations of criminal conduct the defendants never engaged in, or describing circumstances that if true would have established criminal conduct. In most of the cases, police either physically planted drugs or weapons on the defendants and then lied about how they found the contraband, or simply misstated that they had

103. See Resp. to Pet. for Writ of Habeas Corpus at 2, *In re Russell Newman*, No. BA050279-01 (Cal. Super. Ct. Apr. 27, 2000); Resp. to Federal Pet. for Writ of Habeas Corpus at 2, *In re Esaw Booker*, No. BA057055-02 (Cal. Super. Ct. Feb. 15, 2000); Resp. to Pet. for Writ of Habeas Corpus at 2, *In re Walter Rivas*, No. BA165829 (Cal. Super. Ct. Feb. 15, 2000).

104. For purposes of calculating average and median figures, sentences of probation were treated as the equivalent of zero jail time. Because a later violation can result in a probationer serving the entire term in jail, the numbers understate actual punishment.

105. Janelle Stecklein, *Judge reverses probation decision of Tulia brothers*, AMARILLO GLOBE-NEWS (Feb. 5, 2011, 1:12 AM), <http://amarillo.com/news/local-news/2011-02-05/decision-reversed-tullians>.

found drugs or weapons when they had not. Police officers then testified to these same false facts at preliminary hearings and at trial in those rare cases that did not end in guilty pleas. For example, Emmanuel Chavez was arrested and ultimately convicted of possession of a firearm by a minor.¹⁰⁶ In the arrest report, Officer Perez stated that “he and his partners observed” Emmanuel Chavez pass “a sawed-off shotgun” to another minor named Sergio Salcido.¹⁰⁷ According to later evidence gathered by investigators, however, police never saw either minor handle a gun. Instead, Chavez and Salcido were stopped because police knew them to be members of a “tagging crew.”¹⁰⁸ As Perez frisked Salcido, a gun dropped down Salcido’s pant leg and struck the pavement. The officers then made up a story that allowed them to charge Chavez as well as Salcido for possession of the gun.¹⁰⁹

Similar police misconduct led to the wrongful conviction of Diego Barrios. Barrios and several others were socializing in the parking lot of a Jack-In-the-Box fast food restaurant when a “police car drove up to the group and shined its high-beam lights on the group.”¹¹⁰ The officers ordered everyone in the group to kneel down. They then searched and questioned each person. Four persons, including a juvenile by the name of Raymond C., were placed into a police car and taken to the police station. Unknown to the police, Raymond C. had a handgun in his possession at the time which he deposited, during the ride, behind the back seat of the squad car.¹¹¹ Police discovered the gun after searching the car at the station and demanded to know who had dropped the gun. Raymond C. admitted the gun was his, but according to Barrios, “the officers said they did not ‘want’ a juvenile,” and instead “put the gun” on Barrios.¹¹² Barrios pled guilty to a charge of unlawful gun possession.

On a different occasion, police approached another group of youths in a parking lot. After police recovered a handgun from underneath a parked car, they arrested one of the youths and brought him to the station where they asked him, among other things, who owned the gun. When he failed

106. Pet. for Writ of Habeas Corpus at 2, *In re Emmanuel Chavez*, No. FJ10183 (Cal. Super. Ct. Feb. 23, 2000).

107. *Id.*, Ex. A at 1.

108. *Id.*

109. *Id.*

110. Return and Answer to Pet. for Writ of Habeas Corpus, at 9–11, Decl. of Michael Gannon, *In re Diego Barrios*, No. BA126209 (Cal. Super. Ct. July 13, 2000) (recounting statements made by several witnesses).

111. *Id.*

112. *Id.* at 11.

to provide an answer, the interrogating officer “told him that he was going to jail for the gun and rubbed it against Lobos’ fingers.”¹¹³ Lobos pled guilty at his arraignment to a charge of unlawful possession of a firearm by a felon.¹¹⁴

In these cases, contraband discovered by police in the possession of one person, or an unknown person, was attributed to others in order to permit an arrest to be made or to facilitate additional arrests. In other cases, police planted guns or drugs obtained elsewhere on suspects, or simply claimed that they found guns or drugs on suspects who in fact were not in possession of them.¹¹⁵ This is precisely what officers did in the Ovando case, where, after shooting Ovando, the officers planted a weapon on him picked up elsewhere to falsely implicate him in criminal conduct and cover up their own misdeeds.¹¹⁶

Other examples include the case of Ivan Oliver, who was charged with unlawful possession of a gun after police raided a party at which he was present. In Oliver’s case, police searched the residence where the party was held and located several guns. One officer then, investigators concluded, “arbitrarily decided who would be arrested for possessing them,” while other “CRASH officers created scenarios accounting for the recovery of each gun and . . . wrote the arrest report accordingly.”¹¹⁷ In several cases, defendants did not even know what offenses they were alleged to have committed until long after being arrested. One defendant, who was charged with narcotics possession, stated that he “did not find out why he was being arrested until he got to the jail and asked a jailer to tell him what his ‘pink slip’ indicated.”¹¹⁸

113. Pet. for Writ of Habeas Corpus, Ex. B, Decl. of Brian Tyndall, *In re Allan Manrique Lobos*, No. BA 131378 (Cal. Super. Ct. Jan. 31, 2000).

114. Pet. for Writ of Habeas Corpus, *In re Allan Manrique Lobos*, No. BA 131378 (Cal. Super. Ct. Jan. 31, 2000).

115. A gun was planted on Jose Armando Lara, for instance, by Officer Durden, and the weapon was booked into evidence only after Durden obliterated the serial number. See Pet. for Writ of Habeas Corpus, Ex. A at 1, Decl. of Richard A. Rosenthal, *In re Jose Armando Lara*, No. BA145000 (Cal. Super. Ct. Jan. 25, 2000).

116. See *id.* at 2.

117. Pet. for Writ of Habeas Corpus, Ex. A at 1, Decl. of Laura Laesecke, *In re Ivan Oliver*, No. BA135752 (Cal. Super. Ct. Feb. 11, 2000).

118. Pet. for Writ of Habeas Corpus, Ex. B at 1–2, Decl. of Brian Tyndall, *In re Carlos Guevara*, No. BA165829 (Cal. Super. Ct. Feb. 15, 2000). Another Rampart exoneree, Rene Matlong, similarly stated that “he had no idea he had been arrested for possession of a gun until he was given his paperwork several hours later at the jail division.” Pet. for Writ of Habeas Corpus, Ex. B, Decl. of Brian Tyndall, *In re Rene Barela Matlong*, No. BA131589 (Cal. Super. Ct. Apr. 14, 2000). Two other Rampart exonerees made almost identical allegations. Pet. for Writ of Habeas Corpus, Decl. of Brian Tyndall, *In re Juan Torrecillas*, No. BA143145 (Cal. Super. Ct. Apr. 7, 2000) (reporting that Torrecillas told investigators that “he had no idea he had been arrested for possession of cocaine” until

Although present in every Rampart case, police perjury was not the sole cause of the false convictions. In some cases, police coerced an individual to make false statements inculpating the defendant. George Alfaro, for instance, was arrested for violating a gang injunction based on such evidence.¹¹⁹ According to police officers, Alfaro and two other suspects were arrested after police recovered a baggie of rock cocaine at the scene.¹²⁰ The officers claimed that one of the suspects admitted that he possessed the drugs for sale. Rampart investigators, however, concluded that the drugs were planted at the scene, and the officers coerced the admission.¹²¹ As a result of the incident, Alfaro's probation was revoked and Alfaro was sentenced to two years in state prison.¹²²

In other cases, police simply falsely reported incriminating statements made by others. This happened in the case of Gregorio Lopez.¹²³ Lopez and another man named Omar Alonso were arrested after police claimed they saw Alonso in possession of a magnetic key holder containing cocaine and Lopez attempt to discard a similar item. According to the arrest report, police searched Lopez and recovered a gun from his waistband. In fact, investigators found, the drugs said to belong to Lopez were planted, and the gun was found in his car rather than on his person. The prosecution's case was also bolstered by inculpatory statements allegedly made by Alonso. No such statements, it turns out, were ever made, nor did the officers administer Miranda warnings as they claimed to have done.¹²⁴

informed of charges at jail); Answer to Pet. for Writ of Habeas Corpus at 9, Decl. of Barbara Moulton, *In re Alex Umana*, No. BA144035 (Cal. Super. Ct. June 22, 2000). These accounts of being framed match up with Officer Perez's own statements about how police typically went about framing suspects.

"When we talk about planting or putting a case on someone, for some reason, some investigators or some attorneys have thought that we actually—I go into the car, take the three bindles [of drugs], lay it next to him and go, 'See, that's what you dropped.'

It's not the way it works. I take them into custody, put them in the car, do whatever. And you know, when it's time to book evidence, we go and get the evidence from our car. There's no need to go and, you know, lay it on the ground next to them or put fingerprints on the baggies or anything like that. That's just not the way it works.

We get the evidence when it's needed and move forward."

McDermott, *supra* note 15 (quoting Rafael Perez at LAPD Board of Rights hearing on June 3, 2000).

119. See Pet. for Writ of Habeas Corpus at 2, *In re* George Kenneth Alfaro, No. BA159394 (Cal. Super. Ct. Jan. 31, 2000).

120. *Id.* at 6.

121. *Id.* at 2.

122. *Id.* at 2.

123. Lopez is an alias. His real name is Leonel Ramos Estrada. Because court papers refer to Estrada as Lopez, I use that name here.

124. Pet. for Writ of Habeas Corpus, Decl. of Brian Tyndall, *In re* Omar Ramos Alonso and Leonel Ramos Estrada, No. BA148402 (Cal. Super. Ct. Apr. 10, 2000).

Several of the Rampart exonerees falsely confessed, or were reported to have done so. Clinton Harris, for example, was convicted of possession of a firearm by a felon after police reported that they had observed Harris wearing a gun in the waistband of his pants, and that he had admitted that the gun was his, saying “[d]amn, I knew I shouldn’t have bought the gun. . . .”¹²⁵ In fact, Harris never made any such statement. At the time of arrest Harris was seated on the couch of a friend’s apartment. Police officers entered the apartment without consent and found a gun on a table. According to Officer Perez, they decided to attribute the gun to Harris “because he was an ex-con.”¹²⁶

Delbert Carrillo was arrested after police officers allegedly “noticed a large bulge in his front shirt pocket.”¹²⁷ The arresting officers explained in the police report:

Knowing defendant to be on active parole and having a criminal history, we asked him what he had in his pocket (to ensure that it was not a weapon or narcotics). The defendant’s expression went from that of being calm to nervous, and he hesitantly reached into his pocket and removed a clear plastic baggy containing approximately nine white paper bindles, the type routinely used to package rock cocaine, and stated, “its [sic] rocks.” [W]e recovered the bag and found it to contain nine paper bindles, each one, containing approximately ten off-white wafers resembling rock cocaine.¹²⁸

After Carrillo was arrested, police obtained a signed statement reading, with original misspellings, as follows:

I DelBert Carrillo contacted officer Cohan and BRehm to discouse a matter at the time I had cocaine in my posseion. and Because I new them I thought It would not Be a proBlem. Officers then overed it in my Shirt pocket. DEC. I make this statement freely.¹²⁹

Carrillo was charged with possession for sale of cocaine base and ultimately pleaded guilty to an amended complaint that charged him with

125. Pet. for Writ of Habeas Corpus, Decl. of Barbara Moulton, *In re Clinton Harris*, No. BA140224 (Cal. Super. Ct. 2000) (alterations in original).

126. *Id.*, Ex. A, Decl. of Natasha S. Cooper, at 1. Harris allegedly admitted that he was in possession of a gun at the time of the arrest.

127. Pet. for Writ of Habeas Corpus at 3, *In re Delbert Carrillo*, No. BA169722 (Cal. Super. Ct. Sept. 8, 2000) (internal quotation marks omitted).

128. *Id.*

129. *Id.* at Ex. C (statement form attached to police report).

possession for sale of a controlled substance. He was sentenced to the statutory minimum term of two years. Carrillo later alleged that the drugs were planted and police officers coerced him into signing the statement by threatening to file additional charges against him if he refused.¹³⁰ His conviction was vacated after the state discovered evidence corroborating Carrillo's account of the incident.¹³¹

In short, then, the primary "cause" of false convictions in the Rampart and Tulia scandals was police perjury, some form of which was present in 100% of the cases. Innocent defendants who won exonerations primarily had been convicted in the first instance on the basis of the false reports and false testimony of corrupt police officers. That same police misconduct, however, was also responsible for the generation of other types of false evidence, including false witness statements and false confessions that supported the police officers' false reports and perjurious testimony in court.

After police perjury, the most common "causes" of false convictions were the false confessions generated through police misconduct. False confessions were present in about 13% of the Rampart cases. Interestingly, that figure is consistent with findings by Gross and Garrett on the approximate frequency of false confessions in wrongful conviction cases.¹³² While a substantial amount of commentary has focused on the problem of false confessions, and commentators have probed how innocent defendants might be induced to confess to crimes they did not commit, very little discussion exists regarding the problem of entirely fabricated confessions. Yet, as the Rampart cases show, some false confessions "occur" simply because police lie about what suspects actually said.

When the mass exoneration data is added to the existing data regarding the causes of wrongful convictions, there is ample room to doubt the claim that witness misidentification is the leading cause of false convictions. Indeed, when the Rampart and Tulia cases are combined with the data gathered by Gross in his first study (which intentionally excluded these cases), perjury dislodges witness misidentification as the most prevalent cause of known wrongful convictions during the time period covered in

130. Answer to Pet. for Writ of Habeas Corpus at 2, *In re Delbert Carrillo*, No. BA169722 (Cal. Super. Ct. Nov. 9, 2000).

131. *See id.* at 3.

132. Gross found false confessions in 15% of the 340 exonerations examined in his first study. Gross et al., *supra* note 54, at 544. Gross' more comprehensive second study also found false confessions in 15% of the 873 cases. See Gross & Shaffer, *supra* note 4, at 40. Garrett found false confessions in 16% of the 250 DNA exoneration cases he studied. GARRETT, *supra* note 59, at 18.

the study. In the combined data set, perjury is a factor in 221 of the 415 exonerations of innocent defendants occurring between 1989–2003. Witness misidentifications are a close second, factoring into 219 cases during this same period. Gross' more comprehensive study, which includes mass exonerations in the data set, confirms that perjury and false accusation, and not witness misidentification, is known to be the leading factor contributing to wrongful convictions.¹³³

TABLE 1: CAUSES OF FALSE CONVICTIONS FOR EXONERATIONS

	Gross Study (340)	Mass Exon's (75)	Combined Total
Eyewitness Mis-i.d.	64% (219/340)	0% (0/75)	53% (219/415)
Reported Perjury	43% (146/340)	100% (75/75)	53% (221/415)
False Confession	15% (51/340)	13% (5/38) ¹³⁴	15% (56/378)

While there of course is no way to know how generalizable these numbers are, the data does suggest that efforts to reform the criminal justice system in order to prevent wrongful convictions should include greater focus on the prevention of police misconduct. During the last decade, a major effort has been made to improve the reliability of lineup identification procedures. The revised data set suggests that those concerned with decreasing the incidence of wrongful convictions should devote similar attention to enhancing the integrity and reliability of police officer statements and testimony.

E. Method of Conviction

Perhaps the most striking insight to be drawn from the mass exoneration data concerns the high rate of guilty pleas seen in these cases, which provides strong evidence that the wrongful conviction problem extends to defendants who plead guilty as well defendants who contest guilt at trial. Earlier studies of exonerations found only a negligible number of innocents who were exonerated after pleading guilty. In Gross'

133. Gross & Shaffer, *supra* note 4, at 40.

134. Excludes Tulia data because information about those investigations was not sufficient to make a determination.

first study of 340 exonerations, only twenty of the exonerees, or approximately 6%, pled guilty.¹³⁵ The vast majority, about 94%, were convicted after a trial. Garrett's data tell the same story. In Garrett's study of 250 DNA exonerations, sixteen, or 6%, pled guilty. The rest were convicted at trial. This data has been interpreted by some to mean that innocent people generally do not plead guilty, or if they do, they do so only under extraordinary circumstances.¹³⁶

The accuracy of guilty pleas is a major determinant of the scope of the problem of wrongful convictions. After all, the vast majority of criminal convictions, upwards of 90%, are a result of guilty pleas.¹³⁷ If innocent people do not plead guilty but rather insist on going to trial, then the upper estimate of wrongful convictions is bounded by the small proportion of persons overall who are convicted at trial. In other words, even if 100% of defendants who were convicted at trial were actually innocent, the wrongful conviction "rate" would still be only about 5%, since approximately 95% of all defendants plead guilty. If, on the other hand, the fact that a defendant pleads guilty provides no guarantee that the defendant is not actually innocent, then the potential magnitude of the wrongful conviction problem is many times greater. Even if the rate of false guilty pleas is low, the far-greater size of the guilty plea pool ensures that it adds up to a quantitatively large problem.

1. Evidence that the Innocent Do Plead Guilty¹³⁸

It has long been apparent that the innocent do, on occasion, plead guilty.¹³⁹ The more important question, however, is how often false guilty pleas occur, and how false guilty plea rates compare with false trial

135. Gross, *supra* note 2, at 536.

136. See, e.g., Ronald J. Allen and Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 71 (2009) (concluding that false guilty plea rate is much lower than false conviction rate at trial based on evaluation of Garrett data).

137. See Sourcebook of criminal justice statistics online (2006), <http://www.albany.edu/sourcebook/pdf/t5462006.pdf>.

138. See Pet. for Writ of Habeas Corpus at 11, Decl. of Brian Tyndall, *In re Gerald Peters*, No. BA131401 (Cal. Super. Ct. May 9, 2000) (reporting that "Peters plead[ed] guilty to the charges on the advice of his attorney because he believed he would face a stiffer penalty if he chose to fight the charges in a trial and lost"); Scott Glover & Matt Lait, *10 More Rampart Cases Voided*, LA TIMES (Jan. 26, 2000), <http://www.streetgangs.com/topics/rampart/012600more10.html> ("Davalos, 41, an upholstery worker who served 91 days in jail. He said he only agreed to a plea bargain because he was threatened with eight to 16 years in prison.").

139. For a list of sources discussing the problem of innocent persons pleading guilty, see Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 740 n.305 (2002).

conviction rates. If there ever was any real doubt that false guilty pleas can occur in large numbers, the Rampart and Tulia data put those doubts to rest, indicating that at least in some types of cases, innocent defendants are far more likely to be convicted through a guilty plea than at trial. In the Rampart cases not involving alleged probation violations, twenty-five of thirty-two exonerees pled guilty. In Tulia the numbers were about the same: twenty-seven of thirty-four. Overall, fifty-two of the exonerees, or 81%, were convicted through guilty pleas, and twelve, or 19%, were convicted after trial. Those numbers represent a far more typical distribution of guilty pleas and trial convictions than was seen in the Gross and Garrett data, and provide strong reason to believe, notwithstanding prior exoneration studies showing a low incidence of guilty pleas among exonerees, that the problem of wrongful convictions is not contained to those who contest their guilt at trial.¹⁴⁰ Indeed, the mass exoneration cases make clear that, at least with respect to the types of charges at issue in the Rampart and Tulia cases, the method of conviction makes very little difference to the reliability of the conviction. In Rampart and Tulia, wrongful convictions resulted from guilty pleas and trials alike, and as is true in the criminal justice system generally, guilty pleas accounted for the majority of the convictions.

TABLE 2: METHOD OF CONVICTION OF EXONERATED DEFENDANTS

	Gross Study	Mass Exon's	Combined Total
Guilty plea	6% (20/340)	81% (52/64)	18% (72/404)
Trial conviction	94% (320/340)	19% (12/64)	82% (332/404)

As Table 2 suggests, in comparison with other exonerees, the Rampart and Tulia exonerees pled guilty at much higher rates. The percentage of convictions obtained through guilty pleas, however, still falls short of the average. What is the significance of these numbers? On one hand, a trial rate approaching 20% in low level drug cases might seem remarkable. These are typically simple cases to prosecute and the vast majority of such cases undoubtedly would normally be resolved through guilty pleas. On the other hand, the evidence in many of these cases, especially the Tulia

140. See, e.g., Ronald J. Allen & Larry Laudan, *supra* note 136, at 71 (calculating wrongful conviction rate by guilty plea based on Garrett study data showing that 9/200 exonerees pled guilty). Michael Risinger critiques that reasoning in a responsive essay. See D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991, 995 (2010).

cases, was extremely weak. These were cases built on the testimony of a single undercover cop, with no electronic recording of the transactions or corroborating evidence, and in some cases in the face of significant alibi defenses. Given this, it is difficult to tell whether a 20% trial rate is high or low. Regardless, the fact that so many mass exoneration cases were resolved by guilty pleas should erode any perception that actually innocent defendants almost uniformly refused to plead guilty.

Of course, it is possible that the Rampart and Tulia cases, rather than the exoneration cases studied by others, represent the outlier. There are several reasons, however, to believe that with respect to the frequency of false guilty pleas, the Rampart and Tulia cases provide a more typical distribution, and that wrongful convictions, like convictions generally, are usually the end product of a guilty plea rather than a trial verdict. First, as both Gross and Garrett acknowledge, cases resulting in exonerations are the beneficiaries of a phenomenally rare confluence of events that are simply not present in typical cases.¹⁴¹ For a DNA exoneration to occur, for example, the crime must have been one involving biological evidence, where that evidence is dispositive of the defendant's guilt. That evidence must have been gathered but not tested, or not tested properly, preserved for years or decades, and located in quantities and in sufficient quality to permit testing, and defendants must have preserved the means to launch a legal challenge against their conviction once the evidence is discovered. The preconditions for exoneration after a trial conviction are only rarely satisfied; rarer still will they exist where the defendant pleads guilty.

In guilty plea cases, the state is less likely to preserve evidence for later testing, and because no trial record exists, even where such evidence was preserved, it is difficult to assess the significance of exculpatory test results. Defendants who plead guilty typically waive their rights to appeal and to post-conviction review.¹⁴² As a result, innocent people who plead guilty almost invariably lack a viable procedural mechanism to prove their innocence in a post-conviction proceeding, at least absent the type of extraordinary circumstances that occurred in Rampart and Tulia. To make matters worse, many statutes governing access to post-conviction DNA

141. See, e.g., Gross & Shaffer, *supra* note 6, at 4–5 (explaining how exonerations tend to be the product of “blind luck” or “improbable chains of happenstance”).

142. See Nancy J. King, *Appeal Waivers And The Future Of Sentencing Policy*, 55 DUKE L.J. 209, 209 (2011) (finding in her empirical study that defendants who pleaded guilty waived their right to appeal in nearly two-thirds of cases).

testing specifically preclude defendants who plead guilty from obtaining testing.¹⁴³

There is good reason, moreover, to view the mass exoneration cases as far more typical of garden-variety wrongful convictions than the cases included in the earlier Gross and Garrett studies, a very large percentage of which (100% in the Garrett study) involved post-conviction DNA testing. In the Rampart and Tulia cases, most defendants were convicted of drug or gun crimes, which are far more common than the rape, murder, or rape-murder convictions making up the vast majority of the earlier studied exoneration cases. Although some sentences were draconian, especially in Tulia, most sentences were relatively modest in severity, as are most felony sentences imposed on typical felony convicts. As noted above, most of the Rampart exonerees received relatively light sentences, with the average sentence being approximately three years, and the median sentence less than two years. These figures are consistent with national averages for state felons.¹⁴⁴ In contrast, exonerees in the first Gross study had almost uniformly received harsh sentences for the most serious crimes. This was especially true among the non-DNA exonerations in the data pool, of which 85% (166/196) were serving sentences for murder or manslaughter, and 22% among all of the exonerees (74/340) were sentenced to death.¹⁴⁵

Moreover, the exonerations in Rampart and Tulia were largely the product of happenstance. The Rampart exonerations in particular involved run-of-the-mill drug and gun cases that never would have received even passing interest from the outside world had it not been for the cooperation deal struck by Rafael Perez. Unlike typical DNA exonerations, the exonerations in Rampart came about without the intervention of Innocence Projects or big-firm pro-bono advocacy. There were few trial transcripts, physical evidence, or other compelling evidence from which a defendant's actual innocence could be determined.¹⁴⁶ The Tulia exonerations did benefit from substantial pro-bono advocacy, but one suspects that none of the events leading to the uncovering of misconduct in Tulia would have been uncovered had the extent of the misconduct not been as sweeping, the sentences not as draconian, and the racial component not as overt as it

143. See, e.g., FLA. STAT. ANN. § 925.11(1)(a)(2) (West 2006). But see TEX. CODE CRIM. PROC. ANN. art. 64.03(b) (West 2007).

144. See *supra* note 137.

145. Gross, *supra* note 2, at 531.

146. This, in part, was a necessary byproduct of a set of convictions obtained largely through plea bargains.

was. Setting aside the extraordinary manner in which the police misconduct was discovered, the kinds of convictions at issue in Rampart and Tulia were far more typical, substantively and procedurally, than those that have eventuated in DNA exonerations.

V. EXPLAINING WRONGFUL PLEAS

In addition to providing an empirical basis for the claim that innocent people plead guilty, the mass exoneration cases vividly illustrate how and why actually innocent defendants plead guilty. In general, there appear to have been three main factors driving innocent Rampart and Tulia defendants to plead guilty: an outsized trial penalty, a lack of viable strategies to contest the charges, and presumptively or actually unsympathetic forums. Each is considered briefly below.

A. *New Data on the Trial Penalty*

Without a doubt, the overwhelming reason that innocent Rampart and Tulia exonerees pleaded guilty to crimes they did not commit was that they feared that they would do much worse at trial if they did not plead guilty. Typical are the sentiments expressed by one innocent Rampart exoneree who on advice of his attorney pleaded guilty in exchange for a three-year term of probation, believing that "he would face a stiffer penalty if he chose to fight the charges in a trial and lost."¹⁴⁷ That exoneree likely was not wrong. The existence of a trial penalty has been long acknowledged, albeit bemoaned by many.¹⁴⁸ It is an institutionalized feature of contemporary criminal justice. Nonetheless, the coercive impact of the trial penalty is unmistakable, and is plainly evident in the Rampart and Tulia cases.

Tulia provides an extreme example of the coercive impact of the trial penalty. Of the thirty-seven innocent Tulia exonerees, seven went to trial and were convicted, twenty-seven pleaded guilty, one did both, and two

147. *In re Gerald Peters*, *supra* note 138. Peters also alleged that he was physically abused by officers in an interview, but that "he never made a complaint regarding this incident because he felt 'it would do no good.'" *Id.* Similarly, two months after pleading guilty, Ruben Rojas had second thoughts and wrote a letter to the judge who had sentenced him. In the handwritten letter, Rojas explained that "I was informed that I was facing 25 years to life by my defense counsel and that there was no way I could have won my case because I was up against a police officer." He added: "I never did what I was charged for... I'm not guilty." Matt Lait, *Another Inmate Set to Be Freed in Police Probe*, L.A. TIMES, Nov. 17, 1999, at A1.

148. See, e.g., Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67 (2005).

others had their probation revoked.¹⁴⁹ The first defendant to go to trial, Joe Moore, was convicted and sentenced to ninety years in prison for allegedly dealing 4.5 grams of cocaine.¹⁵⁰ Moore had been offered an opportunity to plead guilty in exchange for a twenty-five-year sentence (the minimum available given the charges and Moore's prior record), but he declined.¹⁵¹ Six more defendants stood trial, and were convicted and sentenced to prison terms ranging from 20 to 361 years.¹⁵² In light of this precedent, and with cases substantively indistinguishable in terms of the nature of the charges and the strength of the evidence, the remaining defendants all chose to plead guilty.¹⁵³ Although the sentences imposed on those who pleaded guilty in Tulia were often quite harsh, the harshness of their sentences paled in comparison to those who were convicted at trial. On average, Tulia defendants who pleaded guilty were sentenced to approximately four years in prison.¹⁵⁴ The Tulia defendants who contested their guilt at trial received an average sentence of 615.4 months, or 51.3 years.¹⁵⁵ Trial sentences at Tulia, in other words, were nearly thirteen times harsher than sentences imposed following guilty pleas.

The trial penalty evident in Tulia might be attributed, at least in part, to an apparently intentional prosecutorial strategy to frighten defendants into foregoing trial. Such an express strategy was made easier in small-town Tulia, where word of harsh sentences quickly spread among Tulia's small defense bar and the defendants themselves.

These dynamics were noticeably absent in Rampart. Unlike Tulia, there is no indication that prosecutors were aware of the defects in the cases they brought against innocent defendants. Indeed, after the scandal broke, the Los Angeles District Attorney's Office took affirmative steps to investigate the scope of wrongdoing and to vacate convictions resulting from police misconduct.¹⁵⁶ In terms of size and population, the L.A. justice system also obviously dwarfs Tulia's. There is far less reason to believe

149. Donald Wayne Smith was charged with seven drug trafficking offenses, and the prosecutor elected to try the cases separately. See BLAKESLEE, *supra* note 69, at 117. After Smith was convicted in the first case and sentenced to two years in prison, he accepted a plea offer to resolve the remaining charges in exchange for a 12.5 sentence to run concurrently with his other conviction. *Id.* at 136–37.

150. *Id.* at 59.

151. *Id.* at 48.

152. Cash Love was sentenced to 361 years by the trial court. *Id.* at 92.

153. *See id.* at 160–61.

154. *See Summary of Data (on file with author).*

155. *Id.* In calculating this figure, I counted Cash Love's sentence as 99, rather than 361, years. I also omitted Smith's case. Smith's two-year sentence was based on the least serious of only one of seven charges.

156. *See generally* CONSTANCE L. RICE ET AL., RAMPART RECONSIDERED: THE SEARCH FOR REAL REFORM SEVEN YEARS LATER (2006).

that prosecutors sought to send any messages to specific classes of defendants by seeking harsh trial sentences. Any implicit threat inherent in the harsher trial sentences would seem to be endemic to the justice system in general.

Nonetheless, the observable trial penalty in the Rampart cases, though not on the same order as the average trial penalty in Tulia, was still quite large. On average, actually innocent Rampart defendants who were convicted at trial were sentenced to 101.25 months, or nearly 8.5 years.¹⁵⁷ Actually innocent Rampart defendants who pleaded guilty were sentenced to an average term of 18.5 months, or just over 1.5 years.¹⁵⁸ Defendants who contested their cases at trial, in other words, received sentences on average more than five times harsher than those who agreed to plead guilty.¹⁵⁹ The trial penalty for the larger sample of all Rampart exonerees, including those who did not appear to be actually innocent, was even bigger. For this group, the average plea sentence was 20.3 months.¹⁶⁰ The average trial sentence was 136.3 months.¹⁶¹ Trial sentences were therefore on average 6.7 times longer than plea sentences, with no apparent qualitative differences among the types of crimes charged or the criminal history of the defendants.¹⁶²

The longest sentence imposed on any Rampart exoneree was a term of fifty-four years to life, later reduced on appeal to twenty-nine years to life,

157. See Summary of Data (on file with author).

158. *Id.*

159. Arguably, one could object that these numbers are skewed by the inclusion of the Ovando case—by far the harshest sentence imposed in any of the Rampart cases. There are several reasons, however, to include that case in calculating the numbers. First, Ovando was not the only innocent Rampart exoneree to be charged with a crime of violence. Jose Perez was charged with assaulting a peace officer with a firearm, the same crime charged against Ovando, and pleaded guilty. Perez received a sentence of three-years probation. Raul Munoz and Cesar Natividad were also (falsely) charged with assaulting a peace officer with a deadly weapon—in their case—allegedly attempting to run over a police officer with a car. Both settled the cases by guilty plea. Munoz was sentenced to three-years prison, and Natividad was sentenced to a three year term of probation. None of these defendants suffered the kinds of serious injuries that Ovando did. Ovando's trial sentence was thus about eight times harsher than the harshest plea sentence for comparable conduct, and if one treats a term of probation as equivalent to about one-third of a prison term, his trial sentence exceeded the average plea sentences in the three cases by 1400%. In Ovando's case, prosecutors offered Ovando a thirteen-year deal to resolve the case, but Ovando's lawyer thought the offer was "way too severe" and turned it down. Lou Cannon, *One Bad Cop*, N.Y. TIMES MAG., Oct. 1, 2000, available at <http://www.nytimes.com/2000/10/01/magazine/one-bad-cop.html>.

160. See *supra* note 159.

161. *Id.*

162. In calculating these figures, there were sixty-one plea sentences and twelve trial sentences included in the data. Sentencing data was unavailable in some of the cases. In other cases, defendants were never sentenced because they failed to appear, and a bench warrant issued. Terms of probation were not counted as punishment. Some defendants were deported as a result of their convictions. Deportation was also not counted as punishment in calculating average sentences.

for Lorenzo Nava. Like most of the other Rampart exonerees, Nava was convicted of drug and gun offenses and contested the charges at trial.¹⁶³ After conviction, Nava received an initial fifty-four-year sentence under California's three-strikes law.¹⁶⁴ Nava's case, however, can be compared to Joseph Jones, another Rampart defendant, to show that the long trial sentence imposed on Nava was not simply a function of the three-strikes law or other factors unique to his case. Like Nava, Jones was charged with multiple drug counts and was potentially subject to prosecution under the three-strikes law. According to Detective Chris Barling, who interviewed Jones in the Rampart investigation, "Jones believed that he was facing a life term," and notwithstanding his contention that he was innocent, decided to plead guilty on the advice of counsel.¹⁶⁵ Pursuant to the plea, Jones was sentenced to a prison term of eight years.¹⁶⁶ The disparity in sentence outcome between Nava and Jones is roughly consistent with the average trial penalty evident in the Rampart cases, amounting to at least a seven-fold penalty increase based on Nava's initial trial sentence, and a four-fold penalty increase based on Nava's reduced sentence on appeal.¹⁶⁷

This data provides further evidence that the real trial penalty could be far larger than estimated in some studies.¹⁶⁸ With trial sentences ranging anywhere from four to thirteen times longer than plea sentences, the costs of contesting a typical felony charge are prohibitive. Few defendants can afford to run the risk. The experience of those wrongly convicted in the Rampart and Tulia scandals demonstrates that the coercive power of the

163. See Summary of Data (on file with author).

164. *Id.*

165. Pet. for Writ of Habeas Corpus, Ex. B at 1, Decl. of Chris Barling, *In re Joseph Jones*, No. BA154853 (Cal. Super. Ct. Nov. 10, 1999).

166. Pet. for Writ of Habeas Corpus at 2, *In re Joseph Jones*, No. BA154853 (Cal. Super. Ct. Nov. 10, 1999).

167. These numbers represent minimums because they ignore the upper end of the sentencing range (life) and are based on the minimum sentence that Nava was required to serve.

168. Hans Zeisel estimated that trial sentences were 42% more severe than guilty plea sentences. See Hans Zeisel, *The Disposition of Felony Arrests*, 1981 AM. B. FOUND. RES. J. 407, 444–49 (1981). Other scholars have reached varying estimates. See, e.g., Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959 (2005) (finding that trial penalties varied from state to state, and offense to offense, ranging from 13% to 461%); Jeffery T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631, 652 (2006) (finding that defendants convicted at trial received sentences 57% longer than defendants who pleaded guilty). The Federal Sentencing Guidelines provide a 35% discount for defendants who "accept responsibility." Because of the variety of charge bargains that typically accompany federal plea bargains, actual discounts are almost always far larger than 35%. See Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 224–30 (2007).

trial penalty causes innocent defendants as well as guilty ones to plead guilty.

B. Lack of Effective Trial Strategies for Falsely Accused Defendants

Time and again, actually innocent defendants asked by investigators to explain why they pled guilty repeated a common mantra: it was their word against that of the police, and who were the prosecutors, judges, or jurors going to believe?¹⁶⁹ While this dynamic is present in most cases, it is especially likely to have an effect where defendants have reason to believe they will not be treated fairly. Most of the Rampart exonerees were gang members, some with criminal histories. They were likely correct in believing that few middle-class jurors would give credence to their claims of police misconduct. In Tulia, racial dynamics clearly affected the calculations of the black defendants, who assumed (correctly, given the trial outcomes) that their protestations of innocence would be ignored. In these cases, innocent defendants often had little except their own word to prove their innocence, and their word was demonstrably not enough. In part because of the nature of the cases, and in part because of their lack of resources, the defendants were typically unable to amass any credible exonerating evidence. Given that the police already had demonstrated a willingness to testify falsely,¹⁷⁰ many defendants realized that a successful trial defense was unlikely and simply decided to cut their losses.

C. Unsympathetic Forums

A third reason so many innocent Tulia and Rampart defendants pled guilty, even in cases where the evidence was flimsy, was an undoubtedly accurate perception that the system itself was not constituted in a way likely to give them much chance of prevailing. As one blue ribbon panel observed after investigating the Rampart scandal, the Los Angeles County criminal justice system is characterized by “assembly-line” justice.¹⁷¹ Many actors are complicit in pressuring innocent defendants to plead

169. See Pet. for Writ of Habeas Corpus, Decl. of Michael J. Hansen, *In re William Zepeda and Argelia Diaz*, No. BA156980 (Cal. Super. Ct. Mar. 17, 2000) (reporting that Zepeda “decided to plead guilty to the charge after he realized it was just his word against the officers”).

170. For example, Rafael Zambrano, who was charged with violating probation for unlawful gun possession after police planted a gun on him, claimed that he “decided to plead guilty to the charge after Officer Rafael Perez testified at his preliminary hearing.” See Pet. for Writ of Habeas Corpus, Ex. B, Decl. of Brian Tyndall, *In re Rafael Zambrano*, No. BA138148 (Cal. Super. Ct. Feb. 11, 2000).

171. RAMPART RECONSIDERED, *supra* note 16, at 49.

guilty to crimes they did not commit, including prosecutors who “pressure defendants to accept plea deals in extremely short time frames,” “overworked public defenders” who counsel their clients to accept those pleas, and judges who are quick to impose “draconian” sentences on those who “drain[] judicial resources by demanding a trial.”¹⁷² Moreover, prosecutors are reluctant to doubt the credibility of the police officers with whom they work daily, and judges “are unwilling or unable to pursue their own suspicions of police perjury or misconduct.”¹⁷³ As a result, a falsely accused defendant has little reason to believe that he will fare well by going to trial, and has great reason to believe that he will be much worse off by refusing to take a plea and cut his losses.

Ample evidence also suggests that judges often are biased toward the prosecution.¹⁷⁴ A large part of the bench is populated by former prosecutors. These former prosecutors often have difficulty shedding their former roles. Regardless of background, judges often form relationships with prosecutors who appear regularly in their courtrooms, and many think of themselves as part of a “law-enforcement” team. In addition, electoral politics drive many judges to more pro-prosecution positions. Some judges even campaign overtly on being “tough on crime” or “hard on criminals.”¹⁷⁵ Actually innocent defendants tried before such judges likely are often led to believe, probably correctly, that they will not get the benefit of the doubt should they go to trial.

Arguably, pro-prosecution judges played an especially prominent part in many of the cases in which actually innocent defendants were convicted at trial. The two judges presiding over the Tulia prosecutions initially barred defense lawyers from impeaching undercover agent Tom Coleman’s character. After defense counsel discovered that Coleman had

172. *Id.*

173. *Id.*

174. See, e.g., Susan D. Rozelle, *Daubert, Schmaubert: Criminal Defendants and the Short End of the Science Stick*, 43 TULSA L. REV. 597, 606 (2007) (arguing that judges admit dubious forensic science far more often on behalf of prosecutors than defendants); Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 529 (2007) (noting based on personal observation that “a significant number of judges with prior prosecutorial experience bring a decidedly pro-prosecution attitude to the bench, and that attitude invariably influences their decisionmaking”); Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317 (2010) (arguing that elected judges are biased against defendants and “tough on crime” prosecutors should recuse themselves in criminal cases under ethics rules).

175. Swisher, *supra* note 174, at 328–29 (quoting numerous expressions of overt bias in judges electoral campaigns, including one pledge from a Texas Court of Appeals judge who asserted “I’m a prosecution-oriented person” who “see[s] legal issues from the perspective of the state instead of the perspective of the defense” (internal quotation marks omitted)).

been charged with theft in a neighboring county during the same time period in which the undercover operation was conducted, the judges still barred the defense from putting any of that evidence before a jury, thereby effectively precluding defendants from presenting their theory of the case.¹⁷⁶ In the Rampart trial of Javier Ovando, the presiding judge made a similar ruling against the defense, precluding Ovando's attorney from attempting to impeach Officers Perez and Durden with discrepancies between contemporaneous statements given by them to investigators and a new account of events proffered at trial.¹⁷⁷ Decisions by trial judges to preclude defendants from introducing evidence calling into question the honesty and integrity of the police or challenging substantial inconsistencies in the prosecution case were a major part of the Rampart and Tulia stories, and a clear contributing cause to many of the wrongful convictions that occurred.

D. Innocence as a Minor Factor in Plea Bargaining

Although the empirical evidence from the mass exoneration cases leaves no doubt that innocent defendants plead guilty, the question remains: does innocence have a measurable impact on whether a defendant will hold out for trial? Anecdotally speaking, we know that some innocent defendants turn down favorable plea bargains because of innocence. One Rampart exoneree to do so was Alex Umana. Umana was returning from a barbecue with his daughter and her mother when police stopped him and placed him among a group of four to six people who had been detained by police in the lobby of an apartment building. Although Umana was not in possession of any drugs at the time, he was nevertheless charged with possession of cocaine. Prosecutors offered a plea bargain for a probationary sentence, but Umana rejected the offer "because he was innocent and wanted to fight the charges."¹⁷⁸ Umana was convicted at trial and sentenced to five years in state prison.¹⁷⁹ Several Tulia defendants also refused to plead guilty to drug charges because they were innocent. Take the case of Freddie Brookins, Jr., for example, who was accused of selling an eight-ball of powder cocaine to Coleman. Before trial, the prosecutor

176. See BLAKESLEE, *supra* note 30, at 100.

177. See Tamar Toister, *Rampart Hasn't Changed How Criminal Courts Do Business*, L.A. TIMES, Sept. 21, 2000, available at 2000 WLNR 8421802.

178. Answer to Pet. for Writ of Habeas Corpus at 9, Decl. of Barbara Moulton, *In re Alex Umana*, No. BA144035 (Cal. Super. Ct. June 22, 2000).

179. Pet. for Writ of Habeas Corpus at 2, *In re Alex Umana*, No. BA144035 (Cal. Super. Ct. Apr. 6, 2000).

offered Brookins a plea of five years.¹⁸⁰ The maximum sentence for the offense was twenty years. Brookins discussed the offer with his father, and the following colloquy reportedly occurred: “Did you do it,” his father asked him. “No, I didn’t,” Brookins replied. “Well then,” his father responded, “don’t take the deal.”¹⁸¹ Against the advice of counsel, Brookins declined the plea offer. He went to trial, was convicted, and was sentenced to the maximum term of twenty years.¹⁸²

Although we know that some defendants decline plea offers because of innocence, it is also possible that other innocent defendants plead guilty at equal or higher rates to avoid draconian trial penalties. The question therefore remains: does innocence materially alter guilty plea rates? The Rampart data sheds some additional light. For the purposes of this analysis, I identified three groups of Rampart cases resulting in exonerations. The first group, discussed above, consisted of those who were actually innocent of the crimes of conviction. There were thirty-eight such defendants in the data set. Of the remaining forty-nine, twenty-seven were identified as clearly “not actually innocent.” This group consisted of defendants who in fact were in possession of contraband or who admitted that they were engaged in criminal conduct at the time of arrest, but whose convictions were reversed based on procedural violations. The remaining group of twenty-two consisted of defendants whose guilt or innocence remains unclear given the record evidence. I identify this group as the “may be innocent” group.

Although the numbers are small, they are large enough to permit some tentative comparisons. With respect to plea rates, the data shows that innocence does appear to make some difference. Twenty-five actually innocent Rampart exonerees pleaded guilty, while seven were convicted at trial.¹⁸³ Actually innocent exonerees thus pleaded guilty at a rate of 77%. In comparison, twenty-two of those who were not actually innocent pled guilty while three were convicted at trial. In other words, 88% of those who were not innocent pleaded guilty. Finally, of the remaining group of “may be innocents,” seventeen pled guilty while two were convicted at trial, providing an 89% guilty plea rate.¹⁸⁴

180. BLAKESLEE, *supra* note 30, at 138, 148.

181. *Id.* at 148 (internal quotation marks omitted).

182. *Id.* at 157.

183. The other seven had their probation revoked, or were minors who were adjudicated delinquent.

184. Of the rest, two admitted probation violations and 1 had his probation revoked.

It thus appears from the data that actual innocence does induce some defendants to refuse a guilty plea and hold out for trial, but that the incentive has only a marginal effect, leading the innocent to contest their cases at trial at an approximately 10% greater rate than those who are actually guilty. Nonetheless, the data underscore that the vast majority of the actually innocent resolve false charges against them by pleading guilty. Very few held out for trial, and, as the numbers above documenting the size of the trial penalty demonstrate, those who did and lost paid a heavy price for that decision.¹⁸⁵

VI. THE WRONGFULLY CONVICTED VS. THE ACTUALLY INNOCENT: DOES THE DISTINCTION MATTER?

In the national dialogue about wrongful convictions, definitions of terms like “innocence,” “exonerated,” and “wrongfully convicted” have been contested. Has a person, convicted on the basis of unconstitutionally-obtained evidence, been “wrongfully convicted”? The answer, technically, is yes, but commentators typically use terms like “legal innocence” to describe defendants whose convictions resulted from significant procedural error but who are not factually innocent, or at least cannot establish their factual innocence.¹⁸⁶ Legally innocent defendants were “wrongfully convicted,” but typically are treated as occupying a lesser status in the wrongful conviction debates than those who are “factually” or “actually” innocent.

The term “actually innocent” has tended to be reserved for those who succeed in establishing not only that their conviction was legally flawed, but that they did not engage in any significant criminal wrongdoing. Accordingly, both Gross and Garrett limited their datasets to those defendants who were both formally exonerated by official act declaring the defendant not guilty of the crime of conviction and who were “actually innocent.” By “actually innocent,” Gross and Garrett mean that the exoneration was based on evidence that the defendants “had no role in the crimes for which they were originally convicted.”¹⁸⁷ Defendants who were

185. Of course, whether trial was a good or bad decision for the average innocent defendant falsely charged by corrupt Rampart officers is impossible to determine without information regarding acquittals and dismissals of such defendants, which is unavailable. The data does show that those who gamble on trial and lose fare far worse than those who plead guilty.

186. See Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001) (distinguishing between legal and factual innocence); Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011) (critiquing the distinction).

187. Gross et al., *supra* note 2, at 524.

not guilty of the convicted offense, but who were guilty of committing some lesser crime based on the same conduct, are not considered actually innocent and are typically excluded from any count of exonerations.¹⁸⁸

All of the individuals who were included in the Gross and Garrett studies were thus persons whose convictions were formally vacated, either through pardon or court order, and who were able to produce strong evidence not only that the convictions in their cases were unreliable, but that they were affirmatively innocent of wrongdoing. Other commentators have also urged the importance of distinguishing between actually innocent and procedurally innocent defendants, because convictions of actually innocent people represent far more serious breakdowns in the truth-seeking function of the criminal process.¹⁸⁹ Still, police misconduct remains troubling even where the victim of that misconduct is engaged in unlawful behavior. Such misconduct undermines the effectiveness of constitutional rules established to protect the bodily integrity, privacy, and autonomy of citizens from incursion by the state. When police evade these rules by lying about their conduct, they undermine those mechanisms and weaken the protections safeguarding the innocent and the guilty alike.

A. Wrongful Convictions Resulting from Unconstitutional Police Conduct

The primary aim of this article has been to use the Rampart and Tulia exonerations as a means to understand how police misconduct causes wrongful convictions. Accordingly, until now the article has focused on the Rampart and Tulia cases that meet the actual innocence criteria used by other researchers in studying known wrongful convictions. As discussed above, thirty-eight Rampart exonerees and thirty-seven Tulia

188. See *id.* at 524 n.4. Garrett's study employed similar criteria, generally adopting the same screening mechanism—affirmative proof of innocence—used by the Innocence Project to identify potential clients. See GARRETT, *CONVICTING THE INNOCENT*, *supra* note 59, at 285–86 (explaining that list of 250 DNA exonerations does not include “cases in which there has been no exoneration despite DNA evidence of innocence” and only includes cases in which there is no doubt that the “convicts are actually innocent”).

189. See Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 833 (2010). At least one commentator has taken issue with the narrowness of the definition. In a forthcoming paper, Keith Findley argues that the criteria used to define the “actually innocent” is too narrow, at least where proof of innocence rather than absence of proof of guilt is demanded. Findley thus contends that all persons whose convictions are formally vacated based on evidence of innocence should be considered innocent. See Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2011).

exonerees meet these criteria.¹⁹⁰ A list of all of the innocent Rampart and Tulia exonerees appears in the Appendix to this article.

Forty-nine persons—all Rampart defendants—were excluded from the dataset notwithstanding the fact that their convictions were reversed or vacated by a court with the affirmative consent of the Los Angeles District Attorney on the basis of police misconduct. These defendants did not meet the actual innocence criteria because there either remained affirmative evidence of criminal wrongdoing or insufficient evidence of innocence in the records available for this study. Under the Gross criteria, these individuals were not “exonerated” in the relevant sense. There is no doubt, however, that they were wrongfully convicted. Their cases illustrate various ways in which police officers circumvent constitutional protections and then lie about their conduct in order to convict criminal defendants. I refer to this type of police misconduct as “procedural perjury.”

B. Types of Police “Procedural Perjury”

Procedural perjury occurs when police lie about the circumstances of an encounter in order to ensure that evidence obtained during the encounter is not excluded or excludable. Procedural perjury is a common enough problem that a word—“testilying”—has been coined to describe the phenomenon.¹⁹¹ In one survey, insiders in the criminal justice system estimated that police perjury occurs in 20% to 50% of all Fourth Amendment suppression hearings.¹⁹² Seventy-six percent of police officers also believed that police misrepresented the facts relevant to probable cause determinations.¹⁹³ In general, procedural perjury arises in three main guises: lies about consent, lies about probable cause, and lies about compliance with other constitutional rules of criminal procedure, most commonly, the rules governing custodial interrogation set forth in *Miranda v. Arizona*.¹⁹⁴ As I use the terms, procedural perjury differs from

190. See *infra* Part IV.A. One Tulia defendant, Jonathan Loftin, was a minor at the time of his wrongful conviction and did not receive a pardon because he had already served out his camp sentence. Although his case is indistinguishable from the other Tulia cases in every other respect, I have not included him in the dataset.

191. See generally I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008).

192. See Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996); see also Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992).

193. See Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987).

194. 384 U.S. 436 (1966).

substantive perjury in that when police commit procedural perjury, they lie to circumvent procedural rules that otherwise would prevent them from prosecuting apparently guilty suspects. Procedural perjury is a form of whitewashing that is intended to facilitate what most police officers likely perceive to be the most essential aspect of their jobs: to punish those who are believed to be committing or to have committed crimes. Substantive perjury, in contrast, occurs when police lie to incriminate innocent persons. From the perspective of the criminal justice system's guilt/innocence sorting mechanism, substantive perjury is a far more destructive practice than procedural perjury, although both forms of perjury undermine the integrity of the criminal justice system and diminish the credibility and the legitimacy of the police.

A New York state commission headed by Judge Milton Mollen issued a report in 1994 documenting the "commonplace" types of procedural perjury routinely committed by New York police officers in their day-to-day duties, which included lying about observing unlawful conduct or incriminating facts to justify a search and seizure, lying about where contraband was found to cover-up plainly unconstitutional conduct, and lying about compliance with various rules of constitutional criminal procedure.¹⁹⁵ The commission found that perjury was a particular problem in drugs and weapons cases, a finding that is consistent with the pattern of police misconduct evident in the Rampart scandal.¹⁹⁶ Indeed, all of the types of "testilying" identified by the Mollen Commission are on vivid display in the Rampart cases.

195.

For example, when officers unlawfully stop and search a vehicle because they believe it contains drugs or guns, officers will falsely claim in police reports and under oath that the car ran a red light (or committed some other traffic violation) and that they subsequently saw contraband in the car in plain view. To conceal an unlawful search of an individual whom officers believe is carrying drugs or a gun, they will falsely assert that they saw a bulge in a person's pocket or saw drugs and money changing hands. To justify unlawfully entering an apartment where officers believe narcotics or cash can be found, they pretend to have information from an unidentified civilian informant or claim they saw the drugs in plain view after responding to the premises on a radio run. To arrest people they suspect are guilty of dealing drugs, they falsely assert that the defendants had drugs in their possession when, in fact, the drugs were found elsewhere where the officers had no lawful right to be.

See Capers, *supra* note 191, at 869 (quoting COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF NEW YORK, COMM'N REPORT 36 (1994) (Milton Mollen, Chair)).

196. *See* Capers, *supra* note 191.

1. Lies about Consent

One common form of procedural perjury on display in the Rampart cases is a false claim that a suspect “consented” to a search. Consent is simple to manufacture. Police need only claim that a suspect orally consented to a search to establish the existence of consent, although police in some Rampart cases went further and either forged a suspect’s signature on a written consent form or tricked or coerced a suspect into signing such a form.

In several cases, police falsely claimed to have obtained consent to justify a forcible warrantless entry into a home. For example, police stated that they had received information from unnamed sources that a woman named Laura Villatora was storing cocaine and marijuana in her apartment. According to the arrest report, police sought and Villatora consented to a search of her apartment that turned up approximately seven pounds of marijuana.¹⁹⁷ Rampart investigators later concluded, however, that Villatora, who was home with her daughter when the police arrived, did not consent to a search. When it appeared that police efforts to force open the door would cause serious damage to it, Villatora’s teenage daughter, Laura Reyes, opened the door. Officers then “grabbed Reyes by the hair and arm and dragged her to the living room” where they “demanded to know where the drugs and money were located.”¹⁹⁸ They then began searching the apartment, eventually finding both drugs and money.¹⁹⁹ One of the officers later testified to the false version of events at the preliminary hearing.²⁰⁰ As a result, Villatora pleaded guilty to a charge of unlawfully possessing marijuana with intent to sell and was sentenced to two years in prison.²⁰¹

Similarly, in several cases police falsely claimed to have obtained consent to search a vehicle. For example, in the course of accosting Villatora and her daughter, police officers also learned that Villatora’s marijuana supplier was a person named Porfirio Acosta. Police then induced Villatora to arrange for Acosta to deliver drugs to her home. When Acosta arrived, police detained Acosta and searched his car without

197. See Pet. for Writ of Habeas Corpus at 5, *In re Laura Villatora*, No. BA153152 (Cal. Super. Ct. Jan. 31, 2000).

198. *Id.* at 10.

199. Pet. for Writ of Habeas Corpus at 13, Decl. of Michael Gannon, *In re Porfirio Acosta*, No. BA153198 (Cal. Super. Ct. June 7, 2000) (detailing interviews with Laura Villatora and her daughter, Laura Reyes).

200. *In re Laura Villatora*, *supra* note 200, Ex. B (Decl. of Brian Tyndall).

201. *Id.*

obtaining consent. Officers also searched his home. The officers then falsely stated in the arrest report that Acosta had consented to the searches. They even manufactured a false consent to search form.²⁰² Acosta was also charged with possession of marijuana for purposes of sale. He pleaded guilty and was sentenced to three years' probation and 120 days in county jail.²⁰³

Another Rampart case involved Charles Harris, who was arrested after police allegedly recovered 203 grams of rock cocaine and a handgun in a supposedly consensual search of his vehicle.²⁰⁴ Investigators later concluded that, in fact, Harris never consented to the search.²⁰⁵ Likewise, police claimed to have obtained consent to search Juan Rojo's car when, according to witnesses the D.A.'s office concluded to be credible, "Rojo was taken out of his car at gunpoint."²⁰⁶ Officers testified falsely about these events at the preliminary hearing and suppression hearing, at which one officer testified that he merely "asked Rojo to step out of his vehicle so that he could speak with him."²⁰⁷ The officers also falsely claimed that during this encounter Rojo consented to a search of his residence. Gricelda Orellana was in the residence when police turned up seeking to search it. According to Orellana, she "tried to lock the door" to prevent the police from entering.²⁰⁸ Notwithstanding those efforts, the officers entered and found cocaine in her bedroom. Orellana said that the cocaine belonged to "some guy," but told police officers that "Rojo was innocent."²⁰⁹ Nonetheless, Orellana and Rojo both eventually pleaded guilty to one count of possession for sale of cocaine and each served two years in prison.²¹⁰

2. Lies about Probable Cause

Perhaps the most common sort of lies told by the police are those used to establish probable cause for searches and seizures that otherwise are

202. *In re Porfirio Acosta*, *supra* note 202, at 6–7. It appears that the officers not only lied about obtaining consent from Acosta, but also either forged his signature on a consent to search form or coerced or tricked him into signing it. *Id.*

203. *Id.* at 2.

204. See Pet. for Writ of Habeas Corpus at 5, *In re Charles Edward Harris*, No. BA157278 (Cal. Super. Ct. Mar. 6, 2000).

205. *Id.*

206. Pet. for Writ of Habeas Corpus at 6, *In re Juan Cerna Rojo and Gricelda Orellana*, No. BA156027 (Cal. Super. Ct. May 22, 2000).

207. *Id.*

208. *Id.* (Tyndall Decl.).

209. *Id.*

210. *Id.* at 2.

constitutionally unjustifiable.²¹¹ Numerous Rampart cases involved such misconduct.

So-called “dropsy” cases are one well-known form of “testilying.”²¹² In a dropsy case, police claim that suspects in possession of drugs or guns “drop” the contraband before any Fourth Amendment seizure takes place.²¹³ Since the contraband has been “abandoned” and is in “plain view,” the evidence is admissible. That police often resort to this type of perjury has been apparent for decades. Researchers observed a surge in dropsy cases shortly after *Mapp v. Ohio* was decided,²¹⁴ in which the Supreme Court extended the exclusionary rule to the states.²¹⁵

Dropsy cases were well-represented in the Rampart scandal. In one case, officers discovered a bag of cocaine after they had seized two suspects and then conducted a warrantless forty-five minute search of an apartment building. The two men were arrested and charged as a result. In their arrest report, the officers falsely claimed to have seen one of the men hold and then drop the bag of cocaine.²¹⁶ In another case, a police officer saw a suspect suspiciously stuffing an object under his car seat. After searching the vehicle, the officer discovered cocaine. He then stated in the arrest report, and testified at the probation revocation hearing, that he had observed the suspect drop the cocaine on the ground.²¹⁷ This was later determined to have been false.²¹⁸ In a third case, police had information that the narcotics were located in one of the rooms in a hotel.²¹⁹ After entering the room without a search warrant or consent, police found cocaine and the two defendants inside. Instead of these facts, the arrest report stated that police encountered the defendants in the hallway and saw them drop canisters of rock cocaine to the ground.²²⁰ In a fourth case, police seized a suspect and then, apparently after searching him and

211. See Jennifer Hunt & Peter K. Manning, *The Social Context of Police Lying*, 14 SYMBOLIC INTERACTION 51, 56 (1991).

212. See Capers, *supra* note 191, at 868.

213. *Id.*

214. *Id.*

215. See, e.g., Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960–62*, 4 CRIM. L. BULL. 549, 549–50 (1968).

216. See Pet. for Writ of Habeas Corpus at 10, Decl. of Olivia Rosales, *In re Aristide Vanegas and Rodolfo Arevalo*, No. BA146324 (Cal. Super. Ct. Mar. 28, 2000). One of the men admitted that they were delivering drugs to an apartment in the building at the time. *Id.* at 12 (Decl. of Brian Tyndall).

217. Resp. to Pet. for Writ of Habeas Corpus at 3, *In re Oscar Lafarga*, No. GA024373 (Cal. Super. Ct. Nov. 19, 1999).

218. *Id.*

219. Pet. for Writ of Habeas Corpus, Decl. of Natasha S. Cooper, *In re Carlos Martinez Pena and Manuel Espinoza Ferrera*, No. BA145491 (Cal. Super. Ct. Apr. 28, 2000).

220. *Id.*

finding no contraband, searched the area where the seizure occurred. The officers located a firearm. Instead of reporting these facts, the officers falsely claimed to have actually seen the suspect discarding the weapon.²²¹ The suspect, Michael Williams, was charged with possession of a firearm by a felon, contested the charge at trial, and was convicted. Williams was sentenced to serve twenty-five years to life.²²²

Arguably more egregious than dropsy cases are cases where police falsely claim to have seen the suspect actually engaged in criminal conduct. For instance, Rampart officers detained and searched two individuals without probable cause.²²³ After finding cocaine, the officers stated in the arrest report that they had seen the suspect “engaging in the sale of narcotics prior to her arrest” in order “to establish the necessary probable cause for the detention and search.”²²⁴ Reports involving false claims of direct observation of criminal conduct represent a potentially more serious form of procedural perjury because the false statement not only insulates the recovery of the contraband from suppression but provides direct affirmative (albeit false) evidence of the suspect’s guilt, increasing the chances that an innocent person will be convicted. This risk is apparent in the case of Edward Villanueva, who was convicted of possession of a firearm by a felon.²²⁵ According to the arrest report, Officer Perez was manning an observation point when he personally observed Villanueva with the firearms. Those statements turned out to be false. Officer Perez later admitted that he stopped and searched Villanueva based only on a report from a surveillance helicopter team who claimed to have observed Villanueva with the guns.²²⁶ Officer Perez decided to report the facts differently out of an apparent concern that the true facts left some room to doubt whether probable cause existed for the search, or indeed, whether Villanueva ever actually possessed the guns. Some cases combine dropsy testimony and false claims of observed criminal activity. This occurred in the prosecution of Octavio Fernandez.²²⁷ Officers searched Fernandez and discovered drugs. To justify the search, police falsely

221. Pet. for Writ of Habeas Corpus, Ex. A, Decl. of Richard A. Rosenthal, *In re Michael Williams*, No. BA128788 (Cal. Super. Ct. Jan. 31, 2000).

222. *Id.* at 2.

223. *Id.*

224. Pet. for Writ of Habeas Corpus, Ex. A at 1–2, Decl. of Richard A. Rosenthal, *In re Sonia Castro*, No. BA128771 (Cal. Super. Ct. Jan. 31, 2000).

225. Pet. for Writ of Habeas Corpus at 2, *In re Edward Yumol Villanueva*, No. BA135887 (Cal. Super. Ct. Apr. 28, 2000).

226. *Id.* Decl. of Natasha S. Cooper at 8.

227. Pet. for Writ of Habea[s] Corpus at 5, *In re Octavio Fernandez*, No. BA136807 (Cal. Super. Ct. Apr. 10, 2000).

claimed both that they witnessed Fernandez selling drugs and that he dropped them prior to being seized.²²⁸

Another common type of procedural perjury involves misstatements regarding the location in which contraband was found. In one case, officers searched a suspect's car and found a pouch of heroin-filled balloons above the car's rearview mirror.²²⁹ Worried that they lacked probable cause for the automobile search, the officers falsely reported that the balloons had been found in one of the suspect's socks.²³⁰ In another case, officers discovered marijuana during a search of a suspect's residence and reported instead that it was found either on his person or in his car.²³¹ In a third case, officers falsely stated they recovered a gun near the front door of the defendant's apartment and ammunition in his pocket. These facts formed the basis for charging the defendant as a felon in possession of a gun, for which he served four years in state prison. Credible evidence later revealed that police had found the gun inside the defendant's apartment, under a bed, in a search of doubtful constitutional validity. The gun, moreover, likely belonged to someone else.²³²

3. Lies about Miranda Compliance

While police engage in procedural perjury most frequently to avoid Fourth Amendment suppression concerns, police also commit perjury to evade other constitutional rules. This is especially true with respect to compliance with the *Miranda* rules. Again, the willingness of police to lie about their compliance with *Miranda* in order to ensure that incriminating admissions or confessions made by suspects under interrogation are admissible has been noted by other scholars. While conducting observational studies of police interrogations, Professor Richard Uviller

228. *Id.*

229. Pet. for Writ of Habeas Corpus at 4, *In re Blanca Sahagun and Carlos Carranza*, No. BA147177 (Cal. Super. Ct. Jan. 24, 2000).

230. *Id.* at Ex. A, Decl. of Laura Laesecke. One or both suspects may have been innocent. Carranza's account of the incident confirmed what Perez testified to, which is that Carranza never possessed heroin. However, Carranza admitted that "he helped Sahagun arrange the sale of heroin on the day of the incident," which would seem to make him an accomplice. Sahagun, however, denied the charges, alleging that "the entire arrest report was fabricated because she refused to be an informant for Perez." Sahagun claimed "that an officer at Rampart station displayed a clear baggie containing brightly colored objects and told Carranza in her presence that he would 'put this in [Carranza's] shoes.'" *Id.* at Ex. B (Decl. of Brian Tyndall (alterations in original)).

231. See Answer to Pet. for Writ of Habeas Corpus, Decl. of Vesna Maras, *In re Gene Serrano*, No. BA150628 (Cal. Super. Ct., June 9, 2000).

232. See Pet. for Writ of Habeas Corpus, Decl. of Natasha S. Cooper, *In re Salvador Luis Arias*, No. BA090914 (Cal. Super. Ct. May 12, 2000).

noticed that officers often “advance slightly the moment at which the Miranda warnings were recited to satisfy the courts’ insistence that they precede the very first question in a course of interrogation.”²³³ This type of shading of the truth occurred while police were under the known observation of an outsider. When police have no reason to believe they are being observed, even more egregious deceptions are sometimes attempted.

For instance, many of the Rampart cases included false statements by police that they had complied with *Miranda*. In the Charles Harris case mentioned above, not only did police falsely claim that Harris consented to a car search, they also falsely claimed to have advised him of his *Miranda* rights.²³⁴ These false claims of *Miranda* compliance are often only the necessary precedents to further false claims about incriminating statements falsely attributed to the suspect. This too was true in the *Harris* case, where not only did police lie about Mirandizing Harris, they also attributed incriminating admissions to Harris that he never made,²³⁵ casting his actual guilt into doubt. The same pattern appears in the arrest and prosecution of Carlos Romero. In that case, police conducted a warrantless and nonconsensual search of a residence. During the search, police threatened to arrest Romero’s sister, who in response “identified her brother as a narcotics dealer and directed them to a stash of cocaine.”²³⁶ The officers then arrested Romero. They sanitized the search and seizure by falsely claiming to have been directed to the stash of drugs by Romero himself after they had advised him of his *Miranda* rights.²³⁷

C. The Blurred Line Between Procedural and Substantive Perjury, and Other Forms Of Police Corruption

In some cases, it is impossible to determine whether perjury was committed merely to secure a shortcut to conviction of a guilty suspect or instead to convict an innocent man. Such was the case with Julian Lopez Hernandez. According to the arrest report, Hernandez was arrested after police found eleven balloons of heroin during a consensual search of his

233. H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR’S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE 116 (Contemporary Books 1988) (cited and discussed in Slobogin, *supra* note 192, at 1043 (speculating that “lying about events in the interrogation room may be routine”)).

234. See *In re Charles Edward Harris*, *supra* note 205, Decl. of Laura Laesecke at 1.

235. See *id.*

236. Pet. for Writ of Habeas Corpus, Ex. A at 1–2, Decl. of Richard A. Rosenthal, *In re Carlos Romero*, No. BA154270 (Cal. Super. Ct. Nov. 10, 1999).

237. *Id.*

apartment. After his arrest, police claimed that they Mirandized Hernandez, questioned him, and obtained incriminating statements. Hernandez pleaded guilty and was permitted to take advantage of diversion.²³⁸ During the subsequent Rampart investigation, Officer Perez admitted under oath that Hernandez did not consent to the search and that the officers never read Hernandez his *Miranda* rights prior to questioning him.²³⁹ Perez thus admitted to serious procedural flaws in the search and arrest of Hernandez, but appears to have maintained a belief in Hernandez's substantive guilt. Hernandez, however, asserted an entirely different story. “[H]e claimed that the officers escorted him to an unfamiliar apartment building and used a set of keys owned by a man known as ‘Gerardo’ to open the apartment door. Inside, they found numerous colored balloons on a windowsill in the living room.” Hernandez “denied living at the location or knowing anything about the narcotics,” but stated that he “pled guilty to avoid going to prison.”²⁴⁰ Either way, Hernandez was wrongfully convicted, but whether he was actually innocent is impossible to determine on the scant available record.

Procedural perjury also goes hand-in-glove with other forms of police corruption. William Zepeda and Argelia Diaz were convicted of possession of cocaine for purposes of sale.²⁴¹ Both served two year sentences after agreeing to plea bargains.²⁴² In making the arrest, the officers lied about seeing Zepeda and Diaz selling drugs, and falsely claimed to have obtained consent to search their apartment. While there, the officers “stole a large sum of money from their apartment.”²⁴³ They included these false facts in the arrest report, and then repeated the lies at the preliminary hearing. All of the misconduct occurring in the prosecution of Charles Harris was accompanied, similarly, by the unreported appropriation of \$6,000 from Harris's residence and the theft of at least \$500 by the officers.²⁴⁴ In the *Romero* case, Officer Durden

238. See Pet. for Writ of Habeas Corpus at 2, *In re Julian Lopez Hernandez*, No. BA160279 (Cal. Super. Ct. Jan. 31, 2000).

239. *Id.*, Decl. of Laura Laesecke.

240. *Id.*, Decl. of Brian Tyndall.

241. Pet. For Writ of Habeas Corpus at 2, *In re William Zepeda and Argelia Diaz*, No. BA156980 (Cal. Super. Ct., Mar. 17, 2000).

242. *Id.*

243. *Id.*, Decl. of Olivia Rosales.

244. *In re Charles Harris*, *supra* note 193, at Decl. of Laura Laesecke. According to Rafael Perez, the \$6000 along with three guns seized from Harris's house were given to Harris's sister in exchange for information about drug dealers. *Id.*

reportedly stole several pieces of jewelry from a suspect's residence, as well as \$1,500 in cash.²⁴⁵

All of the false convictions in the Tulia cases, similarly, may have been a collateral consequence of the efforts of a corrupt undercover officer to steal drug "buy" money from the Drug Task Force.²⁴⁶ At least some people believe that Officer Coleman pocketed the buy money, lied about buying powder cocaine from the *Tulia* defendants, and then evidenced his purported buys by turning in small amounts of white powder that he mixed himself, each containing only enough cocaine to trigger a positive reading on a lab test.²⁴⁷ In these cases, police lies about compliance with constitutional rules were concomitant with, or in service to, other acts of corruption.

VII. CONCLUSION

Police misconduct, when it occurs, is a major source of wrongful convictions. The profile of those most at risk of such wrongful convictions likely differs in some respects from that of other wrongfully convicted persons. The offenses are generally less serious, and the sentences less severe, than those involved in the DNA exoneration cases. These cases involve drugs and guns, assaults on police officers, charges of disturbing the peace, resisting arrest, or other allegedly violent or aggressive conduct directed at the police. Hundreds of thousands, perhaps millions, of people have been convicted of such crimes. There is simply no way to know how many persons convicted of such offenses were actually innocent, but both Rampart and Tulia provide stark evidence that police misconduct can, and does, result in wrongful convictions.

Comparison of the mass exoneration data with prior exoneration studies suggests that two important adjustments to the empirical picture of wrongful convictions may be in order. Although earlier studies of wrongful convictions found only a small number of cases involving guilty pleas, in the mass exoneration cases, guilty pleas provided the main procedural vehicle to criminal conviction. In more than 80% of the combined Rampart and Tulia cases, innocent defendants pleaded guilty. While innocence did seem to provide a marginal incentive to some defendants to reject guilty pleas, actually innocent Rampart exonerees held

245. See Romero Pet., *supra* note 236, Ex. A at 2 (Decl. of Richard A. Rosenthal).

246. See BLAKESLEE, *supra* note 30, at 88.

247. *Id.* at 88–89.

out for trials only slightly more frequently than their guilty counterparts.²⁴⁸ The Rampart and Tulia exoneration data thus provides strong reason to suspect that guilty pleas are not insulated from the risk of wrongful convictions.

Consideration of this data should also raise the profile of perjury among the causes of wrongful conviction. Although eyewitness misidentification has received a substantial amount of attention as one of the main identified contributing factors in wrongful convictions, the mass exoneration cases make clear that the “causes” of wrongful convictions vary significantly by crime. These exonerations show that police misconduct is a potentially significant cause of wrongful convictions in its own right. Procedural reforms that reduce the incidence of police misconduct, therefore, should be high on the list of priorities among those working to reduce wrongful convictions.

248. See *infra* Part V.D.

APPENDIX

“Actually Innocent” Rampart Exonerees

1. Alfaro, George Kenneth
2. Bailey, Samuel Joseph
3. Barrios, Diego
4. Booker, Esaw
5. Candido, Roberto
6. Carrillo, Delbert
7. Chavez, Emmanuel
8. Davalos, Octavio Gonzalez
9. Escobar, Edgar
10. Estrada, Leonel Ramos (aka Gregorio Ramos Lopez)
11. Flores, Luis Manuel
12. Gomez, Alfredo
13. Guardado, Manuel
14. Guevara, Carlos
15. Harris, Clinton
16. Hernandez, Miguel
17. Lara, Jose Armando
18. Lobos, Allan Manrique
19. Madrid, Jose Hugo
20. Matlong, Rene Barela (aka Rene Mationg)
21. Montes, Roy
22. Munoz, Raul Alfredo
23. Natividad, Cesar aka Danny Banuelos
24. Newman, Russell
25. Oliver, Ivan
26. Ordonez, Felipe Enriquez
27. Ovando, Javier Francisco
28. Perez, Jose
29. Peters, Gerald
30. Rivas, Walter
31. Rodriguez, Raul
32. Rojas, Ruben
33. Tapia, Daniel
34. Thomas, James
35. Torrecillas, Juan
36. Umana, Alex
37. Wesley, Mohammed Wayman
38. Zambrano, Rafael

Tulia Exonerees

1. Allen, Dennis Mitchell
2. Barrow, James Ray
3. Barrow, Landis
4. Barrow, Leroy
5. Barrow, Mandis Charles
6. Benard, Troy
7. Brookins, Freddie Wesley
8. Cooper, Marlyn Joyce
9. Ervin, Aremnu Jerrod
10. Fowler, Michael
11. Fry, Jason Paul
12. Fry, Vickie
13. Hall, Willie B.
14. Henderson, Cleveland Joe
15. Henry, Mandrell L.
16. Jackson, Christopher Eugene
17. Kelly, Denise
18. Kelly Sr., Eliga
19. Klein, Calvin Kent
20. Love, William Cash
21. Marshall, Joseph Corey
22. Mata, Laura Ann
23. McCray, Vincent Dwight
24. Moore, Joe Welton
25. Olivarez, Daniel G.
26. Powell, Kenneth Ray
27. Robinson, Benny Lee
28. Shelton, Finaye
29. Smith, Donald Wayne
30. Smith, Yolanda Yvonne
31. Strickland, Romona Lynn
32. Towery, Timothy Wayne
33. White, Kareem Abdul Jabbar
34. White, Kizzie Rashawn

35. Williams, Alberta Stell
36. Williams, Jason Jerome
37. Williams, Michelle

Conviction Integrity Units Revisited

Barry C. Scheck*

I. INTRODUCTION

Since 2007, when the Dallas County District Attorney's office established a Conviction Integrity Unit (CIU) that rapidly produced an unprecedented series of DNA and non-DNA post-conviction exonerations, there has been a movement among district attorney offices across the country to declare that they had formed their own CIUs, or Conviction Review Units (CRUs).¹ In 2016 and 2015, the National Registry of Exonerations reported both an increase in the number of CIUs formed and CIU-involved exonerations, although the vast majority of those CIU exonerations came from just two offices.² "Conviction Integrity Unit" has become

* Professor of Law, Benjamin N. Cardozo School of Law, Co-Director and Co-Founder of the Innocence Project. It is an honor to be selected to deliver the Bodiker Lecture. David Bodiker, his family, colleagues, and friends represent everything that is good about the brave defender community in Ohio and across America that truly strives to be liberty's last champions. Except for statements about "best practices" for Conviction Integrity Units that appear on the website of the Innocence Project, all opinions and all errors in this lecture are mine alone and should not be attributed as the official position or policy of the Innocence Project. The following is a greatly expanded written version of the 2014 David H. Bodiker Lecture on Criminal Justice I delivered at The Ohio State University Moritz College of Law on October 7, 2014.

¹ The term "Conviction Integrity Unit" in this article refers to a unit within a prosecutorial office that investigates, post-conviction, possible miscarriages of justice. I will discuss briefly the need for other units within a District Attorney's office to conduct internal audits, root cause analysis, sentinel reviews, or other efforts to learn from error. Sometimes offices will use slightly different names than "Conviction Integrity Unit" for the internal group that re-investigates possible miscarriages of justice. Notably, the Brooklyn or Kings County District Attorney's office uses the name "Conviction Review Unit" to refer to these two functions. *Conviction Review Unit*, BROOKLYN DIST. ATT'Y OFF., <http://www.brooklynda.org/conviction-review-unit/> [https://perma.cc/NFX7-6MAC] (last visited Oct. 6, 2015).

² There were 60 CIU exonerations in 2015 and 70 CIU exonerations in 2016. In 2016, 48 of the CIU exonerations (69%) were drug conviction guilty pleas from Harris County. There were 9 additional CIU exonerations in 2016 for drug crimes from other counties, 10 for homicides, and 3 for other violent crimes. The Harris County drug cases arose from late receipt of laboratory results showing the substances possessed by individuals who pled guilty for whatever reason were not, in fact, controlled substances. By the Registry's count, out of 26 CIUs known to be operating in 2015, 7 produced exonerations; out of 29 known CIUs known to be operating in 2016, 9 accounted for exonerations. The Registry defines "exonerations" as "cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence." NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015 (2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf [https://perma.cc/MHG8-KT82]; NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016 (2017), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf [https://perma.cc/S4Y2-MW92].

a brand name that has good public relations value for an elected official. But what does it really mean? Is it just a fashion accessory, a flashy but empty appellation intended to convey the idea that the office is extremely serious about correcting wrongful convictions and holding its own members accountable for errors or acts of misconduct, but really is not? Is conviction integrity nothing more than a passing fad, a nebulous slogan without real meaning that is good for propaganda purposes, but will not bring about any serious change in the way business is done in American criminal justice system?³

Or does the interest in “conviction integrity” signal something qualitatively different: a movement toward a post-conviction non-adversarial process for reinvestigating potential miscarriages of justice, which involves prosecutors, innocence organizations, and defense lawyers working together in a joint search for the truth; a recognition of ethical and ultimately constitutional obligations to disclose material evidence of innocence post-conviction; and an adoption of procedures, such as “root cause analysis”⁴ and “sentinel review,”⁵ that are hallmarks of a “just culture” approach to organizational management?

The jury is plainly out on those questions. The Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania, with assistance from the Innocence Project, conducted a survey to gather empirical data on what district attorneys who say they have CIUs or CRUs mean by it, and what they claim to be doing. A publication of the Quattrone Center, *Conviction Integrity: A National*

³ Many defense attorneys have expressed negative views about some CIUs, believing it is better to deal directly with courts than it is to engage in a conviction integrity re-investigation. See Hella Winston, *Wrongful Convictions: Can Prosecutors Reform Themselves?*, CRIME REP. (Mar. 27, 2014), <http://www.thecrimereport.org/news/inside-criminal-justice/2014-03-wrongful-convictions-can-prosecutors-reform-themselves> [https://perma.cc/R9RU-XYES] (in which attorneys note that it is preferable for the defense to deal with judges rather than with CIUs due to prosecutors’ inherent conflict of interest).

⁴ An excellent description of root cause analysis generally, and how it should be used specifically by crime laboratories in the United States, can be found in a recently approved directive recommendation from the National Commission on Forensic Science. NAT’L COMM’N ON FORENSIC SCI., ROOT CAUSE ANALYSIS (RCA) IN FORENSIC SCIENCE (2015), <https://www.justice.gov/ncfs/file/641621/download> [https://perma.cc/5YWD-G8YZ]. It should go without saying that if forensic scientists and the medical community are regularly employing RCAs as technique to learn from error, it behooves prosecutors, defenders, and judges to understand it and use it themselves.

⁵ James Doyle provides an insightful analysis of how all stakeholder “sentinel event reviews” could be done in the criminal justice system in response to wrongful convictions,

but also “near miss” acquittals and dismissals of cases that at earlier points seemed solid; cold cases that stayed cold too long; “wrongful releases” of dangerous or factually guilty criminals or of vulnerable mentally handicapped arrestees; and failures to prevent domestic violence within at-risk families. . . . In fact, anything that stakeholders can agree should not happen again could be considered a sentinel event.

James M. Doyle, *Learning From Error in the Criminal Justice System: Sentinel Event Reviews*, in NAT’L INST. OF JUSTICE, MENDING JUSTICE: SENTINEL EVENT REVIEWS 3–4 (2014), <https://www.ncjrs.gov/pdffiles1/nij/247141.pdf> [https://perma.cc/J729-UGW9].

Perspective by John Hollway, contains the results of that survey and recommendations for policies and practices.⁶ Given the limitations of the data we could gather at this early stage in the development of CIUs, I think it is good work, although I am admittedly biased. This lecture and the Quattrone Center report can be viewed as complementary and co-operative publications that rely on the same interview data and have reached similar conclusions about best practices, but from different perspectives and with different emphases.⁷ My perspective is based on more than two decades of re-investigating and litigating wrongful conviction cases as an attorney with an “innocence organization,” working with both CIUs and with District Attorney offices that did not have such units. I have been an “advisor,” formally and informally, to a number of CIUs. Inevitably, my view of the interview data and CIUs is influenced by the fact that I know most of the offices from my own cases and many of the individuals interviewed. Consequently, this article is written more from a “participant observer” viewpoint that I hope is pragmatic, candid, and sympathetic to the enterprise, leavened with a healthy skepticism based on what history teaches about the difficulty of the task. What follows is an outline and commentary on developing best practices for CIUs that can work and have worked. But to begin, I think it is important to make three observations.

First, the process a CIU uses to re-investigate possible miscarriages of justice is only one part of inter-related efforts to identify “errors,” learn from them, and create what’s known in organizational literature as a “just culture” in the office.⁸

⁶ See John Hollway, *Conviction Review Units: A National Perspective*, UNIV. OF PA. LAW SCH. (2016), <http://ssrn.com/abstract=2707809> (Public Law and Legal Theory Research Paper No. 15-41).

⁷ Needless to say, the views expressed by John Hollway and his colleagues are their own, and the views expressed here are entirely mine and should not be attributed to them.

⁸ In a first effort to outline the structure of “Conviction Integrity Units,” done in the context of a Cardozo Law Review Symposium on *Brady* obligations, I presented a model of how an overall “Conviction Integrity Program” might be implemented administratively in a large district attorney’s office to create a “just culture.” It included organizational and flow charts showing how a “Conviction Integrity Unit,” a group dedicated solely to the re-investigation of possible miscarriages of justice, interfaced with Bureau Chiefs, a Training Unit, and a “Professional Integrity Unit.” The Professional Integrity Unit would field complaints from inside and outside the office (from judges, defense lawyers, and the general public), identify problems, track errors, conduct root cause analyses, and develop systemic solutions to problems. There was also emphasis on short, real time “checklists,” like those used by pilots and ICU teams in hospitals and popularized by Dr. Atul Gawande. ATUL GAWANDE, CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT (2009). See also Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them*, 31 CARDZO L. REV. 2215, 2238–56 (2010). The CIU proposal was influenced by the discussions of the transition team for newly elected District Attorney Cyrus Vance, of which I was a member. Very useful “checklists” from the New York County CIU can be found in CTR. ON THE ADMIN. OF CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS’ OFFICES app. A (2012), http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf [<https://perma.cc/4HNG-6P2K>].

A “just culture” approach, which interestingly arose from work done in automobile manufacturing and the airline industry to prevent and learn from error, has achieved a significant foothold in the delivery of medical services since the publication of the National Academy of Science report, *To Err Is Human*.⁹ Here is a definition of “just culture” that does a very good job of capturing succinctly many of the important ideas that are generally associated with the term in the medical context:

[Just Culture] is a defined set of values, beliefs, and norms about what is important, how to behave, and what behavioral choices and decisions are appropriate related to occurrences of human error or near misses. In a Just Culture, open reporting and participation in prevention and improvement is encouraged. There is recognition that errors are often system failures, not personal failures, and there is a focus on understanding the root of the problem allowing for learning and process improvement to support changes to design strategies and systems to promote prevention. A “Just Culture” is not a “blame-free” culture. Rather, it is a culture that requires full disclosure of mistakes, errors, near misses, patient safety concerns, and sentinel events in order to facilitate learning from such occurrences and identifying opportunities for process and system improvement. It is also a culture of accountability in which individuals will be held responsible for their actions within the context of the system in which they occurred; such accountability may involve system improvement or individual consoling, coaching, education, counseling, or corrective action. A “Just Culture” balances the need to learn from mistakes with the need to take corrective action against an individual if the individual’s conduct warrants such action.¹⁰

In the context of a district attorney or a public defender office, the development of a “just culture” will inevitably have different contours and emphases than a “just culture” in a hospital setting or a crime laboratory, although many of the same mechanisms, such as root cause analysis and sentinel review, are plainly applicable. In hospitals and crime laboratories, there are more scientific controls that can be utilized to expose errors in testing procedures and more objective feedback in terms of diagnostic errors. For example, whatever predictions were made based on imaging procedures (CT scans and MRIs) or other predictive clinical tests can be tested after surgical procedures or autopsies to get

⁹ INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 155–97 (Linda T. Kohn et al. eds., 2000) (ebook).

¹⁰ WASH. STATE NURSES ASS’N, MEDICAL ERRORS AND PATIENT SAFETY 4 (2011), <https://www.wsna.org/assets/entry-assets/Nursing-Practice/Publications/pp.errors.pdf> [https://perma.cc/N5NV-K75R].

relatively reliable evidence as to whether the predictions were right or wrong. There is also arguably more agreement about goals and the meaning of outcomes. Saving a patient's life or getting accurate and reliable test results are comparatively clear goals and outcomes as compared to a conviction or acquittal after a fair trial (the goal) that may or may not be an accurate measure of the guilt or innocence of the accused.

Even more vexing in terms of the goals being pursued and measuring the meaning of outcomes is the dismissal of charges by a prosecutor or the "voluntary" plea of guilty by a defendant: Did the prosecutor dismiss because there wasn't enough evidence of guilt, the prosecution wasn't a wise expenditure of resources, or the suspect co-operated on another case? Did the defendant plead guilty even though he or she was innocent because the risk of a mandatory minimum sentence was much too great, or because of a lack of confidence in counsel, inability to make bail, family or employment pressures, or simply because the defense did not know the state possessed undisclosed exculpatory evidence? The significance of dismissals and pleas is not only difficult to assess in real time but retroactively since there is much less of a record to examine than after a trial.

Now, twenty-seven years into an "innocence era" triggered by the advent of post-conviction DNA testing, the criminal justice system is just beginning to count its factual errors more rigorously. The feedback evidence, however, takes a long time to emerge because post-conviction exonerations often take decades. An error rate based on case outcomes has been difficult to calculate.¹¹ An error rate based on "ground truth"—that is, perfect post-conviction knowledge of who was guilty or innocent—is probably impossible. But there is no question that stakeholders in the post-DNA era now recognize that more innocent people have been convicted than anyone imagined, and the rate of error more than justifies innocence reform efforts.¹²

¹¹ The most rigorous empirical studies have been done in capital cases where there is more data, more attention paid to the cases, and some ability to compare exoneration rates to non-capital homicide cases. See Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, 111 PROC. NAT'L ACAD. OF SCI. 7230 (2014) (estimating an exoneration error rate of "at least" 4.1%). Gross et al. appropriately emphasize that false convictions are obviously unknown at the time of the conviction and extremely difficult to detect after the fact such that "the great majority of innocent defendants remain undetected. The rate of such errors is often described as a 'dark figure'—an important measure of the performance of the criminal justice system that is not merely unknown but unknowable." *Id.* at 7230. See also Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 826 (2010); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 776 (2007).

¹² Marvin Zalman has recently canvassed the history and the literature with respect to estimating the incidence of innocents being convicted in the United States, both quantitative and qualitative efforts. See Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221 (2012). Zalman concludes that there is no plausible basis for the error rate to be below 1%, that it is probably higher, and that this is more than sufficient to justify significant commitment to "innocence reform" efforts. *Id.* at 278.

As a result of this conundrum—the system makes more factual errors than believed but has limited objective evidence to identify factual errors conclusively—I suspect that developing a “just culture” for criminal justice stakeholders, as opposed to hospitals or crime laboratories, will put greater emphasis on the need for procedural “fairness” and cognitive neutrality when conducting investigations and making decisions as well greater concern for sanctioning egregious and intentional rule breaking that violate ethical norms. Since the ability of stakeholders to be sure the system is factually accurate is inherently limited—admittedly governed by police officials, judges, and juries making somewhat subjective inferences about whether evidence from disparate sources is “probable cause,” “more likely than not,” or “proof beyond a reasonable doubt”—the perception that stakeholders themselves are fair, trustworthy, and *primarily* interested in *just* outcomes is critical to the system being regarded as legitimate.¹³

This leads to my second prefatory observation: Why, in 2017, are we even talking about conviction integrity units in district attorneys offices as an important arena for innocence organizations and defenders to be engaged in extensive post-conviction re-investigations of potential miscarriages of justice? Why are there not independent, well-funded government entities, modeled after the Criminal Court Review Commission in the United Kingdom (CCRC),¹⁴ to re-investigate possible wrongful convictions? Why don’t we have a federal entity, or state entities, which investigate wrongful convictions like the National Transportation and Safety Board (NTSB) investigates plane crashes or train derailments, asking only “what went wrong and how can it be fixed?” Why are there not “public inquiry” tribunals with broad authority similar to those used in Canada that hold hearings and issue reports

¹³ This is not a call for putting a thumb on the “due process” as opposed to the “crime control” side of the scale to use the terms of Herbert Packer’s famous distinction. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 228–29 (1968). A “just culture” in a prosecutor’s office that focuses on learning from error, and a “conviction integrity program” that tries to implement it, is designed to increase the efficiency of the investigative process. In that respect, it advances “crime control” objectives. It is just another example of how reforms generated by the “innocence movement” have rendered the trade off between “due process” and “crime control” a false choice. See Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 140 (2008).

¹⁴ The CCRC was set up in March of 1997 after the infamous Birmingham Six and Guilford Four cases, miscarriages of justice involving prosecution of the Irish Republican Army. It reviews possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refers appropriate cases to the appeal courts when it believes a conviction is “unsafe” and makes recommendations to improve the criminal justice system as they arise out of the cases. *Our History*, CRIMINAL CASES REVIEW COMM’N, <http://www.ccrc.gov.uk/about-us/our-history/> [https://perma.cc/UXY6-VFVY] (last visited Feb. 28, 2017). The Commission is based in Birmingham and has about 90 staff, including a core of about 40 caseworkers, supported by administrative staff. There are twelve commissioners who aspire to be completely independent and impartial and do not represent the prosecution or the defense. *Who We Are*, CRIMINAL CASES REVIEW COMM’N, <http://www.ccrc.gov.uk/about-us/who-we-are/> [https://perma.cc/55FM-KQBR] (last visited Feb. 28, 2017).

about miscarriages of justice, identifying causes, suggesting remedies, and even setting compensation awards to the wrongly convicted.¹⁵

Peter Neufeld, Jim Dwyer, and I began making these suggestions in February of 2000 when we laid out an “innocence reform” agenda in our book *Actual Innocence*.¹⁶ Independent institutions along these lines seemed to us, and others,¹⁷ an obvious response given the far greater number of exonerations, both DNA and non-DNA, that keep occurring in the United States compared to the United Kingdom or Canada. But so far, only one state, North Carolina, has made a serious effort at setting up an institution that reinvestigates cases to determine if they are wrongful convictions; most other “innocence commissions” have been reports by bar associations or state legislatures reviewing known exonerations as a basis for policy reform.¹⁸

The North Carolina Innocence Inquiry Commission was created in 2006 to function as an independent government entity.¹⁹ It has reviewed 2,005 cases and

¹⁵ See MINISTRY OF THE ATT'Y GEN., EXECUTIVE SUMMARY, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998), http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.pdf [<https://perma.cc/5ZS4-K8SN>]; Sarah Harland-Logan, *Thomas Sophonow*, INNOCENCE CANADA, <https://www.aidwyc.org/cases/historical/thomas-sophonow/> [<https://perma.cc/32JF-AKMJ>] (last visited Feb. 28, 2017); COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2004), http://www.qp.gov.sk.ca/Publications_Centre/Justice/Milgaard/Milgaard.pdf [<https://perma.cc/LJ9H-J9PU>].

¹⁶ BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED app. 1 (2000). See also Barry C. Scheck & Peter J. Neufeld, *Towards the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 103–04 (2002); BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 351 (2003).

¹⁷ Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 152 (2009); Lissa Griffin, *International Perspective on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS. J. 1153 (2013); Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT. L. REV. 89 (2010); Sarah L. Cooper, *Innocence Commissions in America: Ten Years After*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 197 (Sarah Lucy Cooper ed., 2014).

¹⁸ See *Criminal Justice Reform Commissions: Case Studies*, INNOCENCE PROJECT (Mar. 1, 2007), <http://www.innocenceproject.org/criminal-justice-reform-commissions-case-studies/> [<https://perma.cc/8WCW-CB8W>].

¹⁹ N.C. INNOCENCE COMM'N, www.innocencecommission-nc.gov [<https://perma.cc/DQL4-853H>]. See Matt Ford, *Guilty, Then Proven Innocent*, ATLANTIC (Feb. 9, 2015), <https://www.theatlantic.com/politics/archive/2015/02/guilty-then-proven-innocent/385313/> [<https://perma.cc/86W9-QDFN>] (reviewing the Commission, its processes, and its latest successes). The Commission was set up in the wake of the Daryl Grant exoneration largely through the tireless efforts of former Chief Justice of the North Carolina Supreme Court, Beverly Lake, and Chris Mumma, Judge Lake's former law clerk and the Executive Director of the North Carolina Center on Actual Innocence. See *Leadership*, N.C. CTR. ON ACTUAL INNOCENCE, <http://www.nccai.org/about-us/leadership.html> [<https://perma.cc/2BWE-HK8E>] (last visited Feb. 28, 2017).

produced 10 exonerations.²⁰ The full commission consists of eight members, an impressively diverse set of stakeholders—a prosecutor, a criminal-defense attorney, a sheriff, a superior court judge, a victims’ rights advocate, a member of the public, and two discretionary appointments. If the commission concludes there is sufficient new evidence to demonstrate “actual innocence,” it submits the case to a special three-judge tribunal. If the tribunal unanimously finds the evidence of innocence “clear and convincing,” the claimant is exonerated and immediately released.

There is much to admire in this model: The Commission is independent; it has diverse stakeholders working with each other in a non-adversarial “inquisitorial” re-investigation, a good safeguard against “cognitive bias” problems; and, most significantly, it has subpoena power. But there are also glaring problems: The Commission does not consider or pursue constitutional problems such as suppressed exculpatory evidence, prosecutorial misconduct, or ineffective assistance of counsel as factors even though they might be very relevant to assessing the reliability of the evidence as a whole, and the special tribunal will not entertain constitutional claims; there are other procedural bars that can result in good “factual innocence” evidence being ignored because it was presented, however poorly, at trial or at a post-conviction proceeding;²¹ and the multi-layered process has proven to be cumbersome and slow. Notwithstanding these problems, an independent “innocence commission” with real investigative power remains a good mechanism to correct wrongful convictions. But it has unfortunately not yet found traction outside of North Carolina, and the chances of the model spreading are small right now, especially in comparison with the current popularity of “conviction integrity” reform. On the other hand, if “conviction integrity” reform proves to be more flash than substance, one can easily envision a few controversial cases that lead to a backlash against the idea prosecutors can be trusted to investigate themselves, and renewed efforts to establish independent entities to re-investigate potential miscarriages of justice, learn lessons from them, and supplant the function “conviction integrity” units are attempting to perform.²²

²⁰ Case Statistics, N.C. INNOCENCE COMM’N, <http://www.innocencocommission-nc.gov/stats.html> [<https://perma.cc/MYV7-EZN9>] (last visited Feb. 28, 2017).

²¹ Article 2(A)(7) of the Commission Rules states there must be some “credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.” See N.C. GEN. STAT. § 15A-1460(1). In contrast, the CCRC has an exception to the fresh evidence requirement for rare cases. Criminal Appeal Act 1995, ch. 35, §13(2) (Eng.). This procedural bar has been subject to criticism though. See Michael Naughton, *The Importance of Innocence for the Criminal Justice System*, in THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? 17–41 (Michael Naughton ed., 2010) (criticizing CCRC for not pursuing re-investigations to determine “factual innocence” because it requires “fresh evidence” comparable to newly discovered procedural requirements in US).

²² For example, the Conviction Integrity Unit in Cook County, Illinois claims ownership over several exonerations despite years of resistance from the State’s Attorney’s Office before eventually conceding in the face of overwhelming evidence of innocence. According to the National Registry of

This leads to a third and final prefatory observation: “Conviction integrity” reforms—and I am assuming here an earnest, open re-investigation unit that involves a true partnership with innocence organizations and defense counsel consonant with best practices as well as other initiatives to learn from error (root cause analysis and sentinel review)—may have a surprisingly good chance of succeeding. My optimism arises from the fact that a good CIU relies on a series of cognitive science “fixes” (what the forensic science community calls “human factor” considerations)²³ designed to re-orient stakeholders on how to evaluate evidence and relate to each other.

In the Introduction to *In Doubt*, his masterful critique of the psychological processes at play in the criminal justice system, Dan Simon instructs that “[u]nlike most other disciplines that are employed in the analysis of the legal system, experimental psychology operates at a granular level that enables offering direct and immediate solutions to specific problems.”²⁴ He rightly observes that many legal scholars who have addressed the lack of accuracy in the investigative process and the lack of “diagnosticity” in the adjudicatory process²⁵ tend to propose “profound institutional changes to the criminal justice process” that “run against the grain of the current Anglo-American legal culture, and would likely require deep legislative changes and perhaps also constitutional amendments.”²⁶ He calls for “pragmatism” and specific “best practices” that are “practical, feasible, and readily implementable in the short or medium term,” reforms that are targeted at law enforcement officials, lawyers, and judges that could be adopted at the departmental level, or by criminal justice stakeholders themselves, with a minimum of legislative involvement.²⁷

Accordingly, what follows is a “granular” discussion of Conviction Integrity Unit “best practices” that is intended to facilitate productive, non-adversarial post-conviction reinvestigations and efforts to learn from errors involving multiple stakeholders. These “best practices” did not emerge from thin air. The “best practices” for a non-adversarial post-conviction re-investigation come directly from successful experiences of innocence organizations working co-operatively

Exonerations, the State’s Attorney’s Office fought to uphold the convictions of at least six of the nine people whose exonerations they later claimed to have helped secure. See NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, 13–14.

²³ *Human Factors*, U.S. DEP’T OF JUSTICE, NAT’L COMM’N ON FORENSIC SCI., <https://www.justice.gov/ncfs/human-factors> [https://perma.cc/8A9L-JF5P] (last visited Feb. 28, 2017); *Human Factors Subcommittee*, NAT’L INST. OF STANDARDS AND TECH., <https://web.archive.org/web/20160113070656/http://www.nist.gov/forensics/osac/hfc.cfm>.

²⁴ DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 13 (2012) [hereinafter IN DOUBT].

²⁵ *Id.* at 3.

²⁶ *Id.* at 13 (footnote omitted).

²⁷ *Id.* It should be noted that Simon practices what he preaches and offers specific, “granular” best practices at the end of each of his chapters. See, e.g., *id.* at 48–49.

with prosecutors in cases that led to “exonerations” as well as cases that did not. The two offices whose procedures most closely track these “best practices,” Dallas and Brooklyn, have also generated the greatest number of exonerations.

There is historical precedent for this “granular,” non-adversarial approach to “conviction integrity” that provides some basis for optimism. In 1996, Attorney General Janet Reno formed a Commission on the Future of DNA Evidence that had, as one of its principal objectives, the goal of overcoming the resistance of prosecutors and courts to the widespread use of post-conviction DNA testing to determine whether a convicted inmate requesting such a test was wrongfully convicted.²⁸ This resistance, relying on “finality” arguments and statute of limitation time bars, provided any prosecutor who would not voluntarily consent to testing a formidable basis to block testing indefinitely. Despite the insistence of at least one vociferous advocate²⁹ that the first order of business for the Commission should be adoption of model state and federal legislation that explicitly authorized post-conviction DNA testing, the Commission Chair, Chief Judge Shirley Abrahamson of the Wisconsin Supreme Court, elected to form a subcommittee of relevant stakeholders to develop best practices on when prosecutors should definitely consent to post-conviction DNA testing, when they should have discretion to refuse in borderline cases, and when they should be free to refuse in non-meritorious cases. This subcommittee of stakeholders produced a “granular” report specifically defining categories of cases where testing should go forward and checklists for each stakeholder—prosecutors, judges, defenders, crime laboratory analysts, police, and victim advocates—on exactly what they should do in such cases. In turn, this Subcommittee report, *Postconviction DNA Testing: Recommendations for Handling Requests*³⁰ was issued as the first publication of the Commission and it became a very effective instrument for innocence organizations and defense lawyers to obtain consent from prosecutors for DNA testing that could have otherwise been bottled up for years.³¹

²⁸ See *National Commission on the Future of DNA Evidence*, NAT'L INST. OF JUSTICE, <http://www.ncjrs.gov/topics/forensics/evidence/dna/commission/pages/welcome.aspx> [<https://perma.cc/DVB3-BRUA>] (last visited Feb. 28, 2017).

²⁹ I was that advocate. I served as a Commissioner and a member of the planning committee for the Commission. This constitutes a formal written mea culpa to Judge Abrahamson, former Executive Director Chris Asplen, and Commissioner Ron Reinstein.

³⁰ NAT'L COMM'N ON FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (1999), <https://www.ncjrs.gov/pdffiles1/ncjrs/177626.pdf> [<https://perma.cc/RP7K-HP77>].

³¹ The Report identified fact patterns for Category 1 and Category 2 cases where reasonable prosecutors ought to consent to post-conviction DNA testing. *Id.* at 4–5. With the full weight of the United States Department of Justice behind the report, and a group of state prosecutors and local police officials with well-known DNA expertise (as well as “hardline” reputations) on the subcommittee, it was my experience that more prosecutors consented to testing than opposed. The voluntary compliance was, of course, heartening; the opposition, very quickly, became difficult to accept because Category 1 and 2 cases were written to be virtual “no-brainers.”

The Commission later proposed model state legislation. Eventually, all fifty states enacted some form of post-conviction DNA legislation,³² and Congress did so as well by passing the Innocence Protection Act of 2001.³³ While many of those state statutes contained flaws,³⁴ there is no question that the “granular” recommendations of the Commission had a salutary effect because they induced a joint, non-adversarial post-conviction DNA testing process in many jurisdictions that resulted in exonerations and led to the apprehension of the real assailants. Most significantly, as part of the Innocence Protection Act, Congress also passed the Kirk Bloodsworth grant program that authorized federal funding to state and local governments for post-conviction DNA testing.³⁵ The Bloodsworth program was conceived as a way that the Commission’s vision of a non-adversarial post-conviction process could be implemented through innocence organizations and public defenders working together with police and prosecutors to find probative biological evidence, test it, and either reach agreement to vacate the conviction or let a court decide. Over the 2015 fiscal year, \$3,555,053.00 in Bloodsworth grants has been awarded and, with very few exceptions, the recipients were part of a joint post-conviction effort involving law enforcement and innocence organizations or defenders.³⁶

Recognizing this success does not mean one should ignore or minimize the fact that a number of prosecutors spurned the Commission’s recommendations, reflexively opposed testing, and unreasonably refused to vacate convictions even

³² *Policy Reform*, INNOCENCE PROJECT, <http://www.innocenceproject.org/policy/> (last visited Feb. 28, 2017).

³³ Innocence Protection Act of 2001, S. 486, § 104 (2001).

³⁴ Patrice O’Shaughnessy, *NYPD Eyes Dozens of ‘Solved’ Murders: Police Say Ex-cop’s Closed Cases Questionable*, N.Y. DAILY NEWS (Aug. 5, 2001), <http://www.nydailynews.com/archives/news/nypd-eyes-dozens-solved-murders-police-ex-cop-closed-cases-questionable-article-1.917627>.

³⁵ Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, 42 U.S.C. § 14136e (2004) (establishing the Kirk Bloodsworth Post-conviction DNA Testing Grant Program and authorizing appropriations of \$5,000,000 for each fiscal year from 2005 through 2009).

³⁶ *Postconviction Testing of DNA Evidence to Exonerate the Innocent Program*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/justice-system/wrongful-convictions/pages/postconviction-dna-funding-program.aspx> [<https://perma.cc/T44J-CP5E>] (last visited Mar. 1, 2017) (see awards made for FY 2015). See also *Awards Made for “BJA FY 15 Wrongful Conviction Review Program: Representation of Wrongfully Convicted Defendants in Post-Conviction Claims of Innocence,”* U.S. DEP’T OF JUSTICE, <https://external.ojp.usdoj.gov/selector/title?selectionTitle=BJA%20FY%202015%20Wrongful%20Conviction%20Review%20Program%20Representation%20of%20Wrongfully%20Convicted%20Defendants%20in%20Post-Conviction%20Claims%20of%20Innocence&po=BJA> [<https://perma.cc/C7BF-5HNU>] (last visited Mar. 1, 2017) (noting the Wrongful Conviction Review Program grants for the fiscal year 2015); *Funding*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, <https://www.bja.gov/funding.aspx> [<https://perma.cc/Q5PD-P892>] (last visited Mar. 1, 2017) (listing historical data for BJA grants); *Projects Funded by NIJ Awards*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/funding/awards/pages/welcome.aspx> [<https://perma.cc/2LAY-UXTE>] (last visited Mar. 1, 2017).

after court ordered post-conviction DNA testing produced powerful, exculpatory results.³⁷ Indeed, considerable scholarly attention has been focused on this striking phenomenon and the cognitive psychology that underlies cases where prosecutors “irrationally” refuse to admit error.³⁸ Truth be told, what cognitive psychology teaches about the challenges criminal investigators face from confirmation bias,³⁹ motivated reasoning,⁴⁰ groupthink,⁴¹ commitment effects,⁴² the coherence effect,⁴³

³⁷ See Sara Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, N.Y. TIMES (Feb. 15, 2002), <http://www.nytimes.com/2002/02/15/us/dna-testing-in-rape-cases-frees-prisoner-after-15-years.html> [<https://perma.cc/6DPK-ZQ38>]; Andrew Martin, *The Prosecution’s Case Against DNA*, N.Y. TIMES MAG. (Nov. 25, 2011), <http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html> [<https://perma.cc/R2R2-WV2G>].

³⁸ DANIEL S. MEDWED, PROSECUTION COMPLEX 123–67 (2012); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401 (2011); Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771 (2010); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

³⁹ “Confirmation bias” is defined as the “inclination to retain, or a disinclination to abandon, a currently favored hypothesis.” IN DOUBT, *supra* note 24, at 23. Researchers have also identified its reciprocal, “disconfirmation bias,” which is a tendency to judge evidence that is incompatible with one’s prior beliefs as weak. *Id.* “In the context of criminal investigations, confirmation biases have been labeled *tunnel vision*.” *Id.* at 24.

⁴⁰ “Motivated reasoning” research “shows that people’s reasoning processes are readily biased when they are motivated by goals other than accuracy,” which can include any “wish, desire, or preference that concerns the outcome of a given reason task.” *Id.* at 25.

⁴¹ Excessively cohesive groups can fall prey to “groupthink,” a phenomenon described by Irving Janis as encompassing “illusions of invulnerability, collective rationalization, belief in the inherent morality of the group, stereotypes of out-groups, pressure on dissenters, self-censorship, illusions of unanimity, and self-appointed mind-guards.” *Id.* at 29 n.98 (citing IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (2d ed. 1982)). For an unforgettable statement that exemplifies the dangers of prosecutorial “groupthink” watch the interview and read the apology of former prosecutor Marty Stroud concerning the wrongful capital conviction of Glenn Ford in Caddo Parish, Louisiana. A.M. “Marty” Stroud III, Editorial, *Lead Prosecutor Apologizes for Role in Sentencing Man to Death Row*, SHREVEPORT TIMES (Mar. 20, 2015), <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/> [<https://perma.cc/34UE-MKUC>]. Stroud says he felt “confident” Ford must be guilty because he believed Caddo Parish law enforcement simply would not indict an innocent man:

I was not going to commit resources to investigate what I considered to be bogus claims that we had the wrong man. My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person I believed to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion. . . . I did not question the unfairness of Mr. Ford having appointed counsel who had never tried a criminal jury case much less a capital one. . . . *In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning. . . . After the death verdict in the Ford trial, I went out with others and celebrated with a few rounds of drinks. That’s sick. I had been entrusted with the duty to*

and selection bias⁴⁴ is, to say the least, daunting. It makes the whole notion that prosecutors could fairly re-investigate possible miscarriages of justice emanating from their own offices seem problematic on its face, especially since so many of these processes operate below the level of conscious awareness.

Nonetheless, and most important for our purposes, legal scholars and psychologists have begun to explore how the insights derived from cognitive science or “human factors” research can improve the prosecutorial decision-making process on the front end—before a plea, a conviction after trial, an acquittal, or a dismissal.⁴⁵ It turns out, interestingly, that the development of

seek the death of a fellow human being, a very solemn task that certainly did not warrant any “celebration.” In my rebuttal argument during the penalty phase of the trial, I mocked Mr. Ford, stating that this man wanted to stay alive so he could be given the opportunity to prove his innocence. I continued by saying this should be an affront to each of you jurors, for he showed no remorse, only contempt for your verdict.

Id. (emphasis added).

⁴² Escalating commitment has been identified as a factor in flawed criminal investigations and [c]ommitment has been found to increase along with increases in the actor’s responsibility for the original error, the room for concealing failure, the adversity of the outcome of the original decision, the perceived threat entailed by the exposure of the error, and the publicity of the original error. Paradoxically, the more egregious the error and the longer it has persisted, the less likely it is that it will be corrected.

IN DOUBT, *supra* note 24, at 30 (footnotes omitted).

⁴³ The “coherence effect” is a psychological phenomenon that arises when integrating evidence in complex decision making processes:

Th[e] coherence effect is driven by a bidirectional process of reasoning: just as the facts guide the choice of the preferred conclusion, the emergence of that conclusion radiates backward and reshapes the facts to become more coherent with it. This process occurs primarily beneath the level of conscious awareness.

Id. at 34 (footnotes omitted). When combined with other biasing factors, such as motivations and confirmatory biases, the coherence effect can dramatically sway entire cases in a particular direction. *Id.* Witnesses who fit the investigator’s theory of the case will be judged more reliable. *Id.* at 34–35. Similarly, items of evidence are not evaluated independently but according to how they fit into the mental model of the task, *i.e.*, the theory of the case. *Id.* at 35. Whether exculpatory or inculpatory, because of the “coherence effect” one strong item of evidence can make the entire “evidence set” appear exculpatory or inculpatory. *Id.*

⁴⁴ Selection biases include: “selective framing strategy,” the tendency to frame an inquiry in a manner that affirms the salient hypothesis; “selective exposure,” the tendency to expose oneself to information that confirms the focal hypothesis and shield oneself from discordant information; “selective scrutiny,” the tendency to scrutinize information that is incompatible with one’s conclusion, but apply lax standards to the validity of compatible information; and “selective stopping,” the tendency to shut down inquiries after having found a sufficient amount of evidence to support one’s leading hypothesis. *Id.* at 37–39.

⁴⁵ See Barbara O’Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1002–04 (2009); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291; Peter A. Joy, *The*

conviction integrity processes on the back end presents a much richer opportunity to build on what we are learning from cognitive science. As Barbara O'Brien points out, the tendency to seek information that confirms rather than falsifies a suspect's guilt may deviate from scientific norms about hypothesis testing and a prosecutor's role as a "minister of justice to seek the truth," but it makes perfect sense for a prosecutor who is trying to persuade, because marshaling evidence in a one-sided manner is persuasive to judges and juries. It is also easy to understand how the tendency toward confirmation and selection biases can become powerful on the front end when the majority of suspects charged are guilty and, all too frequently, underfunded defense counsel with inadequate access to the information available to the prosecution fail to put forward effective arguments to falsify the guilt hypothesis.⁴⁶

Post-conviction, there is more room for a non-adversarial, dialectical approach to assessing evidence, a safer space to gather more information from all stakeholders, and a unique opportunity to learn from error and "near misses." It requires some creativity, a readiness to get beyond habitual adversarial responses, a willingness not to be hamstrung by procedural bars or doctrinal rigidity, and a focus on achieving just results.⁴⁷

What follows, in italics, are Guidelines for Conviction Integrity Units the Innocence Project has posted on its website.⁴⁸ I will provide commentary to the Guidelines (non-italicized) that represent my opinion alone and should not be taken as any kind of official view of the Innocence Project.

The Guidelines represents an effort to put forward some principles and practical suggestions, based in part on the success of a number of Conviction Integrity programs with whom the Innocence Project and other organizations within the Innocence Network have collaborated. At this point, it is probably wise to characterize these recommendations as "guidelines" from which "best practices" can be developed because there are comparatively few CIUs fully functioning, and fewer still that have a strong track record of success, measured either by exonerations, "quality" case reviews, or formal protocols to learn from error.

The term "best practices" is much abused and should be based on evidence from a substantial and representative data set, although these "Guidelines" do have merit and are drawn from the best CIUs. There are plainly differences in what can

Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 WIS. L. REV. 399.

⁴⁶ O'Brien, *supra* note 45, at 1037.

⁴⁷ See Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015) for an excellent description of the instinctive reaction of "senior" prosecutors to "circle the wagons" and ways prosecutors can overcome cynicism and create collaborative working relationships with innocence organizations and defense lawyers in post-conviction CIU investigations.

⁴⁸ *Conviction Integrity Unit Best Practices*, INNOCENCE PROJECT, <http://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf> [<https://perma.cc/WDU8-F2E6>].

be done depending on the size of a district attorney's office and I am sure that as CIUs proliferate, and as they work collaboratively with innocence organizations and defenders, a dialogue will ensue with constructive suggestions and criticisms as to how these "guidelines" can be improved, and "best practices" for different sized offices can be formulated. In fact, these guidelines have been drafted with large to medium size offices in mind because Conviction Integrity programs began in such offices.

As the Registry of Exonerations stated in its 2015 Annual Report, out of the 2,300 district attorney offices in the United States, "[t]he three most populous counties all have CIUs (Los Angeles, Cook, and Harris); so do six of the top 10, 10 of the top 20, and 14 of the top 50."⁴⁹ But there are examples of collaboration even in medium size and large offices that could be helpful in smaller offices. For example, Mike Nerheim, the State's Attorney in Lake County, Illinois, created a Conviction Integrity program using lawyers from outside the county to assist in reviewing cases.⁵⁰ In New Orleans, the New Orleans Innocence Project and the Orleans Parish District Attorney's office developed a joint Conviction Integrity Project after co-operative efforts that led to the exoneration of Kia Stewart, but it was abandoned after a year based on lack of funding (District Attorney's position) or lack of commitment (New Orleans Innocence Project's position).⁵¹ Small offices in suburban and rural areas might well want to seek the assistance of existing statewide entities such as Attorney General offices, state bar associations, Inspector General offices, innocence organizations, or other privately formed advisory groups such as the one formed in Lake County, Illinois.

⁴⁹ NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, at 13.

⁵⁰ See Emily K. Coleman, *Lake County State's Attorney Debate Focuses on History of Wrongful Convictions*, CHI. TRIB. NEWS-SUN (Oct. 11, 2016), <http://www.chicagotribune.com/suburbs/lake-county-news-sun/news/ct-lns-lake-county-states-attorney-debate-st-1011-20161010-story.html> [https://perma.cc/R6T5-LWQE].

⁵¹ See Janet McConaughey, *Prosecutor-Local Innocence Project Joint Work Brings Freedom*, WASH. TIMES (Apr. 13, 2015), <http://www.washingtontimes.com/news/2015/apr/13/prosecutor-local-innocence-project-joint-work-brin/> [https://perma.cc/DX8P-9AJU]; John Simerman, *Cannizzaro, Innocence Project Call it Quits on Project to Unearth False Convictions*, NEW ORLEANS ADVOCATE (Jan. 11, 2016), <http://www.theneworleansadvocate.com/news/14502358-64/cannizzaro-innocence-project-call-it-quits-on-project-to-unearth-false-convictions> [https://perma.cc/7UUU-DLZV].

II. GUIDELINES FOR CONVICTION INTEGRITY UNITS AND COMMENTARY

A. Individual Cases

1. Case Referrals

Sources for case referrals include:

- a. *Innocence organizations*
- b. *Defense Attorneys (public defender, private defense bar)*
- c. *Internal audit of cases based on finding previous errors or instances of misconduct by police or prosecutors*
- d. *Individual prosecutors identifying cases they believe could be miscarriages of justice*
- e. *Police*
- f. *Courts*
- g. *Press*
- h. *Individuals claiming innocence, usually pro se applications*
- i. *Referrals from Forensic Science Service Providers of erroneous laboratory results or erroneous forensic examiner testimony that is potentially material to the outcome of a case.*

Two sources of case referrals deserve greater discussion: internal audits by the office itself and referrals concerning forensic science errors.

The internal audit of cases based on previous findings of error or misconduct by prosecutors or police has been, and should be, a very large source of cases as the learning from error function of Conviction Integrity programs becomes more robust. One recent example demonstrates the point dramatically.

In Brooklyn, under the administration of Charles “Joe” Hynes, Michael Baum, a lawyer from the Legal Aid Society, asked John O’Mara, head of the newly formed CIU, to investigate the conviction of David Ranta because Baum always believed his client Ranta was innocent and had been framed by a Detective Louis Scarella in 1990.⁵² Scarella was a charismatic and ostensibly productive homicide detective who nonetheless had a suspect reputation among defenders. The Brooklyn CIU conducted an investigation, exonerated Ranta, and Scarella

⁵² See Michael Powell & Sharon Otterman, *Jailed Unjustly in the Death of a Rabbi, Man Nears Freedom*, N.Y. TIMES (Mar. 20, 2013), http://www.nytimes.com/2013/03/20/nyregion/brooklyn-prosecutor-to-seek-freedom-of-man-convicted-in-1990-killing-of-rabbi.html?_r=0 [https://perma.cc/Y5AE-KHAV] (“Every Christmas, Mr. Baum received a Christmas card from Mr. Ranta. ‘I never had any doubt in my mind he was innocent,’ Mr. Baum said in an interview. ‘I sleep with it every night.’ Sixteen months ago, the district attorney, promoting his newly established Conviction Integrity Unit, gave a talk to the public defenders. Does anyone, he asked, know of cases that should be re-examined? Mr. Baum raised his hand.”).

was exposed as a detective who broke rule after rule according to court filings: Scarella and his partner kept few written records, coached witnesses, described taking Ranta's confession in a way that was, on its face, highly suspicious, and allowed two dangerous criminals to leave jail, smoke crack cocaine, and visit with prostitutes in exchange for incriminating Ranta.⁵³ The deliberate rule breaking was so flagrant, and the publicity surrounding Scarella so intense, that the CIU immediately recognized it would have to make a major effort to audit and investigate other Scarella cases.⁵⁴

There were other reasons to believe the Ranta case was not an isolated incident but reflected a more systemic problem. It occurred in 1990, during a period when the homicide rate in Brooklyn was extremely high due, in part, to a crack epidemic and the resulting pressure on homicide detectives to clear cases. More than a decade before Hynes formed his CIU, there were exonerations in homicide cases from the same period (Jeffrey Blake, Timothy Crosby, Anthony Faison, and Charles Shephard), similar cultivation of unreliable informant witnesses by homicide detectives, and promises by the New York City Police Department and Hynes to audit the cases of police officers and district attorneys who were involved.⁵⁵ It seems fair to observe that if Joe Hynes had undertaken the kind of root cause analysis and sentinel review best practices advocated here when these exonerations occurred, he might have avoided many of the internal problems that led to an ignominious defeat at the polls and the tarnishing of his legacy as a reform-minded District Attorney.⁵⁶

An internal review of Scarella cases was the first order of business for the "CRU" formed by Hynes's successor, Ken Thompson. Thompson expanded the staff of the conviction integrity unit to ten experienced assistant district attorneys and three investigators, recruited a former public defender to help organize the unit as well as independent outside panels to advise him on the disposition of cases.⁵⁷ Thompson came to terms directly with the complexity and sheer size of the task and it helped shape his CRU, already recognized by the press as "the most profound reform that Thompson has implemented in his year as district attorney."⁵⁸

⁵³ *Id.*

⁵⁴ Frances Robles & N. R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), <http://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunts-50-murder-cases.html> [https://perma.cc/XLN2-PSLU].

⁵⁵ O'Shaughnessy, *supra* note 34.

⁵⁶ See Joaquin Sapien, *For Brooklyn Prosecutor, a Troubled Last Term, and a Trail of Lingering Questions*, PROPUBLICA (Dec. 30, 2013), <http://www.propublica.org/article/for-brooklyn-prosecutor-a-troubled-last-term-and-a-trail-of-lingering-quest> [https://perma.cc/7ZDS-LCC2].

⁵⁷ See *Conviction Review Unit*, BROOKLYN DIST. ATT'Y'S OFFICE, www.brooklynda.org/conviction-review-unit/ [https://perma.cc/7VZ3-YZT3] (last visited Mar. 1 2017). Ron Sullivan, a former public defender in the District of Columbia and a professor at Harvard Law School, helped organize the unit, along with experienced homicide prosecutor Mark Hale.

⁵⁸ See Matthew McKnight, *No Justice, No Peace*, NEW YORKER (Jan. 6, 2015), <http://www>.

The Scarella cases and others from the Brooklyn homicide unit during this period are illustrative of a pattern one finds in other jurisdictions, large and small. Once a homicide unit, detective, or a police department “goes bad” (has staff and/or supervisors who are engaging in deliberate rule breaking), wrongful convictions are bound to result and systematic auditing and root cause analysis is necessary. Whether it’s a narcotics detective in Tulia, Texas,⁵⁹ the “Rampart” precinct in Los Angeles,⁶⁰ or the infamous “Burge” precinct in Chicago,⁶¹ to pick some comparatively recent and salient examples, cases from police units that “go bad” should be systematically reviewed as soon as possible to see if there are miscarriages of justice as well as police corruption.

Over the past four decades in New York City, there have been periodic “outbreaks” or public scandals that have led to special commissions to investigate police corruption. In 1970, due to the whistleblowing work of detective Frank Serpico and Sergeant David Durk, Mayor John Lindsay created the “Knapp Commission” which famously exposed low level (“grass eaters”) and high level (“meat eaters”) corruption and recommended extensive personnel changes in the structure of the police department.⁶² Later, in 1992, Mayor David Dinkins appointed Deputy Mayor Milton Mollen to investigate police corruption after a

newyorker.com/news/news-desk/kenneth-thompson-conviction-review-unit-brooklyn [https://perma.cc/3AA4-87JH].

⁵⁹ See NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN, 138–57 (2005); Janelle Stecklein, *Tulia Drug Busts: 10 Years Later*, AMARILLO GLOBE NEWS (July 19, 2009), http://amarillo.com/stories/071909/new_news1.shtml#.VwQ5JfkrKJA [https://perma.cc/96BJ-44CS].

⁶⁰ See Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRACTITIONER 121 (2000), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2161&context=faculty_scholarship.

⁶¹ Jon Burge is a former Chicago Police Department detective and precinct commander who gained notoriety for torturing more than 200 criminal suspects between 1972 and 1991 in order to force confessions. Burge was convicted of perjury arising out of testimony in a civil rights case. In 2015, Mayor Rahm Emmanuel established a \$5.5 million dollar fund to compensate victims who were tortured in the Burge precinct. The Chicago Reader and Chicago Tribune have compiled histories of this remarkable saga of police abuse. See John Conroy, *Police Torture in Chicago: An Archive of Articles by John Conroy on Police Torture, Jon Burge, and Related Issues*, CHI. READER (Oct. 8, 2009), <http://www.chicagoreader.com/chicago/police-torture-in-chicago-jon-burge-scandal-articles-by-john-conroy/Content?oid=1210030> [https://perma.cc/D3ZE-2CYB]; *John Burge*, CHI. TRIB., <http://articles.chicagotribune.com/keyword/jon-burge> [https://perma.cc/98WD-M3FL] (last visited Mar. 1, 2017).

⁶² *Knapp Commission*, WIKIPEDIA, https://en.wikipedia.org/wiki/Knapp_Commission [https://perma.cc/6YLY-CNAD] (last visited Mar. 1, 2017); MICHAEL ARMSTRONG, THEY WISHED THEY WERE HONEST: THE KNAPP COMMISSION AND NEW YORK CITY POLICE CORRUPTION (2012). The tenor of these times and the difficulties posed by the “blue wall of silence” to investigate and prosecute police corruption cases are unforgettably rendered by two great movies directed by Sidney Lumet, *Serpico* and *Prince of the City*, both based on true stories. *SERPICO* (Paramount Pictures 1973); *PRINCE OF THE CITY* (Orion Pictures 1981). Bias alert: I should disclose knowing and working with many of the principals (both lawyers and police officers) depicted in these movies.

publicized scandal involving Detective Michael Dowd, who was actively engaged in criminal activity.⁶³ The “Mollen Commission” ultimately concluded that “the corruption exposed in the Knapp Commission . . . was largely a corruption of accommodation, of criminals and police officers giving and taking bribes, buying and selling protection,” whereas the new corruption it discovered was “characterized by brutality, theft, abuse of authority and active police criminality,” fostered by supervisory problems and a breakdown in internal affairs.⁶⁴ What’s striking, in retrospect, is that in neither the Knapp nor Mollen Commission investigations was there a formal audit involving district attorney offices to determine whether the corrupt, rule-breaking police had also engaged in misconduct that convicted the innocent. In fact, there was a perception that the “princes of the city” (the name attached to an elite narcotics unit profiled in a book by Robert Daly⁶⁵ and the eponymous Sidney Lumet movie) were very effective and admired police officers, similar to Scarella, who invariably caught the bad guys notwithstanding a ready inclination to let the ends justify the means.

The potential consequences of failing to conduct such a formal audit was brought home dramatically in 2005, when Drug Enforcement Administration agents working out of the Eastern District of New York discovered the original police file concerning the conviction of a Brooklyn postal employee, Barry Gibbs, in the home of the famous self-described “Mafia Cop” Louis Ippolito. The file was discovered after Ippolito was arrested in Las Vegas for performing a number of “hits” for organized crime with his partner Stephen Caracappa while they were working as detectives in the late 1980s and early 1990s. Ippolito and Caracappa were ultimately convicted of the murders, but while that prosecution was pending, DEA agents who were puzzled as to why Ippolito had the original Gibbs file in his home soon learned that Gibbs was represented by the Innocence Project. In fact, Gibbs had been seeking to prove his innocence for years. The agents accordingly decided to re-investigate the Gibbs case and ultimately produced exculpatory evidence showing that Ippolito had framed Gibbs for a murder to protect the real perpetrator, a member of organized crime, fabricated evidence, and coerced an eyewitness to falsely identify Gibbs at a lineup. The exculpatory evidence was turned over to the Brooklyn District Attorney’s office and Gibbs was exonerated in 2005 after serving 17 years in prison.⁶⁶ He subsequently brought successful civil suits against the state and city of New York.

⁶³ CITY OF N.Y., COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, COMMISSION REPORT 1–2, exh. 1 (1994).

⁶⁴ See CITY OF N.Y., COMM’N TO COMBAT POLICE CORRUPTION, PERFORMANCE STUDY: THE INTERNAL AFFAIRS BUREAU’S INTEGRITY TESTING PROGRAM (2000).

⁶⁵ See ROBERT DALY, PRINCE OF THE CITY: THE TRUE STORY OF A COP WHO KNEW TOO MUCH (1978). Daly was a respected reporter for the New York Times who actually served two years as a Deputy Commissioner in the New York City Police Department.

⁶⁶ *Barry Gibbs*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/barry-gibbs/> [<https://perma.cc/57EW-5375>] (last visited Feb. 28, 2017).

Much can be learned from the information discovered in the course of the Gibbs litigation, but the key take-home lesson for “conviction integrity” purposes is that “innocence” audits should be conducted of the caseloads of police officers who are discovered to be guilty of criminal conduct—whether it be graft, drug abuse, or excessive force on or off the job—because there is a likelihood that deliberate rule-breaking is a slippery slope that can easily infect casework and lead to wrongful convictions. One strongly suspects that if such “innocence audits” had been systematically conducted of the caseloads of corrupt police officers involved in the investigations of the Knapp Commission, the Mollen Commission, or in other police corruption investigations across the country, many miscarriages of justice would have been discovered. Such caseload audits of corrupt police officers, as well as those, like Scarella, who are caught engaging in misconduct to make cases, ought to be a fruitful source of cases for conviction integrity units.⁶⁷

Another increasingly significant source of cases for conviction integrity units are matters that arise from forensic science service providers who seek to correct and notify criminal justice stakeholders or “customers”—the district attorneys, the courts, and the defendants and/or their counsel—of errors in their previous work. These forensic science error cases can arise from new realizations that prior test methods and testimony of analysts were scientifically flawed or from misconduct or negligence by forensic science analysts. Examples include recent reviews conducted by the Department of Justice, the FBI, the Innocence Project, and the National Association of Criminal Defense Lawyers (NACDL) of scientific errors made by FBI analysts in Composite Bullet Lead Analysis (CBLA) and microscopic hair comparison. In those reviews, which covered decades of cases, efforts were made to notify all the stakeholders, and (in the hair review cases) waive procedural bars and provide free DNA testing if the hairs could be found. Some states are also starting to conduct hair reviews because it is likely that errors made by FBI analysts were replicated by state examiners who were regularly trained by the Bureau.⁶⁸

The Texas Forensic Science Commission recognized that crime laboratories had the duty to correct scientific errors of Texas fire marshals and notify stakeholders in arson cases after reviewing the arson murder case of executed inmate Cameron Todd Willingham. The Commission concluded the arson evidence in that case was scientifically “flawed” and contrary to NFPA 921, the

⁶⁷ Needless to say, the criminal investigations and prosecutions of police officers should proceed on one track, whether by state or federal officials, and the retroactive “innocence audit” of the cases of corrupt police officers on a separate track by a conviction integrity unit, or, if necessary due to potential conflicts of interest, an independent outside entity. *See* Handling Allegations of Prosecutorial Misconduct, *infra* Section II.A.4.

⁶⁸ *FBI Testimony on Microscopic Hair Analysis Contained Errors in at least 90% of Cases in Ongoing Review*, INNOCENCE PROJECT (Apr. 20, 2015), <https://www.innocenceproject.org/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-of-cases-in-ongoing-review/> [https://perma.cc/RM3V-B4LY].

guidelines issued by the National Fire Protection Agency in 1992.⁶⁹ This, in turn, instigated a review of arson cases by the Texas Fire Commissioner and the Innocence Project of Texas, as well as attacks on old arson cases throughout the country.⁷⁰ Just as the adoption of NFPA 921 triggered correction of past scientific errors in arson cases, one expects that as the National Institute of Science and Technology (NIST) and the Organization of Scientific Area Committees (OSAC) review and establish new scientific standards for forensic science disciplines that were severely criticized in the 2009 National Academy of Sciences Report—particularly pattern evidence disciplines—there will be more reviews of scientific errors from methods that lacked validation or exaggerated the probative value of results.⁷¹ New statutes in Texas and California clearing away procedural bars facilitate court review of such “outdated science” cases and are likely to be replicated in other states.⁷² Conviction Integrity Units are good vehicles to review these kinds of cases because they are designed to work co-operatively with defenders and innocence organizations to review old cases to see if new evidence requires convictions to be vacated.

Large scale reviews of forensic science error cases that arise from misconduct

⁶⁹ NFPA 921 is a “Guide for Fire and Explosive Investigation” that was first published by the National Fire Protection Association in 1992 and has been subsequently revised in 2014. NAT’L FIRE PROT. ASS’N, NFPA 921: GUIDE FOR FIRE AND EXPLOSIVE INVESTIGATIONS (2014). The publication of NFPA 921 in 1992 exposed the fact that there was no scientific basis to the way many arson experts had been testifying that certain factors (“alligatoring” of wood, burning under furniture, “V” shaped patterns, scouring of floors, “spider glass”) were proof that accelerant was used even if none were found in debris or proof that a fire was otherwise non-accidental. Relying on NFPA 921, five independent experts provided a report to the Texas Forensic Science concluding that the evidence supporting the capital conviction and execution of Cameron Todd Willingham was unreliable. The Commission hired its own expert who confirmed the independent experts’ report and the Commission, despite strong opposition from Governor Rick Perry, finally concluded the Willingham evidence was “flawed.” This led, in turn, to an audit of old Texas arson cases by the Texas Fire Commissioner in conjunction with the Innocence Project of Texas. See Paul Giannelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J.L. & LIBERTY 221, 241–42, 248–50 (2013).

⁷⁰ See Stephen J. Meyer & Caitlin Plummer, *An Arson Prosecution: Fighting Fire with Science*, 28 CRIM. JUST. 4, 8 (2014); Rachel Dioso-Villa, *Scientific and Legal Developments in Fire and Arson Investigation Expertise in Texas v. Willingham*, 14 MINN. J.L. SCI. & TECH. 817, 817–18, 840 (2013).

⁷¹ On December 7, 2015, the International Association of Arson Investigators (IAAI) issued a statement endorsing the use of “multidisciplinary science review panels” to review and correct past arson cases based on unreliable or incomplete arson investigations. See INT’L ASS’N OF ARSON INVESTIGATORS, THE INTERNATIONAL ASSOCIATION OF ARSON INVESTIGATORS ENDORSES THE USE OF MULTIDISCIPLINE SCIENCE REVIEW PANELS 1–3 (2015), <http://www.fsc.texas.gov/sites/default/files/documents/Multidiscipline%20Science%20Review%20Panel%20Document%20Final.pdf> [https://perma.cc/BF9K-6N7G]. The IAAI not only recognized this duty to correct but offered to assist law enforcement with the creation of these independent panels that would include fire scientists, chemists, engineers, lawyers, or others depending on the nature of the case. *Id.*

⁷² See TEX. CODE CRIM. PROC. ANN. art. 11.073 (West 2015); CAL. PENAL CODE § 1473(b) (West 2015).

or negligence by crime laboratory personnel have a long history, dating back to reviews of notorious “dry labbing” analysts like Fred Zain in West Virginia and Joyce Gilchrist in Oklahoma, to the recent scandal involving drug analyst Annie Dookins in Massachusetts.⁷³ Conviction Integrity Units can play a very useful role in these “forensic scandal” cases and in identifying dangerous malfunctions in relationships between forensic laboratories and courts, as demonstrated recently by the CIU within the Harris County, Texas District Attorney’s Office, whose jurisdiction encompasses Houston.

In Harris County, the crime laboratory began in 2011 to clear up a huge backlog in drug testing cases, doing confirmatory tests on cases where only presumptive tests had previously been performed. This effort led to the discovery that more than a hundred people had pled guilty to narcotics offenses even though the substances involved in those cases were not, in fact, controlled substances. When Inger Chandler, newly appointed head of the Conviction Review Unit, learned about these cases and the inconsistent responses of assistant district attorneys assigned to them, she began an organized, centralized internal audit to ferret out wrongful convictions. So far, this effort has not just led to 119 drug crime exonerations in Harris County, but there can be little doubt, as investigative journalists Ryan Gabrielson and Sander Topher have documented: “[T]here is every reason to suspect that [there are] thousands of wrongful convictions that were based on field tests across the United States.”⁷⁴

As more crime laboratories in the United States become accredited, the required reporting of “errors” and “non-conformities” will inevitably surge. Often, especially when state crime laboratories are involved, many district attorney offices will be affected, and it may make sense to develop state- or county-wide multi-stakeholder entities to review the errors in old cases. Even so, the core competencies involved in such reviews are tasks that good Conviction Integrity Units perform all the time, and it would make sense that personnel from those units would take a leading role.

⁷³ For a review of these problems and the need to create a multi-stakeholder non-adversarial approach, see Sandra Guerra Thompson & Robert Wicoff, *Outbreaks of Injustice: Responding to Systemic Irregularities in the Criminal Justice System*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* (Daniel Medwed ed.) (forthcoming 2017).

⁷⁴ See Ryan Gabrielson & Sander Topher, *How a \$2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (July 7, 2016), <https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html> [<https://perma.cc/94FY-ZXTF>]; see also NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, at 10.

2. Case Selection

Criterion for selecting cases for review (any one of the following):

- a. *Facts suggest plausible claim of innocence*
 - i. *That a defense lawyer could have found these “newly discovered” facts with the exercise of due diligence should not be a bar.*
- b. *Evidence of a constitutional violation that undermines the fairness of the proceeding (including Brady violations, ineffective assistance of counsel, unfair trials or plea agreements) that might lead to vacating a conviction.*
- c. *The “interests of justice”*
 - i. *In some jurisdictions, prosecutors and courts have explicit statutory or common law authority to vacate convictions or reduce sentences in the interests of justice. But even in the absence of explicit statutory authority, it should be emphasized that an “interests of justice” orientation or mindset of an “interests of justice” review is frequently an important factor when a CIU makes a judgment about whether relief is warranted when reconstructing what occurred in old cases where there is, as in most cases, a need to resolve issues with less than perfect information.*
- d. *The fact that a defendant pled guilty or is no longer incarcerated should not be a bar to examining cases.*

Some prosecutors may be tempted to send all post-conviction matters that involve constitutional claims, such as *Brady* violations or ineffective assistance of counsel claims, to their appeals unit even if the petitioner or their counsel raise “plausible” claims of innocence and request a CIU investigation. Similarly, some prosecutors might be tempted to narrowly limit CIUs to review just cases of “actual innocence” (cases where it appears possible to prove unequivocally that someone other than the defendant committed the crime) or matters that involve only “newly discovered evidence of innocence” (evidence that a defense attorney could not have discovered with the exercise of due diligence). It would be self-defeating and unfortunate to use such restrictive categories as initial cut-off mechanisms for a number of reasons.

First, it is impractical and invites all kinds of selection biases that make the work of identifying wrongful convictions harder rather than easier. Cases that involve the conviction of the innocent frequently have some constitutional issues lurking, whether it is suppressed exculpatory evidence (inadvertent or intentional)

by law enforcement officers or less than impressive efforts by defense counsel. It is very hard to distinguish at the outset a pure “actual innocence” case that will not potentially involve a constitutional claim—a hazard created by “selective framing.” Conversely, deciding to cease investigating a plausible claim of innocence just because there is a viable constitutional claim is a counterproductive example of the “selective stopping” bias. It runs the risk of failing to discover not only persuasive evidence of innocence, or important evidence of misconduct by anyone involved in the investigation or trial, but also finding the person who really committed the crime before that individual has an opportunity to commit another offense.

Even more vexing is the problem of trying to limit the post-conviction inquiry to just “newly discovered” evidence of innocence—evidence that defense counsel could not have discovered with the exercise of due diligence. This enterprise not only necessitates, by its nature, subjective judgments about the quality of lawyering required in a particular jurisdiction years earlier, but speculation about what could have been discovered and what the lawyer in question actually knew. Very frequently innocence cases are old, the lawyers are unavailable, and files have been lost or destroyed. Worse still, the time and effort spent on determining whether the new evidence could have been found with due diligence by the defense attorney detracts attention from what is most important: the value of the new evidence and where it can lead. This is an example of “selective exposure” bias, the tendency to expose oneself to information that confirms the focal hypothesis and shield oneself from discordant information.

A more successful framing strategy for a CIU is an “interests of justice” orientation. *If the CIU concludes there is a plausible claim of innocence*, the investigation should go forward without continually parsing the new evidence as “newly discovered,” “Brady,” or proof that defense counsel was ineffective.

3. Investigation: Information Sharing and Discovery

- a. *There should be an open exchange of information and ideas with the parties seeking relief.*
- b. *A cooperative approach, including coordination with defense lawyers or innocence organizations, is essential. For example, joint witness interviews with prosecution and defense investigators or lawyers, agreements about recording interviews, jointly planned identification procedures, joint requests to obtain information from third-parties both informally and by legal process are all measures that should be considered and have proven to be successful.*
- c. *One important way to facilitate a co-operative re-investigation is to enter into formal confidentiality agreements with defense counsel with respect to sharing information and prohibiting the disclosure*

of that information. These agreements work best when they are time limited and require reasonable notice from the parties as to a time when either one of them will no longer be bound by the agreement. The value of these confidentiality agreements is providing assurances to both sides that neither will “sand bag” the other with surprise leaks to the press or motions to courts. While some CIUs (notably Dallas) have successfully operated informally with these understandings, formalizing the agreements is generally a good idea.

d. Open file

- i. The district attorney should provide an “open file” that includes work product.*
- ii. All police agency files, including multiple agencies that may have been involved in the investigation, should be disclosed.*
 - 1. Reasonable exceptions should be made for danger to witnesses and other good cause, but the best practice would be to summarize what is being withheld, preserve the information, and have a record available for court review if re-investigation results in litigation. If necessary, the parties may seek court intervention through a binding protective order to facilitate the release of sensitive information.*
- e. Crime laboratory records, including but not limited to, the laboratory case file, proficiency testing, and any relevant personnel records (such as those of the analysts involved in the case) should be disclosed subject to judicial review and protective orders if there are privacy problems with respect to the disclosure.*
- f. Defense disclosures related to evidence proffered as to innocence claims or constitutional violations including work product (subject to confidentiality agreements) but excluding attorney client communications.*

The most important best practice for a robust CIU re-investigation process is an information sharing agreement between the CIU and an individual claiming innocence. The idea for these agreements arose from the unwritten rules that innocence organizations used with the Dallas CIU and other district attorneys over the years when pursuing joint, non-adversarial post-conviction investigations. The crucial take-home lesson from years of experience in this work is that an elected district attorney and the innocence organization need to be assured that neither side will prematurely go to the press with new evidence from an investigation in an effort to “sand bag” the other party. Within the culture of the criminal justice

system, prosecutors and defense lawyers are very concerned about maintaining their reputations as “straight shooters,” someone whose word and discretion can be trusted. It’s an important coin of the realm that is earned by a lawyer only after years of experience with adversaries. Unfortunately, particularly in large jurisdictions, or in instances where “strangers” are pursuing an “innocence” case in a small or large jurisdiction where they do not ordinarily practice, it helps to have specific, written understandings to supplement a good reputation.

The Brooklyn CRU has issued a template for such agreements that is very good.⁷⁵ The principle is that the petitioner will disclose all work product related to the new evidence that the petitioner wants the CRU to review and, in turn, the CRU will disclose its file, including work product. It should be emphasized that this agreement does not require disclosure of all attorney-client communications, but only a waiver from the client to the extent privileged attorney client information is being disclosed as part of “the investigative materials, reports, recordings, communications or other materials” relevant to the investigation of a potential wrongful conviction.

The Brooklyn CRU wisely recognized that requiring, as a pre-condition for disclosure of the prosecution’s file, disclosure of *all* privileged attorney-client communications would be a non-starter for an innocence organization or defense attorney. Some prosecutors bridle at this notion. If a defendant wants to see the entire prosecution file, including work product, they reason, then it is appropriate to require a complete waiver of the attorney-client privilege, including communications that are unrelated to the new investigative materials being proffered in the CIU re-investigation.

This is definitely a “culture clash” issue. Defense attorneys quite rightly regard the attorney-client privilege as a sacrosanct trust they cannot violate without consent from the client and strongly resist disclosure as a condition for seeing the prosecutor’s entire file, including work product. Innocent clients, they argue, will make personal, private admissions to a lawyer that would not ordinarily be made to family members or close friends, and such sensitive information should not be gratuitously shared in a CIU re-investigation. Innocent clients are often initially represented by inexperienced or less-than-competent lawyers who will keep unreliable records or prod clients for what the lawyer thinks are admissions that will set up a plea bargain. This is particularly dangerous when the innocent client suffers from mental illness, learning disabilities, or other cognitive impairments. Innocent clients, like many people in stressful situations, will tell lies to their lawyers if the client thinks it will help, or out of embarrassment. For these reasons and many more, I am sure, defense attorneys and “innocence” lawyers will simply not co-operate with any CIU that insists on a complete waiver of attorney-client privilege as a pre-condition for seeing the prosecutor’s entire file, much less as the price of entry for engaging in a CIU process.

⁷⁵ See *infra* Appendix A.

On the other hand, many prosecutors instinctively believe if someone continues to publicly insist on his or her innocence, then they should have no objection to revealing attorney-client communications. Failure to do so must mean the client is hiding something incriminating, or perhaps knows the person who really committed the crime and is protecting them. “We are not interested in irrelevant attorney-client communications that might embarrass the client,” some prosecutors might suggest, “but only attorney-client communications that are relevant to the offense.” Many prosecutors may also feel, although they do not often say it out loud, that work product in their own files is information that prosecutors don’t ordinarily expect to share, and disclosing it constitutes an invasion of the prosecuting attorney’s privacy, potentially revealing embarrassing private thoughts about colleagues, witnesses, or even crime victims that the attorney never anticipated would be made public.

Given these strongly held views, the compromise solution reduced to writing by the Brooklyn CRU, following the longtime unwritten practice of the Dallas CIU, to exchange the prosecution’s entire file, including work product, for limited and relevant investigative information (including work product) proffered by the client claiming innocence, is a very good solution. There will undoubtedly be situations where the CIU reasonably asks, or a defense/“innocence” lawyer suggests, going further because there might be, for example, crucial prior consistent attorney-client statements in a file that would be helpful to resolving factual disputes. Conversely, there may be important and relevant information in the prosecutor’s file that should be shared but it might involve revealing sensitive information that could endanger the safety of witnesses. There are well-known ways of handling these situations: produce the information for *in camera* inspection by a judge or trusted third party and summarize it. Mechanisms that have proven productive pre-conviction can be usefully and creatively employed to get the best approximation of truth in the post-conviction space. Once a non-adversarial relationship of trust is developed between parties in a CIU re-investigation, it is surprisingly easy for each side to take steps they would never consider for an instant in their usual adversarial mode.

4. Handling Allegations of Prosecutorial Misconduct

Cases involving substantial, fact-based allegations of prosecutorial misconduct involving current or former members of the office should be referred to an independent authority for investigation and review. This referral should include the allegations of misconduct as well as the claims of innocence and constitutional violations.⁷⁶

⁷⁶ The term “misconduct” here is defined by the American Bar Association’s Model Rule on Misconduct:

It is professional misconduct for a lawyer to:

This recommendation attempts to strike a balance between bedrock principles of recusal: a judge or a prosecutor should not act in a case where there is an actual conflict of interest or an apparent conflict that would undermine public confidence in any outcome; and the need to demonstrate that a CIU can, in fact, fairly and independently review cases from its own office.

Using a definition of “misconduct” from the ABA Model Rules provides a good, generally accepted standard for what could be grounds for a CIU recusal, but it, by no means, resolves this difficult issue. On the other hand, prosecutors across the country face similar issues all the time, and most states have some recusal procedure whereby an office will ask another prosecutor in the state, a statewide Attorney General, or a “special prosecutor,” to handle a case where there have been substantial, non-conclusory allegations of misconduct. A CIU should be sensitive to this issue and, ultimately, transparent about its decision to either send the case to an independent authority for investigation and review or a decision not to do so.

5. Standard of Review

Standards of review for assessing claims of innocence should follow state and federal statutes, common law, and constitutional precedent with an “interests of justice” orientation on the application of the law to the facts. The relevant law would ordinarily include statutes concerning new evidence of innocence: state and federal constitutional precedent concerning undisclosed exculpatory evidence, ineffective assistance of counsel, and claims of actual innocence.

Post-conviction case law that would determine a standard of review in the typical CIU re-investigation is bound to be complicated because it potentially implicates multiple constitutional and statutory grounds, and will inevitably be state specific. While federal constitutional standards in *Brady* and its progeny provide a floor with respect to the law on suppressed exculpatory evidence, the highest appellate courts in different states will often interpret those precedents

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- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
 - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
 - (d) engage in conduct that is prejudicial to the administration of justice;
 - (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
 - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES OF PROF’L CONDUCT r. 8.4(a)–(f) (AM. BAR ASS’N 2015).

differently, and in some jurisdictions, state constitutional protections are explicitly more protective than federal law.

The same holds true for “ineffective assistance of counsel” precedent, with the added local complication that the standard for judging the “reasonableness” of alleged errors and omissions by local defense counsel is whether they are “outside the wide range of professionally competent assistance” in a jurisdiction “as of the time of counsel’s conduct.”⁷⁷ What can be safely said, however, about both *Brady* and ineffective-assistance claims is that the Supreme Court’s primary concerns in such cases is the “fairness” of the trial, and the “reliability” of the verdict. And the “materiality” standard in both kinds of cases is virtually the same: is there a “reasonable probability that, but for counsel’s unprofessional errors,” or but for undisclosed exculpatory evidence, “the result of the proceeding would have been different,” with a “reasonable probability” being defined as “a probability sufficient to undermine confidence in the outcome?”⁷⁸

State statutes concerning newly discovered evidence of innocence (evidence counsel could not have discovered with the exercise of due diligence) present similar state-specific variation. Most states have either statutes or common law holdings that require that the newly discovered evidence would “probably” or “more likely than not” have changed the result at trial.⁷⁹ Wisconsin uses a slightly lower standard, a “reasonable probability of a different outcome,” a standard also used in some post-conviction DNA statutes.⁸⁰ Twelve states by statute or case law require “clear and convincing” newly discovered evidence of innocence.⁸¹ California, disturbingly, had for years by far the highest standard—the newly discovered evidence must completely “undermine the entire prosecution case and point unerringly to innocence or reduced culpability,” but thankfully as this article goes to press, new legislation has been enacted with a lower standard.⁸²

⁷⁷ *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984).

⁷⁸ *Strickland*, 466 U.S. at 691; *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (“The question is not whether the defendant would more likely than not have received a different verdict with the [undisclosed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”).

⁷⁹ Justin Brooks, Alexander Simpson & Paige Kaneb, *If Hindsight Is 20/20, Our Justice System Shouldn’t Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALBANY L. REV. 1045 (forthcoming) (manuscripts at 13, n.72).

⁸⁰ *Id.* at 12.

⁸¹ *Id.* at 16–17.

⁸² See *People v. Gonzales*, 800 P.2d 1159, 1196 (Cal. 1990) for the old standard. The new standard is S.B. 1134, 2016 Leg., Reg. Sess. (Cal. 2016), just signed by Governor Brown, which states: “This bill would additionally allow a writ of habeas corpus to be prosecuted on the basis of new evidence that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.” *Governor Brown Signs Innocence Bill*, Cal. Innocence Project, <https://californiainnocenceproject.org/2016/09/governor-brown-signs-innocence-bill/> [<https://perma.cc/L47Y-LPS2>].

Federal and state constitutional claims based on post-conviction showings of “actual innocence” are increasingly being recognized or at least “presumed” to be viable in the right case.⁸³ The case of *Herrera v. Collins*⁸⁴ has been frequently misread by courts and scholars as holding that a showing of “actual innocence,” by itself, cannot make out a federal constitutional claim. This is plainly wrong. There were at least six votes in *Herrera* to recognize such a claim in the appropriate case, and the Supreme Court has recently made it clear that it has not closed the door on “actual innocence” claims.⁸⁵ Indeed, the granting of an original writ in the Troy Davis case makes it clear that a majority exists to recognize an actual innocence claim in the right case. The remand directed the lower court to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.”⁸⁶

All fifty states and the District of Columbia have now finally passed statutes establishing a post-conviction right to prove innocence through DNA testing—although this outcome required much hard work, and it’s not an altogether surprising development after more than 316 post-conviction DNA exonerations over the past twenty-seven years.⁸⁷ But what is truly extraordinary and far more significant is the fact that “forty-nine states and the District of Columbia now allow post-conviction claims of innocence without time limits related to the conviction date,” without a requirement of an independent constitutional violation, and without showing the petitioner was deprived of a fair trial.⁸⁸ As Paige Kaneb points out, this development is proof of a “modern consensus that the Eighth Amendment prohibits the continued punishment of the innocent and the Due Process Clause of the Fourteenth Amendment requires judicial review of compelling claims of innocence, irrespective of how long after conviction new evidence is discovered.”⁸⁹

What is the “standard” or burden of proof for an “actual innocence” claim? In *House v. Bell*,⁹⁰ the Supreme Court suggested that a petitioner’s showing would have to be more persuasive than the *Schlup v. Delo*⁹¹ “innocence” showing needed to overcome the procedural default of a constitutional claim. The *Schlup* standard requires the petition to show that “more likely than not, in light of the new

⁸³ See Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W. L. REV. 171 (2014) [hereinafter *Innocence Presumed*], for an excellent analysis of this emerging trend.

⁸⁴ *Herrera v. Collins*, 506 U.S. 390 (1993).

⁸⁵ *Id.* at 194–201.

⁸⁶ *In re Davis*, 130 S. Ct. 1, 1 (2009).

⁸⁷ *Innocence Presumed*, *supra* note 83, at 202–03, 202 n.134.

⁸⁸ *Id.* at 202 & 203 n.140.

⁸⁹ *Id.* at 209.

⁹⁰ *House v. Bell*, 547 U.S. 518, 538 (2006)

⁹¹ *Schlup v. Delo*, 513 U.S. 298 (1995).

evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.”⁹² The trial court in the Troy Davis remand concluded that the standard should be “clear and convincing evidence that no reasonable juror would have convicted [the petitioner] in light of the new evidence.”⁹³ The trial court’s reasoning is persuasive and there is good reason to believe that the “clear and convincing” standard would be accepted by state courts and the legal community generally.⁹⁴

The District of Columbia has passed a statute mandating that when an inmate demonstrates “clear and convincing evidence” of innocence, a conviction should be vacated and dismissed with prejudice.⁹⁵ Similarly, the ABA has recently adopted Rule of Professional Conduct 3.8(h) requiring that “[w]hen a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.”

But even assuming “clear and convincing evidence” of innocence is likely to become a state or federal constitutional standard for vacating and dismissing a case, that will not help resolve the “difficult” or “grey area” cases frequently encountered by CIUs. The “close” or “gray area” cases ordinarily involve matters where there was no decisive new evidence, such as a DNA test on probative biological samples that could prove “actual innocence,” but there was considerable doubt about the integrity of the conviction given *all* the new evidence, the lackluster performance of defense counsel, or other issues.⁹⁶

In these cases, CIUs, exercising “an interests of justice” framing strategy at the beginning of an investigation, inevitably wind up making final assessments of close cases with a similar “interests of justice” orientation. They will, for example, cumulate inferences from evidence that is “new” but might have been found through the exercise of due diligence by a reasonably competent lawyer with

⁹² House v. Bell, 547 U.S. at 538.

⁹³ *In re Davis*, No. CV409-130, 2010 WL 3385081, at *45 (S.D. Ga. Aug. 24, 2010).

⁹⁴ It should be noted that the de novo consideration of the original writ in the *Davis* case embraced all evidence known at the time of the hearing, of both guilt and innocence, and was not a more limited inquiry about what the trial jury would have done, given the trial record, if it had known about the new evidence of innocence.

⁹⁵ D.C. CODE ANN. § 22-4135(g) (West 2012).

⁹⁶ The exoneration of Brandon Olebar by the King County District Attorney investigated in a non-adversarial fashion with Innocence Project Northwest is an often-cited example because it turned, to a large degree, on admissions made by the real perpetrators after the statute of limitations for the underlying offense had expired. See Lara Bazelon, *The Good Prosecutor*, POLITICO MAG. (Mar. 24, 2015), <http://www.politico.com/magazine/story/2015/03/good-prosecutors-116362> [<https://perma.cc/39K7-RZQJ>]; Mark Larson, *The Exoneration of Brandon Olebar*, MARSHALL PROJECT (Feb. 13, 2015), <https://www.themarshallproject.org/2015/02/13/the-exoneration-of-brandon-olebar> [<https://perma.cc/VNF8-9E3W>].

undisclosed *Brady* evidence that would not be enough by itself to vacate, or take into consideration the effect of an inflammatory closing argument by a prosecutor that was either provoked or insufficiently prejudicial by itself to warrant reversal. At a recent Wrongful Conviction Summit convened by the Brooklyn District Attorney bringing together CIUs from across the country,⁹⁷ elected district attorneys described the standards they use to make final assessments in “gray area cases”: Santa Clara CIU (“No longer have an abiding belief in the conviction”); King County, Washington (“Looking at what we now know about this case, and considering, in light of this knowledge, whether we would have charged it in the first place”); Brooklyn CIU (“A reasonable belief that the interests of justice compel relief”).

Some may be concerned that this kind of “interests of justice” orientation is too subjective, malleable, or even improperly “extrajudicial” (insufficiently tethered to case law). I understand the concern but respectfully disagree. I view this “interests of justice” orientation as a healthy, pragmatic response to the silos and strictures of post-conviction case law and discovery—in many jurisdictions, post-conviction discovery barely exists—which impede sensible consideration of *all* new evidence, new scientific knowledge, and the structural weaknesses of our system. “Interests of justice” is a good longstanding guideline for a prosecutor’s exercise of discretion in making a final assessment, and there is probably not a lot to be gained by trying to refine it further.

Kent Roach makes this point persuasively in a brilliant comparative law essay contrasting the experience of Canada and of the United States in dealing with wrongful conviction cases.⁹⁸ Like “newly discovered evidence” in the United States, “fresh evidence” in Canada “must be credible, potentially decisive, and not have been obtainable at trial with due diligence,” but, Roach notes, “the Supreme Court of Canada has consistently ruled that the due diligence requirement must yield where a miscarriage of justice would result.”⁹⁹

The power of Canadian appellate courts to admit “fresh evidence” includes the “power to order the production of things and witnesses.”¹⁰⁰ “Appeals courts can overturn convictions not only on the basis of errors of law that are not harmless,” but because “the verdict is unreasonable or cannot be supported by the evidence or on any ground that there is a miscarriage of justice.”¹⁰¹ The Canadian

⁹⁷ I attended this “Summit on Wrongful Convictions” at Brooklyn Law School on Oct. 16–17, 2015.

⁹⁸ Kent Roach, *More Procedure and Concern About Innocence but Less Justice? Remedies for Wrongful Convictions in the United States and Canada*, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS* 283 (C. Ronald Huff & Martin Killias eds., 2013).

⁹⁹ *Id.* at 287–88.

¹⁰⁰ *Id.* at 288 (citing Criminal Code § 683).

¹⁰¹ *Id.* at 288.

courts have stressed that a miscarriage of justice “can reach virtually any kind of error that renders a trial unfair in a procedural or substantive way,” and that even if:

there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. . . . the miscarriage of justice lies not in the conduct of the trial or even the conviction entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.¹⁰²

Roach rightly observes that the concern of Canadian courts with miscarriages of justice “includes but is broader than” the growing concern of American courts with “actual or factual innocence.”¹⁰³ But it seems equally fair to note that American prosecutors, when describing why they have vacated convictions and dismissed cases after extensive CIU investigations in “close” or “gray area” cases, sound just like the Supreme Court of Canada! I think this “interests of justice” orientation is a healthy and heartening response to the welter of complex post-conviction restrictions that have arisen in the last forty years under federal and state laws (mostly in reaction to what were believed to be frivolous writs in capital cases) that are now appropriately being stressed by new scientific evidence and proof of all kinds that there are many more wrongful convictions than even the most cynical anticipated. Ultimately, Roach concludes that:

For many working in the American system, habeas corpus review and collateral attack, including the restrictions that courts have placed on such forms of review in terms of limitation periods and actual innocence requirements, may seem natural and inevitable, but understanding the Canadian system may expand the imagination. *It may also invite Americans to rethink the degree to which concerns about factual innocence and the protection of the finality of verdicts from an almost endless stream of collateral challenges may paradoxically make it difficult for those convicted in the United States to overturn their convictions on grounds of innocence.*¹⁰⁴

I think this is a profoundly important insight, and it is time to come up with legislation, both state and federal, that provides for a limited “interests of justice” or “miscarriage of justice” safety valve that reflects what prosecutors in CIUs are beginning to do in a thoughtful and responsible way.

Finally, the conviction integrity process I have just described cannot be fairly

¹⁰² *Id.* at 288 (citing *Re Truscott* 2007 ONCA 575 para. 110).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 305 (emphasis added).

characterized as improperly “extrajudicial,” or immune from judicial review. On the contrary, at the end of a non-adversarial conviction integrity post-conviction investigation, and this point cannot be emphasized enough, there are three options:

Option 1: The CIU and petitioner’s advocates agree that the conviction should be vacated on constitutional grounds, on “innocence grounds” (either newly discovered evidence of innocence pursuant to a statute or pursuant to “actual innocence” as a state or federal constitutional claim), or “in the interests of justice” (if the state or federal court has such statutory or common law authority);

Option 2: The CIU and petitioner’s advocates agree that there is no basis for vacating the conviction; or

Option 3: The CIU and the petitioner agree to disagree about whether the conviction should be vacated and litigate the matter in court—except that new post-conviction proceeding will be conducted with a much better record than would ordinarily be created and more expeditiously since the disputed and undisputed issues should be evident.

Under all three of these options, there is both judicial review and the kind of transparency that will increase public confidence in the outcome of the re-investigation, whether or not it is favorable to the client claiming innocence.

6. Staffing

- a. *The best Conviction Integrity Units have either been run by defense attorneys working on a full-time basis or defense attorneys working on a part-time basis with substantial oversight authority for the operation of the unit. This might well be the single most important best practice to assure that the CIU runs well and is perceived as credible by the legal community and the public.*
- b. *Independent advisory boards of lawyers from outside the office to assist in assessing the cases have proven valuable.*
- c. *Different staffing solutions plainly depend on the size of the office.*
- d. *The CIU should report to and be supported by the District Attorney and executive level staff.*
- e. *Prosecutors who originally tried the case, or prosecutors who participated in the prosecution, should not re-investigate themselves.*

- f. *There should be full-time investigators assigned to the CIU.*
- g. *The CIU should have written policies and procedures for its staff.*
- h. *CIU staff should receive appropriate training for their special assignment drawing upon expertise from cognitive scientists involved in “human factor” research, as well as prosecutors and police involved in successful CIUs, innocence organizations, and the defense bar.*

As emphasized at the outset, the most difficult problem confronting a CIU is dealing with cognitive biases—confirmation bias, motivated reasoning, groupthink, commitment effects, the coherence effect, and selection bias.¹⁰⁵ Experimental literature suggests this cannot be done effectively by just asking well-intentioned career prosecutors to role-play the “devil’s advocate” for each other and raise the “innocence” hypothesis when reviewing a prior conviction from the office.¹⁰⁶ It is far more productive to choose a “devil’s advocate” whose perceptions, motives, and orientation were organically derived from being a criminal defense lawyer, or better still, a lawyer who has done “innocence” re-investigations. Having staff with a healthy mix of prosecution and defense backgrounds can create a non-adversarial but “dialectical” approach to re-investigations, and maximizes the chances that all leads will be fairly and knowledgeably pursued. The most successful CIUs (Dallas and Brooklyn) have always had at least one person in a supervisory capacity that had a strong criminal defense or “innocence” background.¹⁰⁷

It should go without saying that the staff of a CIU, whether lawyers or investigators, former defense lawyers or career prosecutors, should be individuals who command the special respect of their colleagues as trustworthy, fair-minded individuals. Moreover, in my experience, anyone who does these kinds of re-investigations for a substantial period of time learns that the most important lesson is to be humble and just follow the evidence. We’ve all had the experience of believing someone is probably innocent who turns out to be guilty when the investigation is over, or believing someone is probably guilty and who turns out they are innocent. The truth in “innocence” work has always been more incredible than fiction, filled with unexpected outcomes, impossibly lucky coincidences, and the inevitable, chilling recognition that it can happen to anyone.

¹⁰⁵ See *supra* notes 39–44 for definitions of these biases and citations.

¹⁰⁶ IN DOUBT, *supra* note 24, at 45–46.

¹⁰⁷ By contrast, the Cook County CIU staff does not have representation from either an innocence organization or the defense bar. See *Cook County State’s Attorney’s Office Opens Conviction Integrity Unit*, INNOCENCE PROJECT: NEWS (Feb. 3, 2012), <http://www.innocenceproject.org/cook-county-states-attorneys-office-opens-conviction-integrity-unit/> [https://perma.cc/5YTM-MFY5].

In Brooklyn, the late District Attorney Ken Thompson created an Independent Review Panel (IRP) consisting of unpaid distinguished lawyers from outside the office: two criminal defense lawyers and a Columbia Law School professor who was formerly an Assistant United States Attorney. After the CRU conducts its re-investigation in conjunction with defense counsel for the client claiming innocence and makes a written recommendation to the District Attorney, the IRP will conduct its own review of the CRU's recommendations. The IRP will ask questions, request additional information, and finally issue its own independent recommendation to the District Attorney.¹⁰⁸ Interestingly, the CRU staff likes this model because the IRP keeps them on their toes, sometimes asking questions that were unexpected and induces further investigation. Petitioners who disagree with the recommendations of the CRU get a second opportunity to present their arguments and, potentially, a favorable recommendation from the IRP to the District Attorney. This model does depend on outside counsel with adequate resources to devote the considerable time and energy necessary to conduct a fair review in what are invariably fact-intensive records.

Nonetheless, in Lake County, Illinois, a comparatively small jurisdiction that has had many problems with its police force,¹⁰⁹ and a District Attorney's office that was notorious for rejecting meritorious claims of innocence based on DNA testing,¹¹⁰ District Attorney Mike Nerheim has built his CIU around volunteer lawyers from outside the county working pro bono to assess wrongful conviction claims. This outside panel also has access to all underlying materials and is free to suggest investigative steps.

In New York County, the CIU has had an outside Policy Advisory Panel from its formation in 2010 that offers suggestions about policy matters, but does not review individual cases. The Panel continues to include a broad range of stakeholders—a former New York City Police Commissioner, former federal and state prosecutors, former state and federal judges, academics, defense counsel, an “innocence” organization lawyer, and the head of the City’s DNA laboratory.¹¹¹

Speaking as a member of the Panel, I hope it is fair to say we were helpful at the beginning in making suggestions about the use of checklists and other system issues. Professor Rachel Barkow, another member of the Panel, published some of the checklists and policies the New York County CIU created in a very useful

¹⁰⁸ Kings County District Attorney Submission, Program Materials, Summit on Wrongful Convictions, at Brooklyn Law School (Oct. 15–16, 2015).

¹⁰⁹ See Dan Hinkel, *Waukegan Police Have History of Wrongful Convictions, Abuse Allegations*, CHI. TRIB. (Oct. 30, 2015), <http://www.chicagotribune.com/news/watchdog/ct-waukegan-police-problems-met-20151028-story.html> [https://perma.cc/HY3H-2FMM].

¹¹⁰ See Martin, *supra* note 37.

¹¹¹ For a list of the original Advisory Panel, see Press Release, N.Y. Cty District Att'y's Office, District Attorney Vance Announces Conviction Integrity Program (Mar. 4, 2010), <http://manhattand.org/press-release/district-attorney-vance-announces-conviction-integrity-program> [https://perma.cc/EWX6-JXQU].

“nuts and bolts” report, entitled *Establishing Conviction Integrity Units in Prosecutor’s Offices*, that followed a “summit” she organized of all existing CIUs and other prosecutors in 2011.¹¹²

On occasion, the Advisory Panel has been consulted on emergent policy questions, such as: What should the District Attorney do about CODIS “hits” to items of evidence in cases where there have been guilty pleas or convictions? (The answer: investigate, but ultimately notify the court and defense counsel about the “hit” and results of the investigation.) However, the New York County Advisory Panel has not been involved in vetting or ratifying decisions of the CIU; it was not constructed or intended to do so. Accordingly, while it has surely helped District Attorney Vance and the CIU think through issues, and it is certainly true that the New York County, as will be discussed, has been the most creative CIU when it comes to instituting reforms to learn from error or “near misses,” the Policy Advisory Panel has had limited utility when it comes to bolstering the reputation of the CIU within the legal community as to its independence or fairness when reviewing cases because it is simply not involved.

In short, Advisory Panels can be helpful, whether the Panel reviews cases or merely advises on policy. But experience so far has shown that the best way to mitigate cognitive or institutional bias in a CIU, and increase acceptance of such a unit within the legal community and in the public eye, is to make sure CIU staff, or supervisors, include people with a criminal defense background—preferably someone who has done “innocence” work¹¹³ and are independent appointees from outside the office. That was certainly the case with the Dallas CIU from the beginning to the present, and was true as well in Brooklyn.

This is not to say that experienced prosecutors who are respected and trusted individuals within an office should not be staffing a CIU, but having someone from the outside who was a defense lawyer, or a lawyer from an “innocence” organization, in a position of authority or actually running the unit, provides immediate and powerful advantages.

¹¹² See CTR. ON THE ADMIN. OF CRIMINAL LAW, *supra* note 8. The New York County CIU has expanded its program for tracking police officers to include information about civil rights lawsuits and adverse credibility findings, and is working to include more information about internal disciplinary findings relevant to credibility, so that this information is available to prosecutors in future cases and for disclosure to defense counsel as potential impeachment material. They have begun a similar program to track civilians who have lied in prior cases.

¹¹³ I am sure that soon it will make sense to say that a prosecutor who has worked in a successful CIU would meet the definition of someone who has done “innocence work.” After participating in *many* re-investigations that have led both to exonerations, confirmations of guilt, or uncertain outcomes, one develops a different perspective and a different set of ingrained expectations than the ordinary line prosecutor or defense attorney.

7. Transparent Results

Annual report detailing:

- a. *Number and nature of cases reviewed. This includes but is not limited to:*
 - i. *Number of total applications for relief received;*
 - ii. *Number of cases where trials occurred;*
 - iii. *Number of plea cases;*
 - iv. *Number of cases where prior state or federal post-conviction applications had been filed and adjudicated;*
 - v. *Source of referrals—pro se, innocence organizations, defense bar, office initiated investigations pursuant to audits arising from prior wrongful conviction matters (audits involving individual prosecutors, police officers, or forensic techniques), press instigated, or other individuals;*
- b. *Outcomes of investigations. This includes but is not limited to:*
 - i. *Number of cases where a decision was made not to undertake a re-investigation;*
 - ii. *Number of cases where a re-investigation was undertaken;*
 - iii. *Number of cases where relief was granted and the nature of that relief—agree to vacate conviction, the grounds, whether re-trial was sought or a plea agreement was made; agree to dismiss and the grounds;*
 - iv. *Number of cases where investigation was undertaken, no agreement between the parties could be reached, and post-conviction litigation continues, as well as the results of that litigation;*
 - v. *Number of cases sent out for independent investigation because there was substantial, non-conclusory allegation of misconduct by a prosecutor.*

These recommendations are limited to “numbers” and do not contemplate that the CIU should be required to provide the names or the docket numbers of the cases, although that would be preferable assuming there are no privacy objections raised by petitioners, victims, or witnesses that ought to be accommodated.

Keeping track of these numbers is not only a sound quality assurance practice to help the CIU see how key indicators are trending, but it provides an important window for the public to see what the CIU is doing. One factor that jumped out, for example, in the Quattrone Center interviews with CIUs, is that some of them said they had reviewed and/or investigated hundreds of cases whereas other CIUs, in jurisdictions of comparable or much greater size (like Brooklyn), had conducted far fewer investigations. There could, of course, be many factors at play that

account for such numbers that are particular to a jurisdiction. There might be, for example, a particularly litigious and organized group of jailhouse lawyers that could create a great volume of frivolous pro se applications. On the other hand, the summary disposition of hundreds of claims, without a sensible explanation, can raise reasonable questions about the process for considering the claims and the seriousness of the re-investigation.

It should be clear, however, that a failure to find many miscarriages of justice does not necessarily mean a CIU is unfair, insincere, or incompetent. Nor does it mean that there are no miscarriages of justice in the jurisdiction. It could simply mean that the jurisdiction poses unusually intractable problems despite everyone's best efforts when trying to find evidence in old cases. But whatever the reasons, making the numbers transparent will assure the right questions are asked about the efficacy of a CIU.

B. Learning from Errors in Wrongful Convictions or “Near Misses”

A District Attorney’s office must not only investigate and remedy wrongful convictions, but it must also establish policies and procedures to learn from the errors identified in a CIU review (even if relief is not granted) so that the system is strengthened. Different sorts of errors uncovered in the course of understanding the causes of a wrongful conviction will require different remedial actions. “Near misses,” in this context cases where a wrongful conviction almost occurred but was avoided, whether by actions of police, prosecutors, the defense, the press or any other actor, are especially good cases to study. To learn from error effectively a District Attorney’s office must have the following:

- a. *A unit tasked to conduct “root cause analysis” (RCA) of errors, including errors identified by a CIU.*
 - i. *The office must have a written policy that details how it will do root cause analyses for any case where it is determined that there was a wrongful conviction. The policy released by the National Commission on Forensic Science provides a good model. Among other elements, the policy should require the inclusion of an external expert to ensure some objectivity in the process.*
 - ii. *The office must work to remedy the root causes identified by the process, including creating a remedial/corrective action plan and a method for assessing whether the plan solves the problem.*
 - iii. *A report evaluating whether the remediation efforts were successful must be made available to the public.*

- b. *For selected wrongful convictions or “near misses,” the District Attorney’s office should develop the capacity, preferably working in conjunction with an independent third party, to perform a “sentinel event,” “all stakeholder review” where it is likely that the acts of people from more than one unit of the office or more than one entity were involved.*
- c. *Retrospective reexamination of other cases with like factors (same “bad actor,” same “flawed discipline,” when indicated).*
- d. *The lessons learned and the solutions identified must be folded into ongoing training, the orientation of new staff, and policy development in the office.*

To the best of my knowledge, there is no District Attorney’s office right now, with or without a CIU, which has a formalized protocol calling for root cause analysis (RCA) of wrongful convictions, much less serious errors by prosecutors that do not result in wrongful convictions. Most accredited crime laboratories, in sharp contrast, are required to do RCAs by accrediting bodies whenever there is a serious “non-conformity.”¹¹⁴ The National Commission on Forensic Science has adopted an excellent “Directive Recommendation” with commentary explaining how to do an RCA and the organizational literature supporting the practice.¹¹⁵

The “Directive” applies to Forensic Science Service Providers (FSSPs) and Forensic Science Medical Providers (FSMPs) and will likely apply to all federal laboratories very soon. Most accredited state and local crime laboratories probably do RCAs already. It naturally follows that prosecutors will soon realize that their offices, like crime laboratories, are complex organizations where error is inevitable, and learning from error in a “just culture” is necessary. Once it becomes clear to the legal community that RCAs are “event reviews,” not “performance evaluations,” that the purpose of an RCA is learning not punishment,¹¹⁶ and they are comparatively simple and inexpensive to conduct, one would expect RCAs to become standard practice, not only in District Attorney offices, but for institutional defenders as well.¹¹⁷

¹¹⁴ INT’L ORG. FOR STANDARDIZATION & INT’L ELECTROTECHNICAL COMM’N, *General Requirements for the Competence of Testing and Calibration Laboratories*, 17025:2005(E), § 4.11.2 Cause Analysis (May 15, 2005) (“The procedure for corrective action [for non-conformities] shall start with an investigation to determine the root cause(s) of the problem.”).

¹¹⁵ See NAT’L COMM’N ON FORENSIC SCI., DIRECTIVE RECOMMENDATION: ROOT CAUSE ANALYSIS (RCA) IN FORENSIC SCIENCE (2015), <https://www.justice.gov/ncfs/file/641626/download> [<https://perma.cc/PM9P-TQ56>].

¹¹⁶ *Id.* at 7.

¹¹⁷ The New York State Justice Task Force, convened by the Chief Judge of the State of New York in 2009 and charged with recommending reforms to eradicate the harms of wrongful

The New York County CIU, however, has recently done excellent work studying one form of a “near miss”—pre-trial “exonerations”—that could be easily replicated by other offices.¹¹⁸ The CIU has started meeting each month with heads of “trial bureaus” and specialized departments to review any current cases where investigation led to a pre-trial exoneration, in an effort to analyze “root causes” and to “learn lessons.” They maintain a spreadsheet of the pre-trial exoneration, note any “trends or patterns,” and try to identify lessons for both the office itself and law enforcement.

One interesting trend is that in six of ten pre-trial exoneration cases reviewed so far, video surveillance footage provided significant proof that the wrong person was arrested and charged. One lesson learned from the review is that training on early and comprehensive searches for surveillance video is crucial in a metropolitan area like New York City, where there are cameras everywhere and witnesses with cellphones capable of creating surveillance video. But the CIU tried to look at “root causes” in each of the pre-trial exoneration cases, particularly mindful about what would have happened in the video surveillance “exonerations” if there had been no video discovered.¹¹⁹

“Sentinel event” reviews of wrongful convictions, law enforcement failures to prevent a serious crime from occurring, or potentially calamitous “near misses,” are admittedly a more expensive and complex undertaking. DOJ’s sentinel event initiative reported the results of three “beta tests” in Milwaukee, Philadelphia, and Baltimore.¹²⁰ In exchange for the willingness of the jurisdictions to participate in the experiment, the sentinel event review teams were promised “as much anonymity as possible, including details of the sentinel event they chose to review.”¹²¹ Consequently, and most unfortunately, there’s not much substantively that can be gleaned from the report. Nonetheless, the concept of an all-stakeholder sentinel-event review, similar to what is routinely done by the National Transportation and Safety Board, is a critically important goal for stakeholders in

convictions, issued recommendations for root cause analysis to enhance conviction integrity, including: efforts by all stakeholders, both individually and collectively, to develop procedures for conducting analyses of errors and potential solutions, regular RCA training for criminal justice professionals, and complementary state legislation. N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS REGARDING ROOT CAUSE ANALYSIS (2015), <http://www.nyjusticetaskforce.com/pdfs/JTF-Root-Cause-Analysis.pdf> [<https://perma.cc/NA8A-V9BC>].

¹¹⁸ The data reported here comes from a January 20, 2016 presentation to the Conviction Integrity Program Advisory Panel by the head of the CIU, Bill Darrow, attended by District Attorney Vance and other leaders of the office.

¹¹⁹ The CIU has found that it can be challenging to gather all the relevant facts, even in its review of *current* cases, and is considering the best way to include the police and other external sources in those reviews.

¹²⁰ See NAT’L INST. OF JUSTICE, PAVING THE WAY: LESSONS LEARNED IN SENTINEL EVENT REVIEWS (2015), <https://www.ncjrs.gov/pdffiles1/nij/249097.pdf> [<https://perma.cc/DQE7-ZASP>].

¹²¹ *Id.* at 2.

the criminal justice system to pursue when trying to understand and learn from wrongful convictions. Patience and determination should be the order of the day. We are just at the beginning of this process.

III. ETHICAL AND CONSTITUTIONAL OBLIGATIONS TO CORRECT WRONGFUL CONVICTIONS

Creating a CIU is not just a good idea that a diligent District Attorney might consider pursuing, but the best way to recognize the ethical and constitutional obligations to correct wrongful convictions. In 2009, the ABA adopted Model Rules of Professional Conduct 3.8(g) and (h) with strong support for the basic concept behind the rules from state prosecutors.¹²²

As opposed to “traditional” reactions to proposed restrictions on their conduct originating from the ABA, these post-conviction “innocence” rules were perceived as part of a prosecutor’s bedrock responsibility to seek justice, and many prosecutors affirmatively assisted in writing the rules.¹²³ To date, fourteen states have adopted versions of 3.8(g) and (h) either verbatim or with small modifications.¹²⁴

Rule 3.8(g) requires that whenever a prosecutor “knows” about “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which [he] was convicted,” the prosecutor has an obligation to disclose the evidence to defense counsel and investigate. Rule 3.8(h) requires that if the prosecutor knows “by clear and convincing evidence” that the defendant did not commit the offense, the prosecutor shall seek to “remedy” the wrongful conviction.¹²⁵ What triggers post-conviction obligations under 3.8(g) and (h) is that a prosecutor “knows” about “material” or “clear and convincing” evidence of innocence. Consequently, it might be argued, as a purely practical matter, in a jurisdiction where 3.8(g) and (h) have been adopted, a prosecutor is better off not having a CIU because she would be less likely to “know” about “new, credible, and material” evidence of innocence, much less “clear and convincing” evidence of innocence.

I do not believe this is true. Putting aside the moral and political problem of an elected prosecutor consciously avoiding knowledge that an innocent person has been wrongly convicted, in this new “innocence” era, a prosecutor cannot

¹²² See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 79 (2016); Bruce Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 889–93 (2012).

¹²³ *Id.* The only notable exception was opposition from the U.S. Department of Justice.

¹²⁴ AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROF’L CONDUCT (Sept. 15, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.authcheckdam.pdf [<https://perma.cc/2CAC-AZ97>].

¹²⁵ MODEL RULES OF PROF’L CONDUCT r. 3.8(g) & (h) (AM. BAR ASS’N 2015).

effectively hide from a defense attorney, an innocence organization, or reporters, who proffer new evidence of innocence informally or through post-conviction motions and ask prosecutors to investigate the claim. Having an effective and credible CIU in place and ready to act is the best way—by any ethical, practical, and political calculus—for a prosecutor to respond to post-conviction claims of innocence.

It is now becoming clear that defense lawyers also have *some* ethical duties post-conviction to disclose “new, credible, and material” evidence of innocence and cooperate in investigations involving their former clients. In February 2015, the ABA approved revised Prosecution and Defense Function Standards.¹²⁶ These Standards are intended to be “best practices,” “aspirational,” and not a basis for professional discipline or civil liability.¹²⁷ But the Standards have been adopted in some form by the majority of states, influence ethical rules, and are cited frequently by state and federal courts as “valuable measures of the prevailing professional norms of effective representation.”¹²⁸ Standard 4-9.4 entitled “New or Newly-Discovered Law or Evidence of Innocence or Wrongful Conviction or Sentence” states that “[w]hen defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, counsel has some duty to act.”

The Commentary to this new Standard has not yet been published, but one hopes it will adopt many of the suggestions recently made by Lara Bazelon in an excellent analysis of the Standard.¹²⁹ Bazelon rightly points out that defense lawyers may have conflicts of interest when information that exculpates a former client could implicate a current or different former client, and conflicts that arise when an attorney may be helping prove a former client is innocent but proving his or her own ineffective assistance at the same time. She is also rightly worried that state public defenders and court-appointed counsel may lack the knowledge necessary to meet filing deadlines and other requirements necessary to preserve a client’s rights in potential state and federal post-conviction proceedings. Nonetheless, it seems clear that defense counsel has “some” ethical duty to assist

¹²⁶ See AM. BAR ASS’N, ABA CRIMINAL JUSTICE STANDARDS (4th ed. 2015), http://www.americanbar.org/groups/criminal_justice/standards [<https://perma.cc/CS4F-ZMBA>].

¹²⁷ See AM. BAR ASS’N, ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.1(b), http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html [<https://perma.cc/DT72-ZY8Y>]; AM. BAR ASS’N, ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.1(b), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html [<https://perma.cc/CG9A-PQLA>].

¹²⁸ See *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). See also Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10 (2009).

¹²⁹ See Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?*, 106 J. CRIM. L. & CRIMINOLOGY 101 (forthcoming) (manuscript at 142–46), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2764499.

in disclosing and finding material evidence of innocence in the case of a former client and that would likely include cooperating in a re-investigation by a CIU.

Finally, it is fair to say that prosecutors in every state have a post-conviction constitutional obligation to correct a wrongful conviction when they discover “material” or “clear and convincing” evidence of innocence. This analysis relies on the Supreme Court’s recognition in *District Attorney’s Office for the Third Judicial District v. Osborne*,¹³⁰ of “due process” rights that arise from a “state created liberty interest” to prove innocence pursuant to a state’s newly discovered evidence of innocence statutes. Once a state enacts a newly discovered evidence statute (and all states have them), the *Osborne* court noted, “[t]his ‘state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.’”¹³¹ Admittedly, the *Osborne* court observed that a defendant who has been convicted after a fair trial “has only a limited interest in post-conviction relief,” and the State may flexibly fashion and limit procedures to offer such relief. But, as the Second Circuit recently held in *Newton v. City of New York*, whenever a municipality through its agents, servants or employees acts “intentionally or recklessly” to prevent a petitioner post-conviction from “vindicating his liberty interest” pursuant to a newly discovered evidence of innocence statute, a violation of petitioner’s Fourteenth Amendment right to due process can occur.¹³²

In *Newton*, the petitioner tried for years to get a post-conviction DNA test under the New York statute, both *pro se* and ultimately with the assistance of the Innocence Project. On each occasion, the New York City Police Department (NYPD) reported to the courts, the Bronx District Attorney’s office, and petitioner that the evidence no longer existed. In fact, the evidence did exist and was stored in a place where it should have been all along, but due to the intentional misconduct or recklessly inadequate procedures of the NYPD, the evidence was not located until a Bronx Assistant District Attorney made extraordinary personal efforts to find it.¹³³ *Newton* was subsequently exonerated by DNA testing, and prevailed in a federal civil rights lawsuit obtaining an \$18 million verdict.¹³⁴ As opposed to *Osborne*, where a petitioner directly challenged the adequacy of

¹³⁰ Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009).

¹³¹ *Id.* at 68 (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981)).

¹³² *Newton v. City of New York*, 779 F.3d 140, 151 (2d Cir. 2015), cert. denied, 136 S. Ct. 795 (2016). Cf. *Armstrong v. Daily*, 786 F.3d 529 (7th Cir. 2015). After extensive post-conviction litigation that led to Armstrong’s conviction being vacated based on DNA tests and other evidence in state court, the prosecutor and crime laboratory personnel could be sued for a federal civil rights violation for alleged intentional destruction of biological evidence *after* the conviction was vacated but before a re-trial. The re-trial never occurred because the indictment was dismissed based on the prosecutor’s misconduct in destroying the biological evidence and not revealing exculpatory evidence during the post-conviction proceedings.

¹³³ *Newton*, 779 F.3d at 143–44.

¹³⁴ *Id.* at 145.

Alaska's post-conviction DNA statute to vindicate his right to prove innocence with a DNA test, *Newton* was an as-applied challenge to the way state actors were intentionally and recklessly preventing him from proving innocence. Even though this challenge arose in the context of a federal civil rights lawsuit, there is no reason to doubt the existence of a federal or state procedural due process right to be free from intentional or reckless interference by state actors when a petitioner is trying to prove innocence pursuant to a state's newly discovered innocence statute.

In short, the *Osborne* decision has been mistakenly described by some as confirmation of the assumption that neither the *Brady* obligation to disclose exculpatory evidence, nor the prohibition in *Arizona v. Youngblood*¹³⁵ not to destroy potentially exculpatory evidence in bad faith, nor even the "assumed" right to prove actual innocence, survives at all after conviction.¹³⁶ I think this is plainly wrong and, as the *Newton* decision demonstrates, *Osborne*'s recognition of a "state created liberty interest" to vindicate claims of innocence expands the constitutional right to due process during post-conviction litigation and investigation of innocence claims.

As states adopt Rules 3.8(g) and (h), I think it will not be long before they are "constitutionalized." When a prosecutor *knows* about "material" evidence of innocence, it will be a due process violation not to disclose it, and when a prosecutor knows of "clear and convincing evidence" of innocence, a standard that is either equal to, or more demanding than, newly discovered evidence statutes in the states, it will be a due process violation not to seek a remedy for the wrongful conviction. A well-designed CIU is a prosecutor's best response to this rapidly evolving post-conviction constitutional terrain.

IV. CONCLUSION: CONVICTION INTEGRITY UNITS AND THE PROMISE OF CREATIVE, NON-ADVERSARIAL SOLUTIONS IN THE POST-CONVICTION SPACE

It is still too early to know whether CIUs will become a permanent part of the criminal justice landscape in the United States. If they do, and emerge along the non-adversarial lines described here and applied in CIUs like those in Brooklyn and Dallas, then other reforms should naturally follow. For example, opposition to true "open file" discovery on the front end of the process will diminish once it becomes clear that in the most troubling "innocence" cases, the entire prosecution file, including work product, will be disclosed.

Similarly, the non-adversarial review of cases involving plausible innocence

¹³⁵ 488 U.S. 51 (1988).

¹³⁶ See Brandon Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919 (2010) (arguing that contrary to early accounts *Osborne* did not reject a post-conviction right to DNA testing and that the *Osborne*'s state created "liberty interest" analysis could be expanded to protect against intentional and arbitrary interference with the post-conviction litigation process).

claims should demonstrate to both prosecutors and institutional defenders that RCAs and other “just culture” reforms ought to be adopted in the criminal justice system. This would not only improve the operation of the system as a whole, but bring about a more realistic and effective way to hold prosecutors and defense attorneys accountable. It would allow for the correction of mistakes and negligence in a non-blaming environment, and make it easier to identify attorneys who are deliberate rule-breakers and should be referred for bar discipline or even criminal prosecution. Concomitantly, these reviews would inevitably help identify other systemic problems involving police, forensic science service providers, the judiciary, and other stakeholders that require investigation and correction.

In short, there is a fundamental and important difference between the kind of granular, deep dives into problematic cases that inevitably occur in a good non-adversarial CIU investigation and the adversarial post-conviction review pursued on appeal or collateral attack.

In the traditional model, adversaries and the courts are continually narrowing the facts that need review and focusing on what will be determinative legal issues. In a CIU review, the factual record is continually expanding and the focus is on the reliability of the verdict. From this perspective, the CIU participants, both the prosecutors and defenders, literally help each other “see” more about the operation of the system. This freedom to “see” more broadly, and a shared good faith dedication to ensuring just and reliable outcomes, ought to generate new, constructive, and creative ideas beyond resolution of the individual cases. Hopefully, those who are engaged in “conviction integrity” reviews will become leaders of “integrity” reviews that embrace error reforms beyond re-examination of potential wrongful convictions.

Appendix A.



Kenneth P. Thompson
District Attorney

DISTRICT ATTORNEY
KINGS COUNTY
350 JAY STREET
BROOKLYN, NY 11201-2908
(718) 250-2000
WWW.BROOKLYNDA.ORG

DISCLOSURE AGREEMENT

I, [REDACTED], am an attorney at law and represent [REDACTED] (hereinafter "my client") in all legal matters with regards to post-conviction remedies for the above named individual. I have been informed that the Conviction Review Unit (hereinafter "CRU") of the Kings County District Attorney's Office has opened a review and investigation of this conviction. In order for the CRU to fully investigate the conviction, I, and where necessary my client, agree to the following:

1. I agree to share any information that may be obtained or uncovered by me or any agent working on my behalf or on the behalf of my client, where such materials do not conflict with my legal and/or ethical duties with regard to my client, and to provide the CRU with copies of any such materials as soon as is practicable to aid the CRU in their investigation into the possible wrongful conviction of my client;
2. I agree to provide to the CRU, subject to the above limitations, copies of all documents, recordings or other tangible materials relating to interviews with known or potential witnesses conducted by any party on behalf of my client, including but not limited to private investigators, family members and prior defense attorneys, concerning the case for which I have requested the CRU to investigate;
3. I will speak to my client concerning waiving attorney client privilege that my client has had with any previous attorney or agent thereof concerning any investigative materials, reports, recordings, communications or other materials relevant to the investigation into the possible wrongful conviction of my client in regard to the conviction currently under investigation and, as necessary, will provide the CRU written notice of such a waiver executed by my client in order to facilitate the CRU's investigation into the possible wrongful conviction of my client;
4. In return for the above, the CRU agrees to share and provide the undersigned with copies of any materials concerning the original conviction of my client and any materials uncovered or discovered during the course of the Unit's investigation into the possible wrongful conviction of my client that the undersigned may request, including copies of all documents, recordings or other tangible materials relating to interviews with known or potential witnesses, provided that such disclosure is not legally prohibited under the provisions of CPL 190 or any other provision of law and so long as such does not, in the good faith opinion of the CRU, compromise or otherwise potentially interfere with CRU's investigation into the above matter, or jeopardize the safety of a witness, and as long as no adversarial proceeding has been otherwise instigated;

5. I agree on behalf of myself and my client, as well as any person working on my behalf or my client's behalf to treat as strictly confidential all materials and information, oral or written, provided to me by the CRU and understand that any public disclosure of such materials or the information contained therein shall be considered by the CRU as a violation of this agreement and may result in the CRU limiting or ceasing to share such information with the undersigned, at the sole and exclusive discretion of the CRU.

KENNETH P. THOMPSON
Kings County District Attorney

By: _____

Printed Name: _____

Date: _____

